

21 April 2011

By post and email

Strategy Manager
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Dear Sir

FINANCIAL SERVICES OMBUDSMAN SCHEME FOR JERSEY AND GUERNSEY

This letter is written on behalf of Bedell Group.

We divide our comments into dealing with points of principle, the Consultation questions and general comments. In responding, we have considered the proposal from the viewpoint of potential complainants and the service providers and also from the viewpoint of the Ombudsman Scheme, in order to seek a fair balance. References to paragraphs are references to paragraphs in the Consultation document.

1. POINTS OF PRINCIPLE

1.1 Evidence of the need for an Ombudsman

We note a decision appears to have been taken to introduce an Ombudsman Scheme. We are not aware of any form of consultation, despite:

- (1) there clearly being reasons for not having one as it was first suggested in 1999 and not subsequently adopted;
- (2) the 2006 Report to the States indicated there would be consultation on whether to have one;
- (3) we have seen no evaluation of the need nor evidence of the degree and amount of unfairness that is currently perceived to exist and to require an Ombudsman Scheme. This needs to be balanced against the uncertainty, time and costs involved to administer the system.

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If there is sufficient evidence, it should be provided for consultation.

A reasoned decision on whether or not to have an Ombudsman Scheme and the form it should take and the points in issue is needed.

- 1.2 **If there is sufficient evidence, we would welcome a scheme in principle.** The system must, however, be proportionate and suitable for a small jurisdiction made up of (relative to the world) small businesses or small parts of bigger businesses. Everything below is predicated on the above basis.

1.3 **Education and Information**

We consider many complaints or misunderstandings may arise through ignorance or lack of education and experience by the complainant. This can arise for many reasons, including disappointment caused by expectation, ignorance of procedures or where financial risk properly lies. The statutory role and responsibility of the JFSC in this educational area is an important adjunct to resolving such problems. Equally financial services firms should be clear and informative on their roles and responsibilities and to whom complaints should be made. **We encourage the use of a mediator, or if there is to be one the Ombudsman** in this role as stated in paragraph 14.1 (Best Practice).

1.4 **Scope and jurisdiction**

The scope and jurisdiction of the Ombudsman Scheme is not sufficiently clear from the Consultation document. **The UK jurisdiction appears greater in some areas but does not cover other areas proposed for the Channel Islands. The jurisdiction should be similar with simplified adaptations appropriate to the needs of the Island.** Paragraph 3.3 refers to JFSC regulated and supervised activities. This therefore includes banking, investment, insurance and trust company business. It also refers to consumer lending and personal pensions. By contrast, the UK Financial Ombudsman Services (FOS) covers similar but additional activities as stated in the Consultation document. More importantly, the UK does not cover legal services nor trust company services. These are in any event not regulated in the UK. In addition to referring to trust companies in paragraph 3.3, there is one further reference in 7.5 bullet point 5. We note in paragraph 3.3 there is no mention of estates subject to probate. There is, however, an oblique reference to it in paragraph 7.5 bullet point 5. These procedures are subject to the Probate Law and supervised by the Royal Court. They do not appear to be subject to the UK Scheme.

It is also said the Isle of Man Scheme "does not cover trust and corporate business at present" (paragraph 3.3).

Paragraph 6.2 states "The Scheme will dovetail with other ombudsman schemes, particularly in the UK, rather than giving complainants a choice of where to complain."

Furthermore, it is clear the proposal is very much to be based upon the UK model in many respects. For example, there are references to the UK in paragraphs 1.2, 3.3, 6.2, 7.2 and elsewhere.

There may, subject to evidence being provided, be grounds for introducing the Ombudsman Scheme for equivalence of standards and uniformity and generally accepted good standards relative to other countries, particularly the UK.

The conclusion logically and reasonably is that the scope of the UK and Channel Islands Ombudsman Scheme should, to the extent appropriate, "dovetail and be consistent with the UK". It should also be similar to the Isle of Man and similar to Guernsey (if there were to be separate schemes). It therefore follows that trust company business should not be included in the Ombudsman Scheme.

A further reason for not including trust company activity is that this usually involves institutional and corporate clients as well as individuals. Many companies and trusts have multiple owners or beneficiaries and one can pursue a route through the Ombudsman with which the majority do not agree or of which they may positively disapprove.

The trust company business is highly competitive. If Jersey is the only jurisdiction with an ombudsman applying to trust company business, whilst it may be a comfort to some, it will be a positive disadvantage for others. The political nature of the Ombudsman, and the ability of any individual beneficiaries to apply for the Scheme, may well result in current trust business moving elsewhere or, in particular, being set up elsewhere.

