CASE NO: CO/880/2022

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINSTRATIVE COURT

BETWEEN:

THE QUEEN

on the application of

THE ALL-PARTY PARLIAMENTARY GROUP ON FAIR BUSINESS BANKING

Claimant

-and-

THE FINANCIAL CONDUCT AUTHORITY

Defendant

AMENDED STATEMENT OF FACTS AND GROUNDS

I. INTRODUCTION AND SUMMARY

1. On 14 December 2021, the Defendant, the Financial Conduct Authority ('**FCA**'), published John Swift QC's independent Lessons Learned Review (the '**Review**')[1] of the supervisory intervention by its predecessor, the Financial Services Authority ('**FSA**'), into the mis-selling to businesses of Interest Rate Hedging Products ('**IRHPs**'). This

[1] [**D/5-497**]

intervention had led, in 2012/13, to the establishment of a voluntary redress scheme (the '**Scheme**') that the FSA had negotiated with first-tier banks (the '**Banks**').

2. One of the conclusions of the Review was that a so-called 'Sophistication Test' (as amended) that was adopted in the Scheme, which excluded the parties to over 10,000 IRHP transactions from participating in the Scheme (the '**Excluded Transactions**'), denied redress to over 5,000 bank customers (the '**Excluded Customers**') on an arbitrary basis and inconsistently with the regulatory scheme under the Financial Services and Markets Act 2000 ('**FSMA**').

3. It is common ground that, although it is now many years since redress was denied to Excluded Customers, the FCA has the legal powers to do something about this, seeking to compel some or all of the Banks to review sales of IRHPs to Excluded Customers and to pay redress where relevant sales standards had not been met.[2]

4. On the day that the Review was published, however, the FCA published, in a document called 'Report of the Independent Review into the FSA and FCA's supervisory intervention on Interest Rate Hedging Products (IRHP) – The FCA response' (the '**Response to the Review**'),[3] its decision to take no further action in relation to IRHP mis-selling and the Scheme (the '**Decision**').

5. The Claimant contends for the reasons set out below that the Decision was unlawful. It should be quashed and the FCA should be required to reconsider whether to exercise its undoubted powers to secure redress for Excluded Customers.

6. The subject-matter of this claim is important both to the thousands of Excluded Customers, many of whom have had their businesses and livelihoods destroyed by the sale of IRHPs, and because of the public interest in ensuring effective regulation of the financial services sector.

[2] PAP Response, para 6.5 [**C/37**]

[3] [**D/500-528**]

II. THE PARTIES

7. The Claimant is the All-Party Parliamentary Group on Fair Business Banking (the '**APPG**'), a cross-party group of Members of the Houses of Commons and Lords that was established in 2012 to address the widespread mis-selling of IRHPs to businesses. In the current Parliament the Claimant's co-Chairs The APPG is currently Co-Chaired by Kevin Hollinrake MP (Conservative) and William Wragg MP (Conservative). The Vice-Chairs are Bill Esterson MP, Lord Holmes of Richmond, Andrew Griffith MP, Tonia Antoniazzi MP, Dr Lisa Cameron MP, Lord Cromwell, Alison Thewliss MP, The Earl of Lindsay, James Cartlidge MP, Sammy Wilson MP, Chris Stephens MP, Ben Lake MP, Julian Knight MP, Viscount Waverley, Harriet Baldwin MP, Kirsty Blackman MP, Chris Matheson MP, Alexander Stafford MP, Chris Law MP, Peter Gibson MP, Tom Tugendhat MP, Peter Dowd MP and Greg Smith MP. The APPG is an unincorporated association.

8. The Defendant is the FCA, previously the FSA. (Pursuant to the Financial Services Act 2012, with effect from 1 April 2013 the FSA was abolished and its relevant powers and responsibilities conferred upon the FCA.)

III. THE APPG'S STANDING

9. The APPG has standing to bring a claim for judicial review of the Decision:

    9.1. An unincorporated association has standing to make a claim for judicial review if, as is of course required of all applicants for judicial review (by Senior Courts Act 1981, s.31(3)), it has 'a sufficient interest in the matter to which the application relates': *Aireborough Neighbourhood Development Forum v Leeds City Council* [2020] EWHC 45 (Admin), [2020] 1 W.L.R. 2355 [**E/152-166**]; and

    9.2. The APPG has a sufficient interest in the subject-matter of the Decision and in this challenge. The Decision has denied redress for the mis-selling of IRHPs to thousands of bank customers, advancement of whose interests is the APPG's very raison d'être.

10. In its solicitors' response dated 22 February 2022 to the APPG's letter of claim dated 8 February 2022 (the '**PAP Response**'), the FCA confirmed that '*we do not currently propose to take a point regarding the standing of the APPG to pursue judicial review per se*'[4]. The FCA has subsequently suggested in correspondence that the APPG should be represented by one or more of its individual members. The two reasons given for this suggestion are that '*any orders including costs orders can be made (and enforced) against a specific individual or entity and that there are one or more persons who are responsible for the commencement and conduct of the proceedings*'.

11. This suggestion is resisted. The second reason is inconsistent with *Aireborough*, which makes clear that judicial review proceedings may be properly constituted if brought by an unincorporated association: the presence of an identified legal person as claimant is not necessary to ground a claim for judicial review. As for the first reason, the APPG has made an application for a costs capping order ('**CCO**') of £0. If that application succeeds in full, there will be no question of there being a costs order against the APPG; and in any event the question of how, practically, to ensure that any costs ordered against the APPG are paid can be dealt with in the context of that application.

IV. ~~AN INITIAL ISSUE: THE FCA'S FAILURE TO COMPLY WITH THE DUTY OF CANDOUR~~

THE REASONS FOR THE DECISION AND THE FCA'S FAILURE TO COMPLY WITH THE DUTY OF CANDOUR

12. The published reasons for the Decision are those contained in the Response to the Review.[5]

13. In its PAP Response, however, the FCA makes extensive reference to a '*Board Paper*', (the '**Board Paper**') which is described as '*a detailed paper setting out the matters which were relevant to the Decision*'.[6] This Board Paper, which the FCA initially refused to

[4] PAP Response, para 3.2 [**C/36**]

[5] They are also summarised in an accompanying Press Release at [**D/498-499**]

[6] Paragraph 6.3

provide but did ultimately provide to the APPG on 24 March 2022[7] (only after service of the original Statement of Facts and Grounds, despite the APPG's requests for it beforehand), is said to have been provided to the FCA's Board in advance of the meeting on 30 September 2021 at which the Decision is said to have been taken.

~~The PAP Response then sets out at some length what are said to have been '*[t]he principal matters covered by the Board Paper*'. In its solicitors' letter of 4 March 2022, the FCA said that '*in making the Decision, the Board did not have before it calculations or relevant documents aside from what was included in the Board Paper*.'[8]~~

~~14. The Claimant has asked the FCA for a copy of the Board Paper. Remarkably, this has been refused.[9] In the Claimant's submission it ought not to have been. It is elementary (see, e.g., Lord Donaldson MR's well known observations in *R v Lancashire County Council, ex p Huddleston* [1986] 2 All E.R. 941 [**E/167-173**]) that judicial review is conducted with all cards face up on the table. If, as the FCA contends, the Board Paper formed the basis of the Decision, it is self evidently unacceptable for the Court to be asked to consider the Decision's legality in the light of the FCA's solicitors' assertions in correspondence as to what the Board Paper contains, but without either the judge or the Claimant being allowed to see the document itself. It is, as Sedley LJ put it in *National Association of Health Stores v Department of Health* [2005] EWCA Civ 154 at [49] [**E/174-198**], untenable for a public authority, '*tendering its own précis instead*', to refuse production of a relevant document: '*[t]he best evidence rule is not simply a handy tool in the litigator's kit. It is a means by which the court tries to ensure that it is working on authentic materials.*' The Court is accordingly asked to direct that the Board Paper be produced. In so far as it contains matters that are legally privileged (as the FCA's solicitors have said that it does), these can be redacted.~~

15. ~~For present purposes, however, the~~ The APPG takes the reasons for the Decision to be those set out in the Response to the Review and the Board Paper. However, the FCA's deficient disclosure remains an issue. On 30 March 2022 the APPG, prompted by the

[7] Dentons letter dated 24 March 2022 **[C/72]** and enclosed Board Paper **[D/529]**

[8] Dentons letter dated 4 March 2022, paragraph 3.1(c) [**C/56**]

[9] Dentons letter dated 4 March 2022, paragraph 3.1(a) [**C/56**]

receipt of the Board Paper, made further requests for documents relevant to the Decision.[10] On 12 and 14 April 2022, the FCA partially complied with those requests by giving further limited disclosure (the '**April Disclosure**').[11] The April Disclosure was deficient in that it did not satisfy all of the requests made to the required standard, and it also revealed further information and documents previously unknown to the APPG that are likely to be relevant to the Decision. The APPG has therefore made yet further requests of the FCA, which are set out in inter partes correspondence at **[C/100-109]** (the '**Outstanding Disclosure Requests**'). The APPG is unable to understand the reasons for the Decision fully pending the resolution of these requests and pending the FCA's compliance with its duty of candour. The APPG has had to make several rounds of disclosure requests of the FCA, as lines of enquiry relevant to the making of the Decision have been revealed by the piecemeal disclosure given by the FCA. It is trite law[12] that judicial review is conducted with all cards face up on the table, and in the APPG's submission the FCA's failure to disclose relevant documents and information constitutes a breach of this principle and its duty of candour. This present amendment was necessitated by the late disclosure of the Board Paper and the APPG reserves its position as to the costs of the amendment. The APPG reserves its right to seek permission to amend this Statement of Facts and Grounds further upon receipt of adequate disclosure.

