Precedent or president?

History points to the erosion of law and the creation of new non-parliamentary, non-judicial law, as the first stumbling steps down the road to oligarchy.

FOS not only imposes law via precedent but also alters its stance as and when it deems it appropriate. "We do not have to pretend to 'find' what the law is. We unashamedly make new 'law'", boasted Walter Merricks in a June 2001 speech to the Financial Regulation Industry Group. Revealingly, an identical speech given to the Cardiff Faculty of Law in 2002, found this astonishing admission expurgated. The Financial Services Practitioner Panel also expressed its unease in its 2003 report: "The panel has repeatedly pointed out the concern over the FOS's quasi rule-making abilities and the often blurred line of demarcation between the FOS and the FSA".

Personal hearings — cumbersome, expensive?

Walter Merricks believes so, which is a major shift from the views he expressed in 1999 in a speech to the British Insurance Law Association: "As a result of Article 6 of the European Convention on Human Rights, and the HRA, we shall be obliged to offer hearings if parties wish it where their civil rights and obligations are at stake".

FOS rarely allows personal hearings; only 11 were heard in 2005 from nearly 111,000 cases. Lack of accountability and the refusal to allow personal hearings no longer concern Walter Merricks, however. When a practicing solicitor in 1986 and an unashamed advocate of the jury system, it troubled him greatly. "To entrust this judgment to experts I find dangerous. There is the problem that currently, as a matter of law, the standard to be applied in assessing honesty are those of ordinary people. Experts are by definition not ordinary people and they may find it difficult, not to say impossible, to envisage that the standard by which they judge the accused are not those they would normally apply to themselves or their colleagues".

The lack of an appeals process exposes FOS to being in breach of Article 6 of the HRA. Speaking with regard to the Pensions Ombudsman, Mr Justice Lightman observed, in a speech to the Association of Pension Lawyers in March 2001: "It is troubling that the Ombudsman as the investigator sets the standard and as judge rules on compliance and decides the remedy. Since the decision of the Ombudsman is final on questions of fact, there is likely to be an entitlement to an oral hearing and the examination of witnesses…though he recognises the right to both the Ombudsman has had very few such hearings".

Fair judgment is the key question for the FOS

Should FOS decisions be subject to appeal?

FOS believes that it offers an adequate appeals system, that by enabling an Ombudsman to review the adjudication it meets the appeals requirement of the HRA. It suggests that remedies are also available via the FOS Service Review Manager, the Independent Assessor and, ultimately, a judicial review. Regrettably, not one of these processes allows an appeal against the merits of the decision. According to the Building Societies Association response to FSMA two year review in September 2004, "In a judicial review a court would overturn an Ombudsman's decision only if he or she had committed such errors as to deprive the decision of logic, making it legally irrational. As an appeal, judicial review is likely to be of very little use to firms in practice".

The Government believes that the existing appeals arrangements are broadly proportionate, according to FSA Spokesman Rob McIvor: "Such reviews do not re-examine the decision, rather they focus on whether or not the matter has been handled with due process, has applied the law correctly, has taken the right things into account and has acted rationally".

Is FOS a 'no lose' situation for consumers?

FOS allows a firm two 'free' complaints each year before applying a £360 case fee. A fee is levied whether the claim is genuine, opportunistic, malign or fraudulent. The firm pays whether innocent or guilty. "The person who has a complaint can approach the ombudsman, without fear of having to pay more, or of forfeiting any legal rights – a real 'no lose' situation", said Merricks in October 2002. When it determines a claim as fraudulent FOS refuses to challenge the claimant with any implication of deceit, preferring to invest the rejection letter with euphemisms suggesting that the matter should be dealt with through the court system.

FOS derives its rules from the FSA which has, as one of its statutory objectives, the reduction of financial crime. Surely it is therefore incumbent on FOS to report fraudulent tactics to the authorities in the same way that it reports 'problem firms' to the FSA?

Is the adjudication system balanced and logical?

The vast majority of cases are determined by an adjudicator without an Ombudsman being involved. Unlike financial advisers FOS adjudicators do not have to pass examinations and nor do they have to be licenced. Attempts to extract details of how many adjudicators are FPC/CFP qualified have been unsuccessful. However we know that most adjudicators have little practical experience with 25% having less than one year's service and 75% less than two years.

FOS is currently looking to implement a "specific software-based skills set" which will work in conjunction with the existing Knowledge Information Toolkit, an intranet based series of guidance notes. Given the numerous examination passes, training and experience required to become a