

Suggestions from a barrister for firms responding to claims at F.O.S.

1. **Offer to participate in any other form of alternative dispute resolution, such as mediation under any recognised system.** FOS presents itself as offering ADR, so it might seem unreasonable for FOS not to give ADR a chance to achieve a settlement.
2. **Invite FOS to decline jurisdiction and to allow the complainants to litigate.** FOS is not obliged to make a determination in cases submitted to it; it may decline to do so, and to leave the complainants to litigate. Give some reasons why FOS should take this course e.g. need for cross-examination to arrive at the truth, complex facts, difficult law, high quantum, etc.
3. **Ask for disclosure of all written communications from the complainant to FOS, and for FOS's notes of all conversations on the telephone or other contact.** If FOS refuses, it may give a ground for JR on the ground of unfair procedure.
4. **Ask for details of the experience and qualifications of adjudicators and case handlers.** In the *HME Trowbridge* case Lord Justice Stanley Burnton spoke of delegation to appropriately qualified persons; he did not state that FOS had carte blanche to delegate to any persons at all, irrespective of suitability.
5. **Ask for an oral hearing.** Give reasons for so asking. Such reasons might be: (a) there is a conflict of recollection as to an oral conversation at the time of the advice to the client between the client and the adviser; or (b) there are grounds for suggesting that the client might have acted in the same way even if different advice had been given, and the only satisfactory way to explore this will be to ask questions of the client. In the *HME v FOS & Lodge* case Stanley Burnton LJ said:

“If the determination of his complaint involved the resolution of disputes as to what was said in the meetings between Mr and Mrs Lodge and Mr Pickering, or if it could sensibly be argued that if Mr Lodge had received the advice that the Ombudsman ultimately held he should have received he would have acted no differently, the contention that fairness required an oral hearing might have been substantial.”
6. **Ask to see the text of FOS's "KIT" layered notes relating to the type of complaint.** The existence of this decision-making tool was revealed in Lord Hunt's Call for Evidence at para 4.15-4.17. It could be a ground for JR if a firm was denied the opportunity to comment on, and address submissions to, the FOS approach laid out in this material.
7. **Adduce an expert report from an independent expert in financial services.** He should speak of what would have been the approach at the relevant date of a responsible and reasonable body of opinion amongst financial advisers.

8. **If the advice complained about was before December 2001, ask FOS to limit the redress to what the PIA would have awarded.** FOS is empowered to take this into account by Article 7 of Financial Services and Markets Act 2000 (Transitional Provisions) (Ombudsman Scheme and Complaints Scheme) Order 2001, SI 2001 no.2326.

9. **Ask FOS to make a finding as to the outcome which a court of law would have arrived at, and to state its reasons, if any, for making a different determination.** In *HME* the Court of Appeal held that, although FOS could find liability where there is no liability at law, if an Ombudsman does this, “he should say so in his decision and explain why”. So now it may be a ground for quashing a FOS award, if FOS has departed from the law without setting out reasons to justify doing so.