~~To the extent that the FCA files Summary Grounds of Resistance that refer to or rely on the Board Paper, the Court is respectfully invited to ignore such references altogether until and unless the document itself is produced and the APPG has had the opportunity to consider and make submissions about it (and the APPG reserves its right to seek permission to amend this Statement of Facts and Grounds accordingly).~~

[10] Hausfeld letter dated 30 March 2022 **[C/77-82]**

[11] Dentons letter dated 12 April 2022 [**C/94-96**] and 14 April 2022 **[C/97-99]**. The enclosures to which are included at **[D/557-744]**.

[12] See, e.g., Lord Donaldson MR's well-known observations in *R v Lancashire County Council, ex p Huddleston* [1986] 2 All E.R. 941 [**E/167-173**])

V. LEGISLATIVE FRAMEWORK

i. The Consumer Protection Objective

16. The FCA's strategic objective is to ensure that the relevant markets function well.[13] Its operational objectives are consumer protection (the '**Consumer Protection Objective**'), integrity and competition.[14]

17. S.1B of the Financial Services and Markets Act 2000 ('**FSMA**') provides that, in discharging its general functions, the FCA must, so far as is reasonably possible, act in a way which is compatible with its strategic objective and advances one or more of its operational objectives, including the Consumer Protection Objective.

18. The Consumer Protection Objective is now defined in s.1C(1) FSMA (and was until 24 January 2013 defined in s.5 FSMA) as '*securing an appropriate degree of protection for consumers*' [**E/4**]. '*Consumer*' has the wide definition given in s.1G FSMA, which includes the Excluded Customers [**E/5-6**].

19. Pursuant to s.1C(2) FSMA, in considering what degree of protection for consumers may be appropriate, the FCA must have regard to:

> *(a) the differing degrees of risk involved in different kinds of investment or other transaction;*
>
> *(b) the differing degrees of experience and expertise that different consumers may have;*
>
> *(c) the needs that consumers may have for the timely provision of information and advice that is accurate and fit for purpose;*
>
> *(d) the general principle that consumers should take responsibility for their decisions;*
>
> *(e) the general principle that those providing regulated financial services should be expected to provide consumers with a level of care that is appropriate having regard to the degree of risk involved in relation to the investment or other transaction and the capabilities of the consumers in question;*
>
> *(f) the differing expectations that consumers may have in relation to different kinds of investment or other transaction;*

[13] S.1B(2) FSMA [**E/3**]

[14] S.1B(3) FSMA [**E/3**]

…

(h) any information which the scheme operator of the ombudsman scheme has provided to the FCA pursuant to section 232A.

20. To a large extent, the appropriate degree of protection for consumers in the context of the sale of IRHPs is determined with reference to the consumer's regulatory classification: as set out below, the Conduct of Business ('**COB**') and later Conduct of Business Sourcebook ('**COBS**') rules expressly define different classes of customers, who are given different levels of regulatory protection.

ii. Regulation of IRHPs by the FCA

21. It is not controversial that: (i) IRHPs are a type of contract for difference under article 85 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 [**E/104-106**]; (ii) As such, IRHPs are a type of investment that are regulated pursuant to s.22 FSMA [**E/15**]; and (iii) the sale of IRHPs accordingly falls within the FCA's regulatory remit.

22. FSMA confers on the FCA the power to make rules, which are published in the Handbook. The Handbook is divided into modules and contains, among other things, High-Level Standards, which include overarching requirements such as the Principles for Businesses (the '**Principles**') that outline fundamental obligations of all regulated firms, and Business Standards, which outline the day-to-day conduct rules that apply to all regulated firms.

23. The key Principles relevant to the sale of IRHPs to Private / Retail Customers (including the Excluded Customers) are Principles 6 to 9 [**E/103**]:

6. Customers' interests
A firm must pay due regard to the interests of its customers and treat them fairly.

7. Communications with clients
A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.

8. Conflicts of interest
A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.

9. Customers: relationships of trust
A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment

24. The Business Standards module of the Handbook contains a section setting out the COB rules. The original rules were updated from time to time until 31 October 2007, when they were replaced with the COBS rules. The COB / COBS rules set out regulatory standards with which banks were required to comply when selling IRHPs to Private Customers / Retail Clients, including the Excluded Customers. The COB / COBS rules are delegated legislation: they set out the determination of the FSA/FCA, as Parliament's delegate in this regard, as to the levels of protection that are appropriate for different categories of persons receiving financial services.

25. For sales up to 31 October 2007, the following COB rules applied to the sale of IRHPs to all Private Customers (including the Excluded Customers):

    25.1. COB 2.1.3 R [**E/71**], the requirement to take reasonable steps to communicate information in a way which is clear, fair and not misleading;
    25.2. COB 2.2 in its entirety [**E/72-76**], which broadly required firms to conduct their business with integrity and to pay due regard to the interests of their customers and to treat them fairly;
    25.3. COB 5.2.5 R [**E/80**], the requirement to take reasonable steps to ensure that a firm has sufficient personal and financial information about a customer when giving a personal recommendation concerning a designated investment; and
    25.4. COB 5.4.3 R to COB 5.4.6 E [**E/81-82**], the requirement to give risk warnings to customers, and COB 5 Annex 1 [**E/83-86**], concerning a risk warning notice.

26. For sales from 1 November 2007, the following COBS rules applied to the sale of IRHPs to all Retail Clients (including the Excluded Customers);

    26.1. COBS 2.1.1 R [**E/87**], the requirement to act fairly and professionally in accordance with the best interests of the firm's client);
    26.2. COBS 2.1.2 R [**E/87**], which prohibits firms from seeking to exclude or restrict the duties or liabilities they owe to clients under the regulatory system;

26.3. COBS 2.2.1 R [**E/88**], the requirement to give appropriate information in a comprehensible form to a client so that the client is reasonably able to understand the nature and risks of the service and of the specific type of designated investment that is being offered and, consequently, to take investment decisions on an informed basis;

26.4. COBS 4.2.1 R [**E/99**], the requirement for the firm's communication to be fair, clear and not misleading;

26.5. COBS 9.2.1 R [**E/100**], which requires firms to take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client. Those steps included obtaining necessary information regarding the client's relevant knowledge and experience in the investment field, financial situation and investment objectives;

26.6. COBS 10.2.1 R [**E/101**], which requires firms to ask clients to provide information regarding its relevant knowledge and experience in the investment field, so as to enable the firm to assess whether the service or product envisaged was appropriate for the client. This included consideration of whether the client had the requisite knowledge and experience to understand the risks involved; and

26.7. COBS 14.3.2 R [**E/102**], the requirement to provide a client with a general description of the nature and risks of designated investments, taking into account, in particular, the client's categorisation as a retail client or a professional client.

27. It is the Banks' breaches of the Principles and COB / COBS rules in the selling of IRHPs that gave rise to the Scheme.

iii. Regulatory classification of customers

28. COB and later COBS – rules drawn up by the FCA itself – expressly define different categories of customers, who are given different levels of regulatory protection. The COB / COBS rules prescribe the obligations owed by firms (in this case the Banks) in respect of different customers depending on the customers' regulatory classification. The effect of this is that Banks owe the same regulatory duties in respect of all customers within the same regulatory class.

29. Both COB and COBS set out three categories of customers:

Degree of regulatory protection	COB classification	COBS classification
Most protected/regulated	Private Customer	Retail Client
Less protected/regulated	Intermediate Customer	Professional Client
Least protected/regulated	Market Counterparty	Eligible Counterparty

30. Under both COB and COBS, all customers are Private Customers / Retail Clients unless they meet the test for Intermediate Customer / Professional Client or Market / Eligible Counterparties.

31. Under COB, certain types of customers (none of which apply to the Excluded Customers) were automatically designated as Intermediate Customers. Additionally, a customer whose business met certain quantitative thresholds would be deemed to be an Intermediate Customer, namely:

    31.1. a body corporate which had or had had at any time during the previous two years (either itself or through its subsidiaries / holding companies), called-up share capital or net assets of at least £5 million;

    31.2. a partnership or unincorporated association which had, or had had at any time during the previous two years, net assets of at least £5 million;[15] and

    31.3. a trustee of a trust (other than an occupational, small self-administered or stakeholder pension scheme) which had, or had had at any time during the previous two years, assets of at least £10 million.[16]

32. Firms and their customers can 'opt up' into a higher category of customer (with a corresponding reduction in regulatory protection) if certain criteria are met. None of the Excluded Customers opted into a lower class of regulatory protection.

[15] Calculated in the case of a limited partnership without deducting loans owing to any of the partners.

[16] Calculated by aggregating the value of the cash and designated investments forming part of the trust's assets, but before deducting its liabilities.

33. Under COBS, which was introduced in order to comply with the Markets in Financial Instruments Directive ('**MiFID**') [**E/108-151**], certain types of businesses (none of which apply to the Excluded Customers) were automatically designated as Professional Clients. For all other customers, two of the following criteria needed to be met for a customer to be deemed to be a Professional Client:

> *in relation to MiFID or equivalent third country business a large undertaking meeting two of the following size requirements on a company basis:*
>
> *(a) balance sheet total of EUR 20,000,000;*
>
> *(b) net turnover of EUR 40,000,000;*
>
> *(c) own funds of EUR 2,000,000;*

34. Unlike COB, COBS applies these criteria on an individual company basis, not a group basis. Therefore, COBS includes a larger number of corporate customers in its most regulated customer category (Retail Client). None of the Excluded Customers met the criteria for a Professional Client.

35. The criteria to elect to be a Professional Client under COBS are also more restrictive than the opting up criteria for an Intermediate Customer under COB. The conditions include an assessment of the customer's relevant experience and knowledge, and obtaining their consent to the reclassification. None of the Excluded Customers opted into the Professional Client category.