The ombudsman schemes elsewhere have not extended to trust company business. Trust company business is different from banking and other financial services. It generally involves high net worth individuals, corporates or institutions. The value of trusts will, in all but a few cases, exceed the value by many times the proposed compensation figure. There is a simple means to apply to the Royal Court under Article 51 of the Trusts (Jersey) Law 1984.

In the absence of an overwhelming reason supported by evidence to depart from the UK model, the scope of the Ombudsman's duties should not be greater than that of the UK. Indeed to do otherwise will encourage forum shopping and may put a considerable extra burden on the Channel Islands Ombudsman in the early years.

It is assumed from the Consultation document that legal services will not be included and reference to financial advice in paragraph 15.2.8 is assumed to refer to advice on, for example, investments or insurance, such as given by brokers and others. Legal advice often involves some financial matter but for JFSC purposes there is a definition to prevent inadvertently extending the jurisdictional scope beyond what is intended. In any event the Law Society of Jersey operates a complaints procedure and there is a formal statutory tribunal procedure for complaints under The Law Society of Jersey (Jersey) Law 2005.

1.5 **Costs of providing the service**

We comment in relation to the specific questions at 2.7 below. However **we have no doubt the costs could be potentially very great and at large. The costs may be out of all proportion to the type and value of complaints involved. Costs must be proportionate and bear a rational relationship to the problems. We have no doubt the States will need to pay a substantial part of such cost if any Ombudsman Scheme is to work fairly. There will need to be a clear cap on the annual cost for businesses** which cannot be subject to annual increases in excess of the JRP Index. **Businesses will need representation on the Board of the Ombudsman Scheme.** Most businesses will not pay for other competitors' messes beyond their control, nor should they.

1.6 **Comparisons with the other jurisdictions**

There are some references to the UK and Isle of Man. Is there evidence available of the full scope and jurisdiction, number of complaints, costs of funding, credibility and success measurement generally of other jurisdictions? Can lessons be learned and differences and similarities compared? Has that exercise been undertaken?

- 1.7 It is understood that the Jersey Banking Association may support an Ombudsman Scheme in order to obtain SEPA recognition for European payments. If this is the case, the Scheme could be limited to the banking sector, or indeed any other sector that needed to be subject to such a Scheme.

2. SPECIFIC QUESTIONS

I refer to page 11. I have numbered each question which is answered in paragraphs 2.1 to 2.11 below.

2.1 and

2.2 Complainants

We conclude the scheme should be for individuals only.

There are no financial limitations on individuals. Any trustee or council member of a foundation will be acting either in its own capacity for itself or more likely acting in its capacity as trustee or council member for the beneficiaries (who are likely to be individuals) or for the Foundation (which is a legal entity). If acting for such individuals it is hard to see why there should be a financial limit at all on trusts or foundations. In some cases, those individuals may be able to complain but not in all cases.

We note it is intended small businesses can complain, but it is assumed companies generally cannot complain? Is this correct? There may be individual shareholders who are affected? There may be problems of when is a business a business, quite apart from size. There should be no distinction between foundations and companies as both are legal entities. They should be subject to the same criteria.

It would be more logical for individuals acting as individuals, (i.e. not in any other capacity) to be the sole complainants without reference to financial means.

2.3 Relationships

We suggest the UK model is adopted in a simplified form as closely as possible. We have already commented upon bullet point 5 - trusts, foundations and estates.

Refusal to take on a client should not need to be defended. **We do not consider a "potential customer" should be able to complain,** nor should in that case the complaint be able to result in a monetary award of up to £100,000 or whatever is the limit.

2.4 Time periods

Complaints should be brought expeditiously and be generally more simple to bring than a court claim. Torts under Jersey law are prescribed after three years which we consider too short; a ten year period is too long. **We favour 5 or possibly 6 years maximum.** There needs to be a balance between allowing the problem to materialise, the pre-ombudsman procedures to be followed and certainty on the one

hand, and the need for expeditious and ease of enquiry and investigation which is harder as time passes on the other hand.

2.5 Responses

We agree, unless there are specific reasons (as there may be) preventing this and the Ombudsman accepts those reasons.

2.6 Starting date

This effectively applies a retrospective date. This is wrong in principle. It would be wrong to examine a case for an action occurring prior to the enactment date which as a result involved the payment of a monetary award of up to £100,000 or whatever is the limit.

There may well be a breach of Human Rights legislation. The principle of no retrospective effect especially when coupled with a penalty or sanction is very strong and must be respected.

