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

REPLY TO SUMMARY GROUNDS OF DEFENCE AND TO DEFENDANT'S APPLICATION FOR A DIRECTION ETC

I. INTRODUCTION AND SUMMARY

1. The APPG respectfully asks the Court to consider this short Reply to the Summary Grounds of Defence ('**the SGD'**) and the FCA's application for a direction that the APPG add an individual claimant, and its submissions on costs capping ('**the Application**'). The APPG seeks to show that the FCA is wrong to contend that it lacks a sufficient interest in the matter to which this application for judicial review relates, wrong to contend that "*[i]n reality, this claim is a challenge to the decisions taken in 2012 and 2013*" and therefore out of time, wrong to contend that the claim is unarguable on its merits, and wrong in its reliance on section 31(3D) of the Senior Courts Act 1981 (which itself suggests a concerning degree of predetermination and inflexibility). The APPG also submits that there is no need to add an individual as claimant; and that the FCA's resistance to the application for a costs capping order is misplaced.

II. THE APPG HAS A SUFFICIENT INTEREST

2. It is submitted that the FCA was right in its provisional stance of accepting that the APPG has a "*sufficient interest in the matter to which the application relates*" (Senior Courts Act 1981, section 31(3)). Its change of heart is mistaken.

3. The FCA calls its point about standing (in the heading to para 3 of the SGD) a "*[p]reliminary objection*". Standing is not, however, simply a preliminary issue. As the court explained in *R (Good Law Project Ltd) v Prime Minister* [2022] EWHC 298 (Admin) at para 17, "*it is well established that it may also have to be considered at the substantive stage, since sometimes it will be closely linked to the legal and factual merits of the claim.*" There is accordingly no basis for shutting out the APPG's claim at this stage, unless the Court concludes that there is no real prospect of the APPG establishing, at trial in the light of a full consideration of the facts, a sufficient interest in the matter to which this application for judicial review relates.

4. There is, however, *every* prospect of the Court concluding at trial that the APPG has a sufficient interest. It is, of course, accepted that the Decision does not affect the members of the APPG personally. But, as Lord Hope explained in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 A.C. 868 at para 63,

> *A personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent.*

The APPG can and does say just that about the present application. In the terms of the taxonomy devised in the "*thesis*" mentioned by the Divisional Court in *R (Good Law Project Ltd) v Prime Minister* at para 20, this application for judicial review is both "*surrogate*" and "*public interest*".

5. It is a "*surrogate*" application in so far as the APPG represents the interests of persons directly affected by the Decision, namely Excluded Customers, for whom the Decision removed the possibility of belatedly obtaining redress for wrongs left unredressed by the Scheme on the ground of their supposed sophistication. It is true, of course, that an application for judicial review of the Decision could in theory have been made by one or more Excluded Customers. There is, however, no rule that a claimant's interest in the matter to which the application for judicial review relates is insufficient in any case

in which another person's interest is more direct. The question is a discretionary one, taking the circumstances into account.

6. Here, justice would not be served by shutting out the APPG. The Excluded Customers who have the strongest interest in the Decision being quashed and the matter reconsidered are those small and medium-sized enterprises most damaged, often ruinously, by mis-selling (of whom, indeed, the FCA's Board Paper states at para 1.7 that "*it can be assumed that some proportion*" may have faced insolvency [**D/531**]). Yet that very damage makes these potential claimants likely to be the ones least able to afford the expense, and to accept the huge financial risk, of taking the FCA on in court (and it will be noticed in that context that the FCA's costs, which the FCA asks the Court to order the APPG to pay, have reached the sum of almost £130,000 already: see para 57 of the SGD). Contrary to the FCA's contention (at para 31(d)(ii) of the SGD), the APPG *is* (among other things) a group representing the interests of others who may have difficulty representing themselves. An application for judicial review by a group such as the APPG is, assuming the claim to have arguable merit, precisely what the interests of justice call for.

7. The application is a "*public interest*" application because the matters the APPG complains of—the FCA's reasons for its refusal to accept the findings of the Review that it itself had commissioned, including its disregard of the COB and COBS classifications—are matters of public interest. The public interest is served by the FCA's decision-making on important regulatory matters being amenable to review by the court in circumstances where this will not happen otherwise.