36. The thresholds to be designated a Market/Eligible Counterparty under COB/COBS are yet more restrictive. None of the Excluded Customers fell within this category of customer.

37. The statutory framework governing the activities of the FCA (and the FSA before it) accordingly establishes a well-defined hierarchy of bank customers. Customers falling within the definition of Retail Client are entitled to the highest degree of protection by the FCA. The statutory framework does not sub-divide the category of Retail Clients and the Banks owe the same regulatory duties in respect of all customers classified as Retail Clients. Given that the Excluded Customers are classified as Retail Clients pursuant to

FSMA, they are therefore entitled to the same degree of regulatory protection as other members of the Retail Clients class.

iv. FCA's regulatory powers in relation to IRHP mis-selling

38. FSMA confers on the FCA (as it conferred on the FSA) a range of statutory powers to intervene in response to breaches of the regulatory protections under the Handbook. Of relevance to the Decision, the FCA has the power (as explained in more detail below): (i) pursuant to s.404 FSMA [**E/67-70**], to order firms to undertake a consumer redress scheme; (ii) pursuant to ss.382 or 384 FSMA [**E/55-66**], to apply for a restitution order from the Court or itself to order the payment of restitution; and (iii) pursuant to ss.55E / 55J / 55L in Part 4A FSMA [**E/32-49**][17], to vary firms' permissions to undertake regulated activities. Each of these powers was also available to the FSA when it decided to establish the Scheme and to exclude the Excluded Customers from the Scheme.

39. The FCA has the power to order a compulsory redress scheme pursuant to s.404 FSMA. S.404A sets out examples of the kinds of rules that the FCA can impose on firms in carrying out a redress scheme. Pursuant to s.404(1) FMSA, the FCA can order a redress scheme if: (a) it appears that '*there may have been a widespread or regular failure … to comply with requirements*'; (b) it appears that '*as a result, consumers have suffered (or may suffer) loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available in the proceedings*'; and (c) it is considered to be '*desirable to make rules for the purpose of securing that redress is made to the consumers in respect of the failure (having regard to other ways in which consumers may obtain redress)*'[18]. It is accepted that the power to order a compulsory redress scheme was likely not available to the FCA at the time of making the Decision.

40. The FCA is also able to either apply to the High Court for a restitution order or make such an order itself under ss.382 or 384 of FSMA respectively. The requirements for making an application or an order are that a person has contravened a relevant requirement, or been knowingly concerned in the contravention of such a requirement,

[17] The powers currently available to the FCA pursuant to 55E / 55J / 55L FSMA were previously available to the FSA under ss.42 to 45, Part IV FSMA as was then in force.

[18] Section 404(1) FSMA. [**E/67**]

and that: (a) profits have accrued to him as a result of the contravention; or (b) one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention.[19] A restitution order requires firms to pay a just amount to those affected[20] having regard to the profits that appear to have been accrued or the extent of the loss or other adverse effect.[21] A contravention of a requirement by or under FSMA has always been a basis for the exercise of this power.[22] These powers were available to the FCA at the time of making the Decision.

41. Part 4A FSMA confers on the FCA the power (previously contained in Part IV FSMA) to grant permissions, impose conditions and vary conditions on the granting of permissions. These powers were available to the FCA at the time of making the Decision:

    41.1. S.55E FSMA [**E/32-25**] confers on the FCA the power to give permission for an applicant to carry on a regulated activity or activities;

    41.2. S.55J FSMA [**E/38-45**] confers a power on the FCA to vary or cancel and FCA-authorised person's Part 4A permission; and

    41.3. S.55L FSMA [**E/46-49**] confers on the FCA a power to impose requirements on the granting or varying of a person's Part 4A permission.

42. There are therefore a number of statutory powers that were available to the FSA at the time of deciding to establish the Scheme and deciding to exclude the Excluded Customers from the Scheme, which the FSA chose not to use. Most of these powers were also available to the FCA at the time of the Decision. The FCA was therefore able, at the time of making the Decision, to take action in response to the Banks' breaches of the Principles and COB / COBS in relation to the sale of IRHPs to the Excluded Customers. The exercise of such powers would have been in furtherance of the Consumer Protection Objective. Moreover, any such exercise of powers could have been preceded by, and indeed perhaps rendered unnecessary by, an invitation to the Banks to participate

[19] Section 384(1) FSMA. To obtain a court order under s 382, the FCA must prove these same factors to the court's satisfaction.

[20] As defined in s 382(8) and 384(6) FSMA. [**E/56, E/62**]

[21] Sections 382(2) and 384(5) FSMA. [**E/55, E/61-62**]

[22] Sections 382(9)(a)(i) and 384(7)(a). [**E/56, E62**]

voluntarily in granting redress to Excluded Customers. As already mentioned, it is not controversial that the FCA has the power to seek redress for the Excluded Customers.[23]

VI. THE SCHEME

43. This challenge is to the Decision of the FCA not to take action in light of the findings and conclusions of the Review that the Excluded Customers had been wrongly excluded from the Scheme. However, the Decision must be viewed in the context of the decision by the FSA to exclude the Excluded Transactions and Excluded Customers from the Scheme, through the formulation and application of the '**Sophistication Test**'. This context is relevant because:

    43.1. It forms the basis of the findings and conclusions of the Review; and

    43.2. The FCA continues to rely on its flawed approach and reasoning in relation to the Scheme and the Sophistication Test in seeking to justify the Decision.

44. A full factual summary of the Scheme and the establishment of the Sophistication Test is set out in the pre-action protocol letter dated 8 February 2022.

i. Establishment of the Scheme

45. Potential IRHP mis-selling was first brought to the attention of the FSA in 2010. By March 2012 the FSA was facing increasing public pressure to take action. The Review found that the options considered by the FSA as a regulatory response included those set out in Section V(iv) above, namely:

    45.1. The use of its powers to establish a compulsory redress scheme under s.404 FSMA. This option was rejected on the basis that the FSA considered there was inadequate evidence of rule breaches causing loss and/or widespread mis-selling to justify reliance on s.404[24];

[23] PAP Response, para 6.5 [**C/37**]

[24] Review, p 103, para 40(a) [**D/107**].

45.2. The use of its powers to apply for or require restitution under ss.382 and 384 FSMA. This was also rejected on the basis that, at the time, the FSA had insufficient evidence of rule breaches[25]; and

45.3. The power of the FSA pursuant to ss.42 to 45 FSMA (as in force at the time – the predecessor provisions to ss.55E, 55J and 55L FSMA) to vary the permissions of any of the relevant banks.

46. In the event, the FSA declined to exercise the powers that were available to it and instead opted for a voluntary redress scheme. In around June 2012, the FSA proceeded with establishing what is referred to in the Review as the '**Initial Agreement**' with the first-tier banks, which would set out the terms of an initial voluntary redress scheme, with the supervisory assistance of a s.166 Skilled Person. (S.166 empowered the FSA to appoint a suitably skilled person to assist it with its functions.) Upon the Initial Agreement being executed, the Banks and the FSA commenced the '**Pilot Scheme**', through which a sample of IRHP sales for each Bank would be reviewed in accordance with the Initial Agreement.

ii. The Initial Agreement and the Sophistication Test

47. The Sophistication Test developed during the course of negotiations relating to the Initial Agreement between the FSA and the Banks, with major concessions being made by the FCA to the Banks. The Sophistication Test – in each of its iterations – was an arbitrary means of sub-dividing the Private Customer / Retail Client class of customers, in respect of which the Banks owed the same regulatory duties pursuant to COB / COBS, in such a way that some qualified for redress and some did not.

48. The initial purpose of the Sophistication Test, and the basis upon which it was proposed to the Banks by the FSA, was to identify the most vulnerable 'non-sophisticated' IRHP customers who had traded the most complex IRHPs (structured collars), so that they could be given redress automatically, i.e. without consideration of the circumstances of the sale.[26] It was initially proposed that all other IRHP sales (including the Excluded

[25] Review, p 107, para 40(a) [**D/111**].

[26] Review, p 123, para 66(b) [**D/127**].

Transactions) would be subject to a review process whereby the circumstances of the sale would be reviewed and assessed as part of the Scheme in order to determine whether the customer should be offered redress. The effect of this would have been that no Private Customer / Retail Client was automatically denied participation in the Scheme.

49. The Sophistication Test was initially drafted by reference to the Companies Act 2006 small companies criteria, which are used for the purposes of financial reporting requirements. This approach broadly aligned with a proposal that had been made to the FSA by HSBC.[27] The small companies criteria under the Companies Act 2006 are quantitative rather than qualitative and are concerned with metrics such as turnover, balance sheet and number of employees. These criteria tell one nothing about a customer's degree of knowledge and understanding of IRHPs (if any) or about whether the Bank had breached its regulatory obligations in respect of that customer. The criteria accordingly provided an arbitrary—and, the Claimant submits irrational—basis for the exclusion of certain Private Customers / Retail Clients from the Scheme.

50. The Review found that an internal FSA email of 22 June 2012 explained that the small companies criteria made the Sophistication Test more objective. However, the email also warned that *'the arguments against are that it may be more arbitrary and is much less of an assessment of an individual.'*[28]

51. Following further exchanges with the Banks, and upon the proposal of some of the Banks party to the negotiations, the FSA subsequently assented to an amended formulation and application of the Sophistication Test that differed substantially from the first iteration that it had proposed. This amendment to the Sophistication Test was introduced after what the Review describe as '*the briefest possible consideration*'[29]. The criteria for the Sophistication Test that were eventually included in the Initial Agreement (derived from ss.382 and 477 of the Companies Act 2006[30] and as suggested by the Banks) were as follows:

[27] Review, ps 117-118 [**D/121-122**].