2.7 On funding

The Consultation document envisages the financial services industry funding the scheme. It does not indicate whether the States will meet some costs or provide, for example, accommodation or staffing. We note the Isle of Man government meets all the costs. All charges levied on financial services firms will, or will tend to, do one or more of the following:

- (1) reduce profit and therefore tax take;
- (2) leave less funds available for other costs including employees' salaries and employment prospects;
- (3) increase prices with an adverse effect on competitiveness to win business from outside the Island and a charge on customers.

Jersey should not be at a disadvantage to the Isle of Man or indeed other international financial centres. It will be a factor in location or relocation decisions.

The key issue is the amount of cost and bearing in mind this amounts to another form of enforced tax or anchor drag on business. Other examples are the existing costs of paying for the JFSC and Jersey Finance Limited and professional institutes.

In the UK there are very many businesses, and some many greater in size, complexity and wealth, which will in total pay a larger sum. The number of businesses in the Channel Islands is much smaller and the costs of the Ombudsman Scheme relative to size are likely to be proportionately higher.

If it is proposed to have a levy of £50-200 per provider as in the UK, there would be no issue but what is in fact proposed? It is only when the budget is disclosed and the number of businesses registering known, that figures and the anticipated number of complaints and costs of such complaints can be considered.

We assume 20%/80% split would be a starting point. In the early and later years States funding will be needed to establish and maintain the Ombudsman.

Any contribution by industry will require a mechanism to cap uncontrolled bureaucratic growth and cost, and a scale of case/time charges structure. What is proposed? He who pays needs some control and influence. There must be proportionality of the total costs weighed against the value of the service.

2.8 Fees on first complaints

Yes.

2.9 Flat fees

Yes.

2.10 Inclusion of sectors

Yes (subject to comments above on the meaning of financial advice).

2.11 Grading criteria

Jersey Finance Limited uses employees which is a more static statistic and a convenient measure of the size of a business. There could be a number of bands. The model is already there.

3. Other points

3.1 Ineligible matters

3.1.1 In paragraph 8 bullet point 5 we suggest the dispute should refer to the legitimate exercise or non exercise of commercial or fiduciary or discretionary judgment. Please add the words I have underlined.

3.1.2 In paragraph 8 bullet point 6 the terms "private trust" is not understood. It does not exist. Point 6 would be covered by point 5 as a discretion can apply to other matters than just wills and trusts.

3.2. Additional ineligible matters could include:-

3.2.1 a form of summary strike out in a potentially hopeless case or one which is on all fours with another prior decision. For example if the financial services provider has already investigated the matter, reconsidered its decision in the light of any further submissions and the Ombudsman finds on a summary basis no possibility of an adverse finding, the enquiry should properly be cut short. If the Ombudsman gets it wrong, there could be an appeal on procedure. However it should be assumed the Ombudsman can reach a proper decision.

3.2.2 Where the matter is or is likely to be subject to or connected with an existing or likely criminal investigation or trial of or sentencing on criminal charges which has not yet been concluded.

3.3 No doubt some complaints are made principally out of a breakdown of a relationship and the complaint procedure is used as a means for vengeance for not being able to get what the complainant wants or to place undue pressure to achieve or reinforce some collateral aim. If the Ombudsman is to have credibility his jurisdiction, scope and method of working must be above reproach and be seen to be helpful to all.

3.4 The Ombudsman should have power to collect costs from an unmeritorious or persistent complainer with an ability to pay all or something and not to invariably place the burden on the financial services provider. This is an unfair burden particularly as the service provider will have incurred considerable cost of:

- (1) executive time, including senior executives' time;
- (2) external advisers;
- (3) research and investigation etc.

3.5 Where an error is repeated inadvertently until found to be wrong, there is a possibility of unforeseen and unprovided for multiple compensation claims with serious financial and reputational consequences for the service provider and its other clients. For all but large institutions, this could result in bankruptcy and resultant further loss to other innocent people involved in the business, loss of employment and loss to the Island's reputation.

4. **In conclusion**

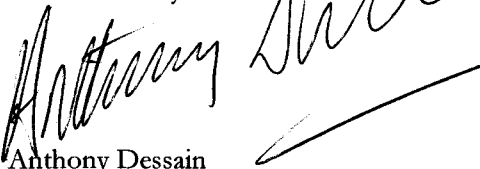
We therefore recognise that considerable further thought is required in relation to:

- (1) whether an Ombudsman Scheme can be justified;
- (2) the business activity to be covered;
- (3) the type of complainant;
- (4) time periods;
- (5) the funding and in particular budget facts;
- (6) ineligible factors;
- (7) procedures generally.

It is only when and if there is proper further consultation and draft legislation that meaningful comments can be given as the detail will be key.

We hope these conclusions contribute positively to the debate.

Yours sincerely



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