III. THERE HAS BEEN NO DELAY – THIS IS NOT A CHALLENGE TO DECISIONS IN 2012 AND 2013

8. The FCA seeks (at para 32 of the SGD), to characterise the APPG's claim as a challenge to a decision made in 2012 and 2013 and therefore as out of time. It is plain, however, that the FCA did make a fresh decision in 2021, in response to the findings of the Review, not to take any action in relation to mis-selling of IRHPs to the Excluded Customers. That is not a mischaracterisation but a simple statement of what happened. The process by which the Decision was taken is pleaded by the FCA at paras 26 to 29 of the SGD. Indeed, the FCA's internal documents demonstrate that it understood that

a discrete decision was required in relation to whether to take any action in response to the findings of the Review.

9. The suggestion at paras 34 to 35 of the SGD that each of the Grounds relies upon a challenge to the FCA's 2012/13 decision in agreeing the Sophistication Test, and that the claim is therefore out of time, is wrong:

   9.1. The APPG's case does *not* depend on establishing that the decision to agree the Sophistication Test was unlawful. Its case is that, in the light of the Review's conclusion that the FCA had been wrong to exclude the Excluded Customers from the Scheme by the application of the Sophistication Test, and in the light of the reasons given in the Review for that conclusion, the FCA acted irrationally and thus unlawfully in coming to the Decision not to take action to procure belated redress for the Excluded Customers.

   9.2. The FCA seeks to justify the Decision almost exclusively by contending that the Review was wrong and that the decision to agree the Sophistication Test was lawful and in any event correct. It is therefore necessary to analyse that justification with reference to the FCA's reasons for agreeing to the Sophistication Test in 2012 and 2013. That is a product of the unyielding approach taken by the FCA. It does not mean that the APPG's case relies upon establishing that the decision to agree to the Sophistication Test was unlawful.

   9.3. Even if it does, however, that is no reason for characterising the challenge as being solely to what happened in 2012 and 2013. The FCA's submission in this respect amounts to saying that a public body can never be held accountable by judicial review for decisions it makes in response to the discovery of some past wrong or alleged wrong, once the period for challenging that matter itself has expired. But there is no principled basis for exempting such decisions from accountability by way of judicial review. Nor does this happen in practice: see, e.g.,

      9.3.1. *McCarthy & Stone v Richmond upon Thames BC* [1992] 2 A.C. 48, HL, quashing the council's then recent decision not to revoke its policy, adopted over a year earlier, of charging for certain consultations;

9.3.2. *R v London Borough of Hammersmith & Fulham ex p CPRE* [2000] Env. L.R. 532, HC, granting leave to challenge a refusal to revoke a grant of outline planning permission made some years earlier; and

9.3.3. the ongoing challenge by the pressure group Reprieve and two MPs to the Prime Minister's decision in July 2019 not to order a public inquiry into the UK's alleged complicity in the unlawful rendition of terrorism suspects to the US during the early 2000s (see *R (Reprieve) v Prime Minister* [2021] EWCA Civ 972, [2022] 2 W.L.R. 2, a recent decision on another aspect of that case).

10. The FCA's reliance on the decision in *R (Jenkinson and others) v FCA* (case number CO/5140/2013)—a claim for judicial review brought by Excluded Customers in 2013—is misplaced. The case was brought on different grounds (limited to a challenge to the £10 million IRHP notional amount threshold), without any refence to the regulatory ambit of the FCA and the COB and COBS classifications, and (as pointed out in the Review itself) without the benefit of the findings of the Review (Review at para 44 [**D/337**]). *Jenkinson* also made no reference to the genesis of the Sophistication Test, which the Review revealed was proposed by the FCA as a means by which to generate automatic redress for certain customers, without factual enquiry into their case, as opposed to excluding customers from the Scheme altogether (see the Review at para 66 **[D/127]**).

IV. THE CLAIM IS ARGUABLE ON THE MERITS

11. The SGD makes no knockout point on the merits. As has already been mentioned, it is a fallacy to suppose that the APPG's claim depends on showing the adoption of the Sophistication Test to have been unlawful. It suffices that the Review showed that the Sophistication Test had wronged many businesses by placing them into the class of Excluded Customers, and that the FCA's response to the Review's finding to that effect was irrational. And in any event it does not matter whether the claim does or does not involve showing that the adoption of the Sophistication Test was unlawful, because a claimant is entitled to challenge a refusal to put right a historic unlawfulness (see para 9.3 above).