[28] Review, p 118, para 56(e) [**D/122**]

[29] Review, p 320 [**D/324**]

[30] Review, p 321, para 16 and fn 1331 [**D/325**]

1.11 'Sophisticated Customer Criteria' means:

1.11.1 In the financial year during which the sale was concluded, a Customer who met at least two of the following:

1.11.1.1 a turnover of more that £6.5 million;

1.11.1.2 a balance sheet total of more than £3.26 million; or

1.11.1.3 more than 50 employees; [the '**Companies Act Test**']

Or

1.11.2 The Firm is able to demonstrate that, at the time of the sale, the Customer had the necessary experience and knowledge to understand the service to be provided and the type of produce or transaction envisaged, including their complexity and the risks involved. [the '**Additional Test**']

52. This Sophistication Test was the product of discussions between the FSA, the Banks and HM Treasury. It had no basis in the statutory framework governing the FSA's jurisdiction and was an arbitrary means of distinguishing between members of the Private Customer / Retail Client regulatory class.

53. The effect of this iteration of the Sophistication Test was to:

53.1. Exclude customers on the basis of the Companies Act Test, which was an irrational and arbitrary means of determining whether the Banks had acted in breach of their regulatory obligations in relation to a particular customer and / or whether such breaches should be remedied;

53.2. Put the determination of sophistication partially in the hands of the Banks, by adding in the Additional Test as to sophistication which the Banks would decide; and

53.3. Exclude from the Scheme *altogether* any customer deemed to be 'sophisticated' based on these criteria (irrespective of the category of product that they transacted or their regulatory classification), including the Excluded Customers (which is to be contrasted with the initial intended purpose of the Sophistication Test set out at paragraph 48 above, i.e. to facilitate automatic redress for the smallest IRHP victims who transacted the most complicated products, without factual enquiry).

iii. The Pilot Scheme and amendment of the Sophistication Test

54. Following the conclusion of the Initial Agreement, the Banks proceeded with the Pilot Scheme, as part of which sample sets of customers of each of the Banks who would otherwise be deemed sophisticated were nonetheless reviewed with the purpose of assessing the efficacy of the Sophistication Test.

55. The Pilot Scheme revealed widespread mis-selling (over 95% of cases). Structural issues with the Initial Agreement were also identified, including in relation to the functioning of the Sophistication Test.

56. Many exchanges followed between the Banks and the FSA. The Review records that, during this time, many of the decisions being taken by the FSA would affect portions of the potential claimant population but were not properly tested by way of impact analysis, nor was there any proper analysis as to why certain groups of potential groups should or should not be excluded from the Scheme[31]. The two major changes to the Sophistication Test that were made following the Pilot Scheme were:

    56.1. The Companies Act Test was amended so that the numerical limits were applied by reference to the customer's company group (if it was part of one) rather than to the individual customer (the '**Companies Act Group Test**'); and

    56.2. During discussions between the FSA and HM Treasury, HM Treasury stated that it *'had been lobbied hard by the CEOs of the banks'* and as a result had come to the view that '*total redress costs need to be reduced*'.[32] HM Treasury therefore appear to have introduced the idea of an additional limb to the Sophistication Test, namely an arbitrary IRHP notional threshold: as they put it, an '*additional test to deem any customer with a hedge greater than £3.26m as sophisticated*'.[33] The FSA subsequently amended the Sophistication Test to add this additional limb, so that any customer would be deemed sophisticated (and would therefore be excluded from the Scheme entirely) if either they – or the group of connected

[31] For example, at para 65 on p 169 of the Review [**D/173**].

[32] Review, p 188, para 116 [**D/192**].

[33] Review, p 190, para 121 [**D/190**].

clients[34] of which they were a part – had an aggregate notional value of IRHPs over £10 million (the '**Notional Test**').

57. The Review refers to evidence collected by John Swift QC and his team, from which it is clear that there was no principled or reasoned basis for the selection of the £10 million threshold and that it was a purely arbitrary figure:

> *FCA employee I, who played no part in the discussions at the time, later heard from those involved that the £10 million threshold was arrived at through the use of 'an Excel spreadsheet containing the entire retail customer population' and the relevant team having ''played with the thresholds' until they were left with a 'reasonable population' that 'felt about right''. FCA employee A confirmed the existence of 'a spreadsheet … that I was using … to model', but explained that the FSA '[had] limited data and intelligence and you have to make a decision and you can't quite quantify the lasting impact of that'. They considered that the FSA 'certainly did not know who would be captured by the objective test. We did not have that level of data or understanding about the potential unskilled population and therefore we were making judgments based upon samples and … discussions with the firm'. Looking back, they concluded that 'it's actually, now I think about it, really bad that we couldn't get more data from the firms on their base to model this. What we were told is they just didn't have it.*'[35] (Emphasis added.)

58. The FSA communicated the amendments to the banks by way of a letter dated 29 January 2013. The Review notes in relation to the contents of that letter:

> *The starting point for determining whether a customer was sophisticated (and therefore fell outside the Scheme) had shifted – from both the test outlined in the Initial Written Undertaking agreed in June 2012, and the proposed amendments to the Initial Sophisticated Customer Criteria outlined on 17 January 2013. A speaking note prepared for meetings with the banks on 29 January 2013 described the FSA as having made two 'big concessions' in relation to the Sophisticated Customer Criteria (particularly for Lloyds), and that it was likely to be unpopular with consumer groups, who had not been consulted on the changes. It outlined that a £10 million notional threshold rather than £7.5 million or £5 million had been selected for a number of reasons. In particular, it stated that the FSA had looked in detail at the types of customers who fell on both sides of an absolute cut-off for notional value. As noted above, however, based on the contemporaneous records and the witness evidence provided to the Review, it does not appear that the FSA*

[34] Such a group of connected clients or parties was defined in accordance with the BIPRU (i.e. the Prudential sourcebook for Banks, Building Societies and Investment Firms) definition of groups of connected clients.

[35] Review, p 195, para 131 [**D/199**].

undertook such work in any great detail, if at all.[36]

59. The close relationship between the FSA, the Banks and HM Treasury in formulating the terms of the Scheme, including the Sophistication Test, is highlighted by the events that followed immediately after the sending of the 29 January 2013 letter, as revealed by the Review:

> *The same day, after 10.00 p.m., HMT official H contacted FCA employee M, apologising for the late hour and requesting to 'speak briefly'. M and FCA employee G called them that night. An internal FCA email circulated just before midnight records that HMT official H 'had spoken to all the banks and… wanted to feed back on two key issues which they had raised' (in particular, RBS) regarding the FSA's position set out in its letter of 29 January 2013. HMT official H explained that their 'impression was that the [banks] were a lot happier overall and in particular on sophistication and the FOS…. [Their] impression was that as a result of this, they seem to have shifted their position 'quite a lot'. FCA employees M and G 'confirmed again that whilst we had moved substantially on sophistication to ensure that the right customers were involved in this exercise, we felt strongly that we should maintain our position on redress'. In the round, they considered that the position arrived at by the FSA represented 'a balanced approach which ensured fair and reasonable outcomes for the small and unsophisticated customers who had been mis-sold and was fair to the banks'. HMT official H 'asked us to keep…[them] informed as issues progressed tomorrow'.*[37]

60. Thereafter, the Scheme continued to operate for 3 years applying the amended Sophistication Test by which the Excluded Customers were excluded from participating in the Scheme and obtaining redress on the basis of the Sophistication Test.

iv. Impact of the Sophistication Test

61. The FCA published the final results of the Scheme on 30 September 2016.[38] The following statistics illustrate the scale of the exclusion of customers from the Scheme based on the Sophistication Test:

[36] Review, p 199, para 139 [**D/203**].

[37] Review, p 201, para 140 [**D/205**].

[38] FCA diagram of progress through stages of the Scheme [**D/1**]

61.1. A total of 30,784 IRHP products came within the 'review population' of the Scheme. That population comprised: (i) 2,104 Category A sales (sales of structured collars); (ii) 26,089 Category B sales (sales of all other standalone IRHPs); and (iii) 2,591 Category C sales (sales of caps). In total, there were 7,501 Category C sales, but these were only included in the Scheme (and therefore the 'review population') where the customer proactively raised a complaint in relation to their cap(s).

61.2. At the first stage of the assessment, 10,577 sales of IRPHs were excluded from the Scheme on the basis of the Sophistication Test. This represented approximately 34.3% of the review population.

61.3. The basis of the exclusion for 4,977 of the sales was the 'companies test' – i.e. those customers were automatically excluded based factors relevant to the size of the business, which was assessed on a group basis rather than the individual company level. A further 5,309 sales were excluded because the value of the IRHP exceeded £10 million, which was again assessed on an aggregate basis across company groups, not on an individual company basis. The final 291 were excluded based on the Banks' subjective assessment of their customers' sophistication.

61.4. Those figures can be broken down by the type of product as follows:

61.4.1. 505 Category A sales were excluded based on the Sophistication Test. For all other customers of structured collars, redress was automatically provided; and

61.4.2. 9,809 Category B sales and 263 Category C sales were excluded based on the Sophistication Test. Of the 16,570 customers who were permitted to raise complaints about Category B and C sales through the Scheme (and did not opt out), approximately 90.6% of the sales were assessed as non-compliant.

VII. THE REVIEW

i. The Terms of Reference

62. In June 2015, the FCA committed to a review of its supervisory intervention on IRHPs, and the Review was announced in June 2019. The Review was intended to examine the '*quality and effectiveness of the supervisory intervention*'. It covered the period from 1 March 2012 to 31 December 2018. The FCA stated that the purpose of the Review was to consider what lessons could be learned from its intervention, not to reopen the Scheme or individual cases. However, the FCA did not appear to have contemplated the conclusions that would be reached in the Review.

63. The Review's Terms of Reference cover four broad topics:[39] (i) whether the approach to the intervention was reasonable, including consideration of the other options available to it and the parameters for the Scheme; (ii) whether the eligibility criteria for the Scheme were appropriate; (iii) whether the Scheme delivered fair and consistent outcomes for SMEs in a proportionate and fair way; and (iv) whether the redress exercise was delivered in an effective and timely manner. The present challenge is principally concerned with the impact of the Review's findings and conclusions in relation to topic (ii) and the Decision taken in light of those findings and conclusions.

64. The Terms of Reference include, *inter alia*, the following question about the appropriateness of Scheme's eligibility criteria:[40] '*(a) The scope of the scheme in light of the FSA's jurisdiction, including the definitions of SMEs who might benefit from it, the products covered and whether it was right to exclude commercial loans with mark-to-market break costs'.*

65. The standard adopted in the Review when assessing the conduct of the FSA and FCA (in this Section referred to collectively as the 'FCA' save as where necessary to distinguish between them) was that of '*an experienced, skilled and efficient regulator acting in accordance with its statutory duties and taking full account of the evidence available to*

[39] The Terms of Reference are set out in the Review at Appendix 3 [**D/427-430**]

[40] Question 2 of the Terms of Reference, Review, p 425 [**D/429**]

it at the time of the decisions.'[41] The Review also expressly precluded using the benefit of hindsight in making evaluations.[42]

ii. Conclusions reached by the Review

66. The Review concluded that reaching a voluntary agreement with the Banks was an appropriate way for the FCA to respond to its concerns about the sale of IRHPs to those customers who were eligible under the terms of the Scheme. However, in respect of the Excluded Customers, the Review concluded that the Scheme was an inadequate response and the FCA was '*wrong to confine* [the Scheme] *to a subset of Private Customers/Retail Clients designated as 'non-sophisticated'*'.[43]

67. The Review explained that all Private Customers / Retail Clients who fell within the remit of the FCA had the same rights and were owed the same obligations by the Banks, and the FCA had the same corresponding duty to protect those rights. While the FCA may have been able to treat some customers more advantageously than others, the Review concluded that the FCA's decision to restrict the scope of the whole Scheme to 'non sophisticated' customers was made '*after only the briefest consideration*' and without adequate consultation.[44] It found no evidence of any impact analysis being conducted nor evidence as to how the Sophistication Test was appropriate.[45]

68. The Review explained that the Private Customers / Retail Clients who fell within the FCA's remit are defined through a legislative test (as set out in Section V(iii) above). There are stringent conditions imposed upon a bank if it wishes to move a customer from this category into that of Intermediate Customers/Professional Clients, the consequence of which is to reduce the regulatory protections afforded to the customer.

69. The FCA's position when making representations to the Review was that not all customers were entitled to the same regulatory protection, nor did it owe them the same duty to protect against risk under s.5 of FSMA (as it applied to the FSA at the relevant

[41] Review, p 295, para 3 [**D/295**]

[42] Review, p 295, para 3 [**D/295**]

[43] Review, p 316, para 1 [**D/320**].

[44] Review, p 32 paras 42-43 [**D/36**]

[45] Review, p 322 para 17 [**D/326**]

time).[46] The FCA considered that some customers falling within its remit would have appreciated the risks in purchasing IRHPs, and therefore the redress scheme should be limited to non-sophisticated customers in order to secure them more timely redress than those non-sophisticated customers would otherwise receive.

70. The Review concluded that this approach was wrong. FSMA contemplated that a different level of protection was appropriate for different categories of consumers, but the legislation itself prescribes these different categories: Private Customers / Retail Clients and Intermediate Customers / Professional Clients.[47] The Review concluded that '*all Private Customers/Retail Clients were entitled to equal regulatory protection. There was no proper basis for differential treatment of different customers within that category*'[48].

71. The Review further found that the Sophistication Test which was used to distinguish between Private Customers / Retail Clients had no connection to the legislative framework that comprises the FCA's jurisdiction. Rather, the Companies Act Test – which excluded customers based on the size of their business (turnover, assets or employees) – was based on the Companies Act 2006. The Review concluded that there was no adequate explanation for why the customer's size meant that it should not qualify for redress under the Scheme, and the criteria were '*not objectively reasonable, nor appropriate*'[49]. Further the Review found:

> *no clear evidence as to how the Companies Act size test was identified as appropriate. There was no clear evidence of any impact analysis having been undertaken (save a subsequent and very basic exercise in relation to the revisions to the Scheme, which sought to identify in numerical terms how many more customers would be included and excluded). There was no examination of whether the test or tests to be applied were the right ones, and the 'blunt tool' as it has been described appears to have been adopted at the suggestion of one of the banks*.[50]

72. The Review concluded that:

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[46] Review, ps 318-9, para 9 [**D/322**]

[47] Review, p 317 paras 4-7 [**D/321**]

[48] Review, p 317, para 4 [**D/321**]

[49] Review, p 322, para 16 [**D/326**]

[50] Review, p 322, para 17 [**D/326**]

> *The FCA should aim to ensure that persons within the same category are treated consistently: where rules exist for the protection of all within a defined class, regulatory intervention should not be restricted to benefit only a subset of that class unless there is an objective justification founded on strong evidence and tested through consultation.*[51]

73. The Review also found the Additional Test in the Sophistication Test was not appropriate. The Banks were entitled under the terms of the Scheme to assess whether a customer had sufficient knowledge and experience to understand the IRHP contract. However, whilst a customer's understanding may be relevant to some of the Banks' regulatory obligations, other regulations, which were also within the FSA's jurisdiction, were breached even if the customer was capable of understanding the contract. The subjective element of the Sophistication Test therefore also did not align with the FSA's regulatory remit.[52]

74. The Review concluded, in relation to the Sophistication Test in the Initial Agreement, that it was:

> *clear that the FSA should never have agreed to limit eligibility for the Scheme, without adequate justification and consultation. Concluding the Initial Agreement on this basis (i.e. limiting eligibility within the category without such justification/consultation) was a serious regulatory error. This was exacerbated by the speed with which the relevant decisions were taken, the absence of any proportionality assessment weighing likely benefits and detriments, the lack of any meaningful involvement by the Board, and the failure to pause for proper consultation, formal or informal, with stakeholders*[53]

75. The Review found that the changes to the eligibility criteria following the Pilot Scheme '*were all agreed 'behind closed doors', without consultation or explanation*'.[54] As to the process by which amendments to the Sophistication Test were made following the Pilot Scheme, the Review found that:

> *[The FCA] sought to ensure that only the 'right' subset of Private Customers/Retail Clients would be eligible for the Scheme – without ever clearly articulating what*

[51] Review, p 372 [**D/376**]

[52] Review, p 322, para 18 [**D/326**]

[53] Review, p 324, para 21 [**D/328**]

[54] Review, p 326-327, para 28 [**D/330-331**]

that subset should be. Aided by this lack of specificity, the banks succeeded in getting the FSA to make several substantial concessions on the scope of the Sophisticated Customer Criteria. The position eventually arrived at – a mix of criteria of considerable complexity, as set out in the Supplemental Agreement – reflected the banks' very considerable success in further limiting their financial exposure to redress for Private Customers and Retail Clients.[55]

76. In relation to the first additional criterion - the Companies Act Group Test - the Review found that '*[t]his change in approach meant that, in effect, the FSA assumed knowledge and experience of IRHPs as a result of the group structure, even if none existed at the level of the subsidiary that had purchased the relevant IRHP*.'[56] The Review also noted that the Sophistication Test was amended to remove customers' ability to demonstrate that they did not satisfy the company size criteria.[57]

77. In relation to the second additional criterion – the Notional Test – the Review found that: *'The £10 million threshold for this appears to have been an <u>essentially arbitrary figure</u>, again with <u>minimal underpinning analysis or impact assessment</u> by the FSA, albeit still significantly higher than the threshold suggested by the banks.*'[58] (Emphasis added.)

78. Overall, in relation to the Sophistication Test, the Review concluded that:

It was never clear, nor obvious, why customers who fell on the wrong side of the quantitative criteria (whether as set out in the Initial Agreement or as amended subsequently) should be excluded from the Scheme in the first place. The FSA appears to have proceeded on an impressionistic view that certain kinds of Private Customers/Retail Clients were deserving of regulatory protection, whereas others were not, without ever expressly articulating or testing that approach. On that basis, it adopted and varied the eligibility criteria (often at the instigation of the banks), with only a vague understanding of the real-world impact these changes would have on businesses that had been mis-sold IRHPs. This was particularly problematic as customers deemed sophisticated under the objective test had no opportunity of disproving this under the Scheme. The built-in asymmetry gave the banks 'two bites of the cherry'; whereas customers faced failing either the quantitative or qualitative test, without any adequate means of challenge. Such

[55] Review, p 327, para 29 [**D/331**]

[56] Review, p 328, para 31 [**D/332**]

[57] Review, p 330, para 36 [**D/334**].

[58] Review, p 329, para 32 [**D/333**]

customers had no opportunity to demonstrate that they were in fact non-sophisticated, no matter how arbitrary the result produced by the strict application of the eligibility criteria was in their case.

Overall, far from using the Pilot Stage to satisfy itself that only those with genuine knowledge and experience of IRHPs and their risks would be excluded, the FSA embarked upon a significant further narrowing of the eligibility criteria for the Scheme. Having made further concessions down to the last moment, it ended up with an untested, unsampled mix of criteria so complex they had to be set out in a diagram resembling an intricate ancestry chart.[59]

79. The abovementioned findings and conclusions of the Review made very clear, the Claimant submits, that the operation of the Scheme and the Sophistication Test as it applied to Excluded Customers was irrational and inappropriate.