12. The FCA argues (at para 13(c) of the SGD) that the claim is based on a misunderstanding of the regulatory scheme, namely a belief "*that the FCA's response to mis-selling is constrained by the regulatory categories in COB and COBS (or in FSMA) …* ." That is, however, a misleading caricature of the APPG's case. The APPG accepts that COB and COBS, and the FMSA itself, did not and do not themselves prescribe how the regulator should respond to an outbreak of IRHP mis-selling. But neither, absent cogent justification, could their classifications be ignored in such a response. Given the stringent criteria set out in COB and COBS for transferring customers into less protected categories (see paras 31 to 32 and 35 of the Amended Statement of Facts and Grounds ('**the SFG**') [**A/30-31**]), Parliament surely cannot have intended that the generic "*consumer protection objective*" should be interpreted as empowering the FCA, at any rate without cogent justification, to disregard the COB and COBS classifications and to create its own arbitrary criteria to determine which consumers were deserving of its regulatory protection. Certainly, the Review did not consider that the FCA was entitled to do so and, having regard to the genesis of the Sophistication Test in the FCA's attempts to generate automatic redress for a subset of customers within the group of customers classed as Private/Retail pursuant to COB and COBS (see Review para 66 [**D/127**]), it does not appear that the FCA thought so either.

13. In any event, when the Review concluded that the Sophistication Test had not been based on any such justification ("*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*": see the passage quoted at para 94 of the SFG [**A/53-54]**)), the FCA was not lawfully entitled to brush this conclusion aside in the manner it did in the Decision. The FCA itself accepts that a decision to distinguish between customers to whom regulatory assistance was to be provided, which is what the Sophistication Test was, must be based on evidence; and that it cannot dispute the Review's finding (see para 17 [**D/326**]) that there is no evidence that the FSA undertook any analysis to understand the impact of the Sophistication Test. Nowhere in the SGD does the FCA attempt a defence of the Sophistication Test itself.

14. The FCA seeks to justify the Decision on the basis that the Sophistication Test was a necessary compromise in order to prioritise securing redress for the most vulnerable customers from banks when it was in a relatively weak bargaining position (SGD at para 17). In fact, the Review found that the Sophistication Test's exclusionary criteria

were introduced after only the briefest consideration, with no impact assessment, and no evidence that they did in fact distinguish between customers based on the likelihood that they were mis-sold IRHPs (see SFG at paras 67 and 71 [**A/43-44**]). There is no evidence that a Scheme that included all the customers within the FSA's remit could not have been agreed and, to the extent that the FSA felt its bargaining position was weak, that was a consequence of its own shortcomings (SFG para 97 [**A/55**], Review at paras 32-33 [**D/33-34**]).

15. The FCA quotes (at para 40) Lord Diplock's reference in *Council for the Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374 at 410 to an irrational decision as one that is "*so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it.*" But the Court will know that the bar is not always set so high or described so colourfully: compare Sedley J's observations in *R v Parliamentary Commissioner for Administration, ex p Balchin* [1998] 1 P.L.R. 1, 13E-F:

> *[the claimant] does not have to demonstrate […] a decision so bizarre that its author must be regarded as temporarily unhinged. What the not very apposite term "irrationality" generally means in this branch of the law is a decision which does not add up - in which, in other words, there is an error of reasoning which robs the decision of logic.*

It is well arguable that the Decision in the present case was such a thing.

16. The FCA's objection to Ground 2, the Ground that complains of the FCA's failure to consult before reaching the Decision, is primarily based on the assertion that the APPG has not identified a requirement of consultation under the FSMA or at common law. The APPG does not, of course, suggest that the FSMA required the FCA to consult as to its response to the Review: the FSMA unsurprisingly does not cater for the situation where the FCA finds itself with the task of considering its response to independent findings that it has in the past acted wrongly towards a large number of persons. But the APPG *does* contend that consultation was required at common law, as part of the common law duty of fairness.

17. What the common law demands by way of fairness is dependent on a close examination of the facts. It is, as Lord Mustill put it in *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 A.C. 531, 560 in an often-cited passage (e.g., recently

by the Judicial Committee of the Privy Council in *Public Service Commission v Richards* [2022] UKPC 1 at para 30), "*an essentially intuitive judgment*." [**E/228**] As such, it is a judgment ill-suited to being made at the permission stage of an application for judicial review, unless the answer is really very clear. Here, far from it being clear that it was fair of the FCA to take the Decision—i.e. to decide to take no action in relation to the Review's revelations as to the wrong done to Excluded Customers—without consulting the Excluded Customers, there are good reasons for thinking that it was *un*fair. For it gave Excluded Customers no opportunity to seek to persuade the FCA that its response to the Review should do other than allow the banks to hold on to the undeserved benefit of the Sophistication Test.

IV. IT IS NOT HIGHLY LIKELY THAT THE DECISION WOULD HAVE BEEN THE SAME, AND IN ANY EVENT THERE IS AN EXCEPTIONAL PUBLIC INTEREST

18. Contrary to the FCA's contention at paras 52 to 54 of the SGD, it cannot be seen—on the premise that the Decision was unlawful for the reasons given by the APPG—to be highly likely that the Decision would have been the same in any event. The FCA lists factors arguably capable of supporting a lawful refusal to provide any redress to Excluded Customers in the face of the damning conclusions of the Review. But to argue that a more favourable outcome for Excluded Customers would therefore have been highly unlikely is to go too far. (It is, moreover, troubling to see the FCA thus coming very close to prejudging the outcome of a new decision-making process, should the Court agree with the APPG that the Decision was unlawful and must be retaken.)

19. Even if the Court does conclude that an identical decision would have been highly likely, there is nevertheless an exceptional public interest in the process taking place lawfully, and being seen to take place lawfully, and the Court is therefore asked to allow the claim to go forward in any event under subsection (3E).

V. NO NEED TO ADD AN INDIVIDUAL CLAIMANT

20. The APPG's primary position is that it is not necessary to determine the FCA's application to join an individual claimant until after determination of the APPG's applications for: (i) permission to proceed; and (ii) a costs capping order ('**CCO**').

21. The APPG in any event contends that neither of the grounds relied upon by the FCA (at para 3 of the Application) justifies the APPG being compelled to join an individual claimant:

21.1. The FCA refers to difficulties arising in relation to confidentiality obligations under section 348 of the FSMA. However, the terms and management of disclosure have already been agreed[1] between the parties (namely, that information which is subject to confidentiality restrictions under s 348 of FSMA is only provided to the lawyers representing the APPG and certain named individuals to whom the obligations under s 348 have been explained and about whom the FCA has received prior notification), by which the dissemination of disclosure is to be controlled; and

21.2. The FCA argues that an individual claimant would provide a mechanism for enforcing the court's order, including costs orders. This will plainly not be a relevant consideration in the event that a CCO in the amount of £0 is ordered, as sought by the APPG. But in any event there is no reason to believe that the APPG would seek to avoid payment of an adverse costs order. And even if it did, its composition is a matter of public record, so the FCA would have no difficulty in finding individuals to enforce against.

VI. THE APPLICATION FOR A COSTS CAPPING ORDER IS WELL MADE

22. The APPG has not (as the FCA contends at para 5 of the Application) omitted any reference to the factors in section 89(1) of the Criminal Justice and Courts Act 2015 ('**CJCA 2015**'). These factors are, to the extent possible, addressed in the witness statement of Heather Buchanan dated 11 March 2022 [**B/1-14**] and at paras 115 to 119 of the SFG [**A/62-63**]. The APPG is unable to provide the court with information regarding the financial resources of the 121 persons who have contributed to the APPG's CrowdJustice campaign, or the extent to which they are likely to benefit if relief is granted to the APPG because, as is usual practice in CrowdJustice campaigns,

[1] See the exchanges in Hausfeld's letter dated 22 March 2022 (at para 6) [**C/70**], Denton's letter dated 24 March 2022 (at para 4) [**C72-73**] and Hausfeld's letter dated 30 March 2022 (at para 2) [**C77-78**]. The parties have not reached agreement about the extent to which s 348 applies at all. The APPG has stated that it is for the FCA to identify any material to which the FCA claims the provision applies. The FCA has refused to identify the information over which it claims confidentiality, save for Annex 3 of the September 2021 Board Paper [**C/72**].

the APPG is not in possession of this information for each donor. The APPG can however confirm that the biggest donor to the CrowdJustice campaign has no direct interest in the outcome of the proceedings (Heather Buchanan witness statement at paras 42-43 [**B/12-13**]).