VIII. THE DECISION

80. It fell to the FCA to decide how to respond to these findings and conclusions of the Review. That entailed a fresh decision-making process, the purpose of which was to determine whether (and if so how) to use the statutory powers referred to in Section V(iv) above to address the Banks' breaches of regulatory obligations to the Excluded Customers in the light of what the Review had concluded was the irrational exclusion of the Excluded Customers from the Scheme. That process, of course, needed to be undertaken, so far as reasonably possible, in way that advanced one or more of the FCA's operational objectives, these of course including the Consumer Protection Objective (see ss.1B(1)(b) and 1C FSMA and paragraphs 16 to 20 above).

81. Given what the Review had concluded, a decision to do nothing at all required, the APPG respectfully submits, some quite compelling reasons if it was to be a rational decision.

82. As explained earlier, the FCA responded to the Review in its Response to the Review. The reasons for the Decision are short and can conveniently be set out here almost in full:

[59] Review, p 332, paras 41-42 [**D/336**]

4.1 The terms of the Review made clear that it was not intended to be a route by which the Scheme could be re-opened, and the Review does not suggest this. However, as a responsible regulator we have considered carefully, in the light of its findings, whether we should seek to use our powers to require any further redress to be paid to IRHP customers.

4.2 We have concluded that we should not take any such action. Our reasons are as follows.

4.3 First, and most important, as we have explained (3.21-3.28) [(this is a reference to other parts of the Response to the Review, to be referred to shortly)], *we do not agree that the FSA went wrong in limiting the scope of the Scheme to less sophisticated customers within the Private Customer/Retail Client class. Notwithstanding the shortcomings in processes and governance which we have acknowledged, we consider that this was a reasonable approach, given the FSA's regulatory aim of providing swift and certain redress to those who were in the most vulnerable circumstances among that varied customer base. We consider that the FSA thereby provided appropriate protection to all the various customers involved, including the more sophisticated, who remained able to pursue mis-selling allegations and claims for redress against the banks through complaint routes outside of the Scheme and by litigation.*

4.4 Secondly, and in any event, we consider that it would not be appropriate or proportionate for us to take further action now. The Scheme was entered into by the FSA and the banks by voluntary agreement in good faith at the time and the regulator set out the entirety of the steps it required the banks to take (beyond operating their normal complaints channels and responding to court claims) to ensure they paid redress to mis-sold IRHP customers. We have never suggested we would seek to extend the Scheme, or take further steps, to include or assist the excluded customers. Doing so now would also make it harder for us to agree other voluntary remediations with firms in future, which would hamper our ability to resolve issues swiftly and require more formal action more often, with the delays and resource burdens that would bring.[60]

82A. Further, according to paragraph 4.2 of the Board Paper,

The material considerations that we have identified, for assessing whether redress can or should now be imposed are discussed below. They are:

[60] Response to the Review, p 25 [**D/524**]

a. The FCA disagrees with the Review's adverse findings about the Scheme's scope;

b. The banks have a strong argument that they could reasonably regard the matter of redress for sophisticated customers as already closed;

c. Difficulty and complexity of any redress action and evidential problems;

d. Burden on FCA resources;

e. Reasons for seeking redress for [persons deemed under the Scheme to be] sophisticated customers now.[61]

83. The FCA's reasoning may accordingly be summarised as follows: (i) there was nothing fundamentally wrong with the use of the Sophistication Test; (ii) even if there was, it would not be appropriate now to put this wrong right.

84. As the paragraphs quoted above at paragraph 82 explain, the FCA's reasons for asserting that the FSA did not go fundamentally wrong in adopting the Sophistication Test are set out in paragraphs 3.21 to 3.28 of the Response to the Review[62]. In essence, the FCA contends:

84.1. It was appropriate for the FSA to seek to protect more vulnerable customers who had purchased IRHPs;

84.2. The voluntary nature of the agreements necessarily involved some trade-off and that there was no evidence that the Banks would agree to a voluntary scheme that included all Private Customers / Retail Clients;

84.3. The FSA was obliged by FSMA to assess what it considered to be an appropriate degree of protection for consumers who had been sold IRHPs (in alleged accordance with s.5 FSMA as it then applied to the FSA);

84.4. It was reasonable to judge that some customers were more likely to have understood the risks of their IRHPs and so it was reasonably to implement the Sophistication Test;

84.5. It was reasonable for the redress scheme to prioritise, and if appropriate be limited to, less sophisticated customers, so as to secure more timely redress for them; and

[61] Board Paper, p 5 [**D/533**]

[62] Response to the Review, p 11 to 13 [**D/510-512**]

84.6. The Scheme provided swift redress for the customers it reasonably considered to be most at risk, and the differentiation of customers within the Private Customer/ Retail Client class was an appropriate mechanism for achieving that outcome, based on their likely sophistication as identified by detailed criteria the FSA developed.

84A. Although the FCA thus, for public consumption, asserts that

> *[n]otwithstanding the shortcomings in processes and governance which we have acknowledged, we consider that this was a reasonable approach*

and that

> *[w]e consider that the FSA thereby provided appropriate protection to all the various customers involved*
>
> (see paragraph 4.3 of the Response to the Review, quoted at paragraph 82 above);

and although, according to paragraph 7.1 of the Board Paper[63],

> '*[t]he outcome we want to achieve is that we give the public confidence that … the scope of the … Scheme was in fact a reasonable one*',

this is inconsistent with the FCA's internal statements as to what it really considers about the Scheme. For example, at its meeting on 20 May 2021, the FCA's Executive Committee was briefed that

> *We know that there are gaps in the record keeping around the negotiations and staff directly involved who were interviewed could not recall how/why the FCA [sic] agreed to the banks['] requests on sophistication. It is therefore unlikely*

[63] Board Paper, p 15 **[D/543]**

that we will be able to dispute the facts.[64]

IX. A CHALLENGE TO DECISIONS TAKEN IN 2012/13?

85. The Decision was notified to the public on 14 December 2021.

86. The FCA has suggested in the PAP Response that the Claimant's challenge to the Decision is '*in substance a challenge to decisions taken by the FCA in 2012 and 2013*' and that the claim for judicial review is therefore out of time. This is incorrect:

86.1. The Review has brought to light material matters relating to the establishment of the Sophistication Test and the exclusion of the Excluded Customers and John Swift QC has reached a number of important conclusions regarding the appropriateness of the FSA's actions. The findings and conclusions of the Review were such as to require the FCA to consider afresh whether it should exercise its powers pursuant to statute to take action in relation to the sale of IRHPs to the Excluded Customers, on the basis of what is now known to it and to the public;

86.2. The Decision by the FCA not to exercise its powers under the current statutory framework in light of the findings and conclusions of the Review is a fresh decision of the FCA, not merely a repetition or reconsideration of the decisions of the FSA in 2012/13. Indeed, the FCA itself refers, in the PAP Response, to its decision '*not to seek to use its powers to require any further redress to be paid*' and asserts that '*[i]n taking the Decision, the FCA weighed up the relevant matters (including the findings in the draft Report) and exercised its regulatory judgement and discretion*'[65]; and

86.3. The Decision is accordingly not properly characterised as a mere confirmation of a decision made by the FSA in 2012/13, but is instead a freestanding decision that

[64] HRHP Board sub-committee paper, Annex 3 – Slides provided to the Executive Committee, p12, section '*Other aspects in the report or known to us'* **[D/632]**

[65] PAP Response, paras 2.1 and 2.2 [**C/35**]

is amenable to judicial review. The present claim has been brought promptly and in any event within 3 months of the Decision being published.[66]

X. GROUND ONE: THE DECISION IS IRRATIONAL

(i) Irrational to reject the findings of the Review concerning the Sophistication Test

87. As the Response to the Review explains, the '*most important*'[67] factor said by the FCA to support the Decision is the FCA's disagreement with the Review, in so far as the latter found that the FSA ought not to have adopted the Sophistication Test.

88. The FCA was not, of course, bound as a matter of law to accept whatever conclusion on this issue the Review reached: John Swift QC was not acting as a judge determining legal rights. But the FCA, being a public body and required as such to act rationally in the light of its statutory obligations, and having commissioned a distinguished expert (and a team of others, who together worked for two years at a cost of over £7m[68]) to review its predecessor's conduct, is not entitled simply to dismiss such of the Review's conclusions as it finds disagreeable. It must have rational grounds for doing so.

89. It is respectfully submitted that the grounds set out in paragraphs 3.21 to 3.28 of the Response to the Review (see paragraph 84 above) do not meet this test.

90. As set out above, the Consumer Protection Objective is one of the operational objectives of the FCA, in furtherance of which the FCA is required to act, as was the FSA. A core component of the protections afforded to consumers as part of the regulatory framework are the COB / COBS rules, with which Banks were required to comply when selling IRHPs to their customers.

91. The COB / COBS rules prescribe a hierarchy of regulatory protection for different classes of customers. Customers within the same class are entitled to the same level of regulatory

[66] The date on which grounds to make the claim arose is the date the Decision was published, not the date it was made internally by the FCA's Board, cf *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36 [2004] 1 AC 604 at [26]

[67] Response to the Review, p25, para 4.3 [**D/524**].

[68] Response to the Review, Annex 1 'The costs of the Review', p 27 [**D/526**]

protection, as recognised by the designation of regulatory standards under COB / COBS according to the class of customer.

92. The Excluded Customers were classified as Private Customers (pursuant to COB) / Retail Clients (pursuant to COBS). As such:

92.1. The Banks' regulatory obligations in respect of the Excluded Customers were the same as in respect of other Private Customers / Retail Clients; and, it is submitted,

92.2. The Excluded Customers were *prima facie* entitled in all circumstances to the same level of protection by the FSA (and are now *prima facie* entitled to the same level of protection by the FCA) as other Private Customers / Retail Clients (including those deemed to be 'non-sophisticated' and included within the Scheme).