23. The FCA's first objection to the application for a CCO overlooks the APPG's funding structure. The APPG does not hold significant financial reserves; it raises funding for day-to-day operational expenses (which do not include payment to its members) and it fundraises for specific projects as and when they arise. Consistently with the APPG's approach to donations, it has been reasonable in setting the target sums it has sought in the CrowdJustice campaign and has been honest and open with contributors as to how that money will be spent.

24. The suggestion that the APPG ought to be denied a CCO because it has not incentivised additional donations to its CrowdJustice campaign and has not sought to raise funds that would enable it to pay adverse costs is not well made:

    24.1. The resources that contributors are able and willing to commit to the CrowdJustice campaign are not limitless and there is no basis for suggesting that if the APPG had set a higher target it would have been met;

    24.2. There is similarly no basis for suggesting that contributors would have been willing to donate any sum at all to fund the FCA's costs; and

    24.3. Even if the APPG had been able to raise a small amount more by way of its CrowdJustice campaign, this would not have enabled the APPG to meet the FCA's adverse costs of the claim. As already mentioned, the FCA's costs up to and including the preparation of the SGD (i.e. prior to determination of the permission stage) are already claimed in the very substantial sum of £129,281.61.

25. The FCA's second objection to the application for a CCO is repetitive of other parts of the SGR, which are addressed elsewhere in this Reply. The FCA's contention that the lawfulness of its response to the Review is a matter of no general public importance sits ill with the fact that the FCA spent over £7m on commissioning the Review, which it raised through the exercise of public law powers, ultimately at the expense of financial services consumers (see para 10(d) of the Application).

26. As to the FCA's third objection, the APPG has stated in clear terms, supported by a statement of truth, that it will not be able to proceed with the claim in the absence of a CCO: see para 118 of the SFG [**A/63**]. The FCA's suggestion that the Court should go behind that statement is made without any proper basis. The suggestion that the Excluded Customers might have significant resources available to them is entirely speculative and is also made without any evidential basis.

27. Finally, as to the FCA's fourth objection:

    27.1. The APPG repeats its submissions above in relation to the financial resources of the contributors to the CrowdJustice campaign.

    27.2. The APPG does not stand to benefit financially from the relief that may be granted in the judicial review. However, the relief will advance the APPG's aim and purpose of advocating for victims of IRHP mis-selling and promoting fairness in business banking.

    27.3. The APPG agrees that there is no basis for thinking that any person who has provided financial support will benefit from relief. That is a point in favour of the making of a CCO, not against it as the FCA's submissions appears to suggest.

    27.4. The APPG has made clear that it is content for any CCO to be reciprocal: see para 112 of the SFG [**A/61**]. That being the case, the making of a CCO would not be "*completely unfair and one-sided*" as the FCA complains. For the avoidance of doubt, the APPG submits that, in the circumstances of this case, it is appropriate for the caps to be set at different levels for each of the parties.

    27.5. For reasons already given, the APPG is plainly an appropriate person to represent the interests of Excluded Customers and the public interest in ensuring a properly functioning financial regulatory system.

28. The FCA's attempt to compare its position to that of the APPG in seeking to allocate some part of the £101,030 raised thus far through CrowdJustice is inapt. The parties have vastly different resources: the FCA was able to spend over £7 million on the Review and has hired a firm of City solicitors to spend huge sums responding to the claim. The £129,281.61 spent by the FCA thus far significantly exceeds the £101,030 raised by the APPG through CrowdJustice in respect of the entire proceedings. By contrast, the APPG has modest means, its members are bringing the claim in the public

interest and do not stand to benefit financially, and the funds available to it in the litigation are limited to what can be raised via CrowdJustice. It would be unjust for the APPG to face any costs exposure at all in these circumstances.

THOMAS ROE QC

ANNA LINTNER

STATEMENT OF TRUTH

The Claimant believes that the facts stated in this Reply 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: 15 June 2022