93. In these circumstances, for the purposes of the FSA's supervisory response to IRHP mis-selling, a decision to devise an *ad hoc* system of classification – by which some Private Customers / Retail Clients were protected by being included in the Scheme and others were left to fend for themselves – required cogent justification if it was to be done at all. Further, if it was to be done, it required careful design of the system to ensure that the further distinctions that were drawn were rational and reasonable ones by reference to the Consumer Protection Objective.

94. Yet, as the Review found, this altogether failed to happen. As the Review put it about the decision to deny protection under the Scheme to some Private Customers / Retail Clients:

> [The representation from the FCA that section 5 FSMA left it] *reasonably open to the FSA to take the view that some customers falling within the Private Customer/Retail Client group likely would have appreciated the risks in purchasing an IRHP, and that any redress scheme should be limited to non-sophisticated customers in order to secure more timely redress given the very difficult financial circumstances that many of them were facing … does not … sit well with the legal and regulatory framework. Under FSMA, a 'consumer' includes any person who uses regulated financial services, whether they be retail clients, investment professionals or market counterparties. Given the breadth of the definition, a different level of protection is appropriate for different categories of such 'consumers'. This was reflected in the*

COB/COBS customer classifications/client categories. It does not follow, however, that the FSA or the FCA was justified in further differentiating, by reference to the consumer protection objective or at all, as between consumers within the same category without adequate objective justification and without prior proper consultation with stakeholders. I have also seen no contemporaneous evidence to suggest that the FSA analysed or justified the concessions it made from time to time by reference to the consumer protection objective.[69]

95. Even if some degree of distinction between those Private Customers / Retail Clients deserving of redress under the Scheme and those not so deserving were permissible in principle, what was done in practice was, as the Review found (and as the FCA internally admitted that it could not dispute - see paragraph 84A above):

95.1. Arbitrary, irrational and without objective justification; and

95.2. Done at the behest of the Banks and HM Treasury, following inadequate consultation with relevant stakeholders and without undertaking proper impact assessments.

96. The Response to the Review entirely fails to deal with these objections. It does not engage with the findings of the Review in this respect, instead making a series of points about what are essentially other considerations, none of which can justify such egregious failures by the FSA. The FCA's statement, in the Response to the Review, that '*we do not agree that the FSA went wrong in limiting the scope of the Scheme to less sophisticated customers within the Private Customer/Retail Client class. … we consider that this was a reasonable approach …*'[70] entirely misses the point. For, as is now known from the Review, the Sophistication Test *did not work* as a tool for identifying 'less sophisticated customers'. Further, the FCA has yet to put its '*cards face up*' on the table in respect of the decision-making process that led to the Response to the Review and the Decision: the April Disclosure has revealed that the '*Project Board*' was the organ within the FCA responsible for addressing the Review and the Response to the Review, but the

[69] Review, p 319, paras 9 and 10 [**D/323**]

[70] Response to the Review, para 4.3 [**D/524**] – see above at para 82

FCA has yet to comply with the Outstanding Disclosure Requests in connection with the Project Board's function and interaction with the Review team.

97. As for the suggestion that there is no evidence that the Banks would have agreed to a scheme that included all Private Customer / Retail Clients including the Excluded Customers, nor is there any evidence that they would *not* have agreed to such a scheme or, if required to do so, complied with one that had been imposed on them. The more telling point is that there is no evidence that the FSA sought to negotiate on this point at all at the time of originally excluding the Excluded Customers (at which time the FSA appears to have been heavily influenced by the banks and HM Treasury). In this context it is not accepted that the FSA had to trade away the regulatory protections of nearly 35% of relevant transactions in order to procure agreement from the Banks to a voluntary scheme at all. Even if it had, as the Review points out, this was a situation of the FSA's making and it should not have found itself in this position[71].

98. In the circumstances set out above, it was irrational for the FCA, by the Decision, simply to reject the Review's conclusion that the FSA had been wrong to adopt the Sophistication Test and thereby to exclude the Excluded Customers.

99. That conclusion by itself (if accepted by the Court) is enough, the APPG submits, to warrant the quashing of the Decision. The FCA asserts that the second part of the Decision – its view is that '*it would not be appropriate or proportionate for us to take further action now*' – is one that pertains '*in any event*'[72], i.e. that it would have refused to take any further steps even if it had *accepted* that the Review was right in its criticisms of the Sophistication Test. It is submitted, however, that this is unconvincing. The FCA's own position is that its rejection of the Review's criticisms is the '*most important*' reason for the Decision (see paragraph 80 above). It is unrealistic to suppose that if the FCA had proceeded from the premise that the Review was *right* in its damning criticisms of the Scheme, it would really still have decided to do nothing for the Excluded Customers.

[71] Review, p 305, para 22 [**D/309**]

[72] Response to the Review, para 4.3 [**D/524**] – see above at para 82

(ii) Irrational to decide to do nothing further

100. At the time of making the Decision the FCA had – and still has – available to it the statutory powers set out in Section V(iv) above. As mentioned, it is not in dispute that the FCA could exercise those powers to take action to remedy the earlier failings and to procure redress for the Excluded Customers. A decision to do nothing in the face of the findings and conclusions of the Review ought to be supported by cogent reasons, if it is to be a rational one.

101. The FCA accepted in the Response that:

101.1. Looking forward, '*our regulatory judgements on any such differential treatment within a redress intervention should be reasoned, evidence-based and objectively justified*'[73]; and

101.2. the FCA should give due consideration to its statutory powers to obtain compensation and restitution[74] (i.e. those set out in Section V(iv) above).

102. Notwithstanding this, the FCA has:

102.1. Decided not to act in relation to the Excluded Customers – thereby perpetuating the differential treatment of the Excluded Customers – without reasoned, evidence-based or objective justification; and

102.2. Declined to exercise its available statutory powers (or even seek on voluntary basis) to obtain compensation and restitution for the Excluded Customers.

103. The FCA justifies its decision to take no further action – even on the premise that Sophistication Test was wrong – on the sole ground set out at paragraph 4.4 of the Response (reproduced at paragraph 82 ~~80~~ above). In summary, the FCA says that the Scheme was entered into by the FSA and the banks by voluntary agreement in good faith at the time and seeking to extend the Scheme now would, the FCA contends, make it harder for the FCA to agree other voluntary remediations with firms in future. The FCA says this would hamper its ~~their~~ ability to resolve issues swiftly and require more formal action more often.

[73] Response to the Review, p 13, para 3.30 [**D/512**]

[74] Response to the Review, p 18, para 3.65 [**D/517**]

103A This reasoning by the FCA is informed by paragraphs 4.15 to 4.39 of the Board Paper, which set out an extended analysis of potential arguments that the FCA speculated might be presented by the Banks in the event that the FCA decided to take further action in relation to the Excluded Customers. The FCA opined that it '*seems likely that the banks have a legitimate expectation that the FCA will not require them now to provide redress to sophisticated customers*'[75] because of the following matters[76]:

103A.1 The terms of the original redress agreement in 2012/13;

103A.2 The FSA/FCA's course of conduct and correspondence relating to the position of Excluded Customers, in particular its failure to take action in relation to the Excluded Customers in the face of the facts set out at paragraph 4.28 of the Board Paper, namely, (in essence) facts suggesting that the FSA/FCA knew during the Scheme's operation that there were increasing numbers of Excluded Customers, and unhappiness on the part of Excluded Customers about their exclusion, but, as the Banks could observe, the FSA/FCA did not do anything about this at the time; and

103A.3 The passage of time since the underlying events and the Scheme.

104. The APPG submits that the ground set out at paragraph 4.4 of the Response to the Review, as informed by the matters mentioned at paragraph 103A above, ~~this~~ is not a rational ground for the FCA now refusing to take action in relation to the Excluded Customers. In particular:

104.1. This argument is based on mere supposition on the part of the FCA and lacks any evidential basis;

104.2. The FCA is in any event the Banks' regulator. It is not and should not be dependent upon the Banks' acquiescence or approval in carrying out its functions. If, as a result of the FCA now deciding to take action in relation to the Excluded Customers, the Banks are less willing to agree other voluntary remediations in future then the FCA can and should utilise the statutory powers available to it to compel the Banks to provide appropriate redress;

[75] Board Paper, para 4.15 **[D/535]**
[76] Board Paper, para 4.17 **[D/536]**

104.3. It is hardly surprising that the Banks agreed to the terms of the Scheme – excluding as it did 35% of IRHP sales (many of which will have been non-compliant) on the basis of the Sophistication Test which has now been found to have been wrong and arbitrary. The Banks' agreement to the very advantageous terms of the Scheme does not provide a reasonable ground for the FCA refusing to now put right what is now known to have gone wrong in 2012 /13; and

104.4. The information acquired by the FCA during the Scheme – in particular the extent of non-compliance in IRHP sales – and the findings and conclusions of the Review were not known to the FCA at the time the terms of the Scheme were agreed with the Banks. In the light of this further information the FCA is entitled (and, the APPG contends, required) to take further action in respect of the Excluded Customers.

104.5 The redress agreement with the Banks expressly stated that '*6. Nothing in this Agreement prevents or in any other way limits the FSA from taking disciplinary action or taking any other regulatory action in respect of any matter or business involving the Firm*';

104.6 The FCA cannot rely on its own earlier wrongful failure to take action in relation to the Excluded Customers, even in light of the matters set out at paragraph 4.28 of the Board Paper, as a reason for refusing to take action now; and

104.7 Expiry of limitation to bring a civil claim and expiry of the right to complain under the Dispute Resolution Complaints Sourcebook are irrelevant for the purposes of the FCA's regulatory jurisdiction in relation to the Excluded Customers. And the mere passage of time is not a rational ground for denying redress to the Excluded Customers if it would otherwise be appropriate to procure redress. (On the contrary, the fact that thousands of Excluded Customers continue to suffer the consequences of having been mis-sold IRPHs is a ground on which to procure redress now, on an expedited basis.)

104B. Further, the Board Paper reveals the irrational emphasis placed by the FCA upon the

perception and interests of the Banks it was charged with regulating, to the exclusion of other relevant considerations including the interests of the Excluded Customers.

104C. Taken in the round, the Response to the Review and Board Paper show the FCA adopting reasoning which would reach a pre-ordained result, maintaining the status quo and not offering redress to Excluded Customers. For example, of the five '*material considerations'* identified in paragraph 4.2 of the Board Paper for the purposes of assessing '*whether redress can or should now be imposed'* (see paragraph 82A) above, in fact, the first four are factors pre-disposed to weigh against providing redress, and the fifth, namely the reasons for seeking redress for sophisticated customers now, was, as is evident from paragraphs 4.46 to 4.48 of the Board Paper, not actually considered with any reference to the harm suffered by the Excluded Customers, but rather justified by reference the decision taken in 2012/2013 – a self-serving and circular argument.

105. By reason of the matters set out in this Section above, the APPG contends that the Decision was one that no reasonable regulator could have come to: it was irrational and arbitrary.

XI. GROUND TWO: THE DECISION IS PROCEDURALLY UNFAIR

106. In deciding whether: (i) to exercise its powers pursuant to FSMA to procure redress on behalf of the Excluded Customers; and (ii) to discriminate between the Excluded Customers and other Retail Clients, the FCA was under a duty to act fairly. What fairness requires in any given case is, of course, dependent on all the facts (*R v Secretary of State for the Home Department, ex p Doody* [1993] UKHL 8; [1994] 1 AC 531, per Lord Mustill at 560 [**E/199-236**]). It is submitted that in the present circumstances fairness required, as a minimum, that the FCA:

106.1. Consult with those persons likely to be adversely affected if a decision was taken not to exercise its powers, i.e. the Excluded Customers; and

106.2. Not place disproportionate weight on the views and demands of the Banks.

107. As the Review found:

> *Where the FCA considers that there is an objective justification for limiting the scope of a remedy to only certain persons within the same class, there should be proper consultation with stakeholders before any such action is approved. In that context, the FCA should explain its intended approach and the reasons for it (for instance that that group alone has suffered detriment and/or that the wider scope would be disproportionate) and allow affected persons and other stakeholders a proper opportunity to make representations in respect of the proposed restriction'*[77]

108. The Review found that the Scheme was established without any proper impact assessment in relation to the Banks' customers who were affected by it and without any proper consultation with the relevant stakeholders, except the Banks themselves:

108.1. '*The changes to the eligibility criteria were all agreed 'behind closed doors', without consultation or explanation, meaning that customers found themselves suddenly excluded from the Scheme without knowing why this was being done and without any opportunity to comment before the changes were made…*'[78];

108.2. '*As indicated above, I have seen no evidence of any adequate analysis or impact assessment underpinning the various changes, whether individually or collectively*'[79];

108.3. '*There is nothing in the evidence before this Review that suggests that 'consumer groups' were consulted on, or approved of, these changes*'[80]; and

108.4. '*Not only was the Scheme presented as a fait accompli, in respect of which there had been no consultation, but the intended beneficiaries (and the wider public) were not even informed about its full components*'[81].

109. Given the findings of the Review, both fairness and rationality required that the FCA

[77] Review, p 373 [**D/377**]

[78] Review, ps 326-7 [**D/330-331**].

[79] Review, p 329 [**D/333**].

[80] Review, p 330 [**D/334**].

[81] Review, p 367 [**D/371**].

ought, in making the Decision, to have consulted those stakeholders who were not consulted prior to establishing the Scheme and ought to have carried out a full impact assessment in relation to the Excluded Customers. Instead, the Decision was made without any impact assessment or consultation at all. This was despite the FCA knowing at the date of the Decision (even if the FSA was not aware at the time of the Scheme) that sales were non-compliant and IRHPs were mis-sold in over 90% of cases.

XII. RELIEF

110. If the Court agrees with the APPG's contentions above as to the unlawfulness of the Decision, the Decision falls to be quashed. It will then be for the FCA to reconsider, in the light of all relevant facts and consistently with the Court's judgment, what steps (including by way of consultation of affected persons) to take in the light of the Review.

111. Whilst this is a matter for the FCA, the APPG submits that, in carrying out the above, the FCA should be acutely conscious of the criticisms and concerns raised in respect of the Scheme and the actions of the banks both in the Review and elsewhere. The FCA should also consult in respect of using the same powers to require firms which did not participate in the Scheme, but in respect of which there is evidence of IRHP mis-selling, to establish a similar scheme, given that it is now known (as it was not at the time that the Scheme was established) how widely the problem of IRHP mis-selling extended.

XIII. APPLICATION FOR JR COSTS CAPPING ORDER

112. If permission to proceed with the claim for judicial review is granted, the APPG seeks a CCO pursuant to s. 88(2) of the Criminal Justice and Courts Act 2015 ('**CJCA**') limiting the adverse costs that the APPG may be ordered to pay to £0. The APPG is willing for the CCO to be reciprocal, i.e. for its own recoverable costs to be limited. The grounds upon which the CCO is sought are set out in the witness statement of Heather Buchanan dated 10 March 2022.

113. Pursuant to s.88(6) CJCA, when considering whether to make a CCO the court must have

regard to, among other things, the financial resources of the parties and must be satisfied that:

113.1. The proceedings are public interest proceedings;
113.2. In the absence of the order, the claimant would withdraw the application for judicial review or cease to participate in the proceedings; and
113.3. It would be reasonable for the claimant to do so.
(the '**CCO Criteria**')

114. S.88(7) CJCA provides that the proceedings are 'public interest proceedings' only if: (i) an issue that is the subject of the proceedings is of general public importance; (ii) the public interest requires the issue to be resolved; and (iii) the proceedings are likely to provide an appropriate means of resolving it. Pursuant to s.88(8) CJCA, the matters to which the court must have regard when determining whether proceedings are public interest proceedings include: (i) the number of people likely to be directly affected if relief is granted to the applicant for judicial review; (ii) how significant the effect on those people is likely to be; and (iii) whether the proceedings involve consideration of a point of law of general public importance.

115. All three of the CCO Criteria are satisfied in the present case, as explained below.

116. These are plainly public interest proceedings. In particular:

116.1. Over 10,000 IRHPs were sold to Excluded Customers, most of whom have received no redress at all for the Banks' regulatory breaches. The negative impact of IRHP mis-selling on many of these Excluded Customers has been very significant;
116.2. Judicial review is, because of the expiry of relevant limitation periods for civil claims, likely to be the only available means by which the Excluded Customers are able to obtain redress and the Banks can be held accountable for their regulatory breaches;
116.3. The challenge to the Decision involves consideration of issues of general public importance, namely the proper functioning of the financial regulatory system. Specifically, it focusses on the operation of one of the primary regulatory

objectives of the FCA, the Consumer Protection Objective, and the manner in which the FCA has interpreted its function. This is of central importance to the FCA's ability to effectively discharge its statutory mandate.

117. As set out in the witness statement of Heather Buchanan dated 11 March 2022 [**B/1-14**], filed in support of the APPG's application for a CCO, the APPG relies entirely on external sources of funding for its work, derived from: (i) donations; (ii) membership fees; and (iii) project funding from participating institutions. Its funds are held via the Athena Foundation and as of 25 February 2022, the APPG had net income of £15,952.60 (which is required for the payment of salaries). That being the case, the APPG does not have the funds required to pay its own or any adverse costs of these proceedings.

118. The APPG is funding its own costs of these proceedings through a crowd funding campaign (which, as at the date of issue, has raised approximately £100,000.00). Its lawyers have agreed to act on the basis of a conditional fee agreement, whereby their upfront fees will be limited to a maximum of 25% of their standard rates (with such fees being further limited to being paid from whatever funds are raised through Crowd Justice), with the balance being deferred and contingent upon success in the JR Claim and in those circumstances being limited to the extent of any costs recovery that the APPG makes. However, the funds raised via the crowd justice campaign will likely be insufficient to meet even the substantially reduced up-front fees of the APPG's lawyers, meaning that there will be no funds available to meet any adverse costs order. The APPG has no other financial resources from which to pay adverse costs. As such, if a CCO is not made the APPG will not be able to proceed with the claim.

119. In circumstances where it has no ability to meet an adverse costs order and the members of the APPG are Members of both Houses of Parliament who have no personal economic interest in the outcome of the claim (and cannot be expected to personally meet the costs of litigating on behalf of those whose interests they represent), it will be reasonable for the APPG to withdraw the claim if a CCO is refused.

XIV. DISPOSAL

120. The Court is respectfully invited to quash the Decision and to remit to the FCA the question of its response to the Review.

~~THOMAS ROE QC~~

~~ANNA LINTNER~~

THOMAS ROE QC

ANNA LINTNER

STATEMENT OF TRUTH

The Claimant believes that the facts stated in this amended statement of facts and grounds are true. I am duly authorised by the Claimant to sign this statement of truth. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

~~Signed:~~

~~Kevin Hollinrake MP~~

~~Position: Co-Chair, All-Party Parliamentary Group on Fair Business Banking~~

~~Date: 11 March 2022~~

Signed:

Kevin Hollinrake MP

Position: Co-Chair, All-Party Parliamentary Group on Fair Business Banking

Date: 6 May 2022