AMENDED IN ACCORDANCE WITH PARAGRAPH 6 OF THE ORDER OF CHAMBERLAIN J, SEALED ON 10 JUNE 2024

IN THE HIGH COURT OF JUSTICE
KINGS'S BENCH DIVISION
ADMINISTRATIVE COURT

Case No: AC-2022-LON-001500

B E T W E E N:

THE KING

on application of

THE ALL-PARTY PARLIAMENTARY GROUP ON FAIR BUSINESS BANKING

Claimant

- and -

THE FINANCIAL CONDUCT AUTHORITY

Defendant

AMENDED DETAILED GROUNDS OF DEFENCE

A. INTRODUCTION

1. This claim for judicial review arises in the context of proactive redress exercises, past business reviews and complaints-led reviews (together "**the Reviews**") established over the course of 2012 and 2013 by nine banks ("**the Redress Banks**"), and overseen by skilled persons appointed under s.166 of the Financial Services and Market Act 2000 ("**FSMA**"), pursuant to agreements with the Defendant, the Financial Conduct Authority ("**the FCA**"). The FCA is a body corporate established under FSMA. Prior to 1 April 2013 the Defendant was known as the Financial Services Authority ("**FSA**")[1].

2. The Reviews concerned the Redress Banks' sale of Interest Rate Hedging Products ("**IRHPs**") from 1 December 2001 to 2011. The Reviews and the supporting undertakings given by the Redress Banks to the FSA are referred to as "**the IRHP Redress Scheme**". The IRHP Redress Scheme, entered into voluntarily by the Redress Banks, did not reduce the options available to customers of the banks. They continued

[1] When addressing the facts below, the Defendant will use the name that applied at the relevant point in time.

to be able to make complaints and claim redress. Also, under it, the Redress Banks ceased all marketing of the riskiest type of IRHPs to all retail clients, agreed not to foreclose on or adversely vary retail clients' existing lending facilities and to treat its complainants fairly. In addition, the IRHP Redress Scheme secured a mechanism by which the Redress Banks agreed to review the sale of IRHPs to many but not all retail clients and, as appropriate, to offer the customer redress. Any redress offers were not binding on customers. They could be rejected if customers were dissatisfied and wished to seek a remedy through another route.

3. As discussed below and in Mr Steward's witness statement from ¶46, in June 2019 the FCA appointed Mr John Swift KC to undertake a non-statutory independent review of the quality and effectiveness of the FSA's supervisory intervention on IRHPs, including an assessment of its actions in relation to the IRHP Redress Scheme ("**the Swift Review**"). Notwithstanding the fact that the express purpose of the Swift Review was for the FCA to learn lessons for the future, not to reopen decisions taken ten years ago, the Claimant, the All-Party Parliamentary Group on Fair Business Banking ("**the APPG**"), challenges the decision taken by the FCA, in 2021, upon receipt of the Swift Review, not to attempt to take further action to require the Redress Banks to pay further redress to bank customers who may have been mis-sold IRHPs between 1 December 2001 and 2011 ("**the Decision**"). In particular, the FCA concluded, amongst other things, that the finding of the Swift Review that the FCA made a serious regulatory error in agreeing to the scope of the IRHP Redress Scheme did not justify seeking to require the Redress Banks many years later to provide further redress for customers whose sales fell outside the scope of the IRHP Redress Scheme ("**the Excluded Customers**").

4. The APPG, purporting to rely on certain findings of the Swift Review, alleges in its Re-Amended Statement of Facts and Grounds ("**SFG**") that the FSA acted irrationally in agreeing to the terms of the IRHP Redress Scheme in 2012 and 2013[2]. It further alleges

[2] SFG ¶954.1: *"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 … Arbitrary, irrational and without objective justification."*

that the FCA acted irrationally (Ground 1[3]) and procedurally unfairly (Ground 2[4]) in deciding, almost ten years later (i.e. in 2021), not to seek to compel the Redress Banks to provide redress for Excluded Customers.

5. The Court is invited to refuse the claim for the following reasons in summary.

6. *Abuse of process:* The APPG's challenge to the Decision depends on repeated allegations that the FSA/FCA acted unlawfully in 2012/2013 in entering into the agreements which established the IRHP Redress Scheme, in particular as regards the Sophistication Test for determining eligible customers and transactions (see ¶¶43, 47, 49, 53, 57, 59, 63, 71, 79, 93-96, 98, 100, 104~~3~~, 106-109 of the SFG). The APPG has engaged the FCA about the scheme since 2012 (Mr Lloyd's witness statement at ¶36). It did not bring a timely challenge for judicial review, as it ought to have done if it wished to challenge the material decisions taken in 2012 and 2013. It was appropriate that, in light of the Swift Review's findings about the scope of the IRHP Redress Scheme, the FCA considered whether it should attempt to take further action to require the Redress Banks to pay further redress to bank customers who may have been mis-sold IRHPs between 1 December 2001 and 2011. However, the Decision does not provide proper grounds for impugning decisions that ought to have been challenged many years ago, if they were to be challenged at all. See the observations of Lord Diplock in O'Reilly v Mackman [1983] 2 AC 237 at 280H-281A, (*"The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision"*.) The APPG's further amendments to the SFG to seek to rely upon correspondence between the FSA and the Redress Banks in 2012 and 2013 only underlines the FCA's concern that the claim involves an impermissible challenge to the lawfulness of the Sophistication Test as it was agreed and implemented in the IRHP Redress Scheme in 2012-2013.

[3] Ground 1: *"The Decision is irrational"*.
[4] Ground 2: *"The Decision is procedurally unfair"*.

7. *Ground 1 – irrationality (¶¶35-43 below)* The APPG cannot identify any legal obligation on the FCA to establish a scheme similar to the IRHP Redress Scheme for the benefit of the Excluded Customers. Instead, it is constrained to mount a contorted rationality challenge involving two degrees of alleged irrationality: irrationality in 2012/2013, and irrationality in 2021. The FSA/FCA did not act irrationally in 2012 and 2013 in agreeing the sophistication criteria, which is the premise of Ground 1. The FCA therefore did not act irrationally in 2021 in proceeding on the basis that the FSA/FCA acted rationally in 2012 and 2013 (Ground 1(i)). Similarly, the FCA did not act irrationally in deciding in 2021 not to take steps to seek to exercise statutory powers to require the Redress Banks to provide redress to the Excluded Customers in respect of any IRHPs mis-sold between 1 December 2001 and 2011. That decision was rational (Ground 1(ii)).

8. *Ground 2 – procedural fairness (¶¶44-47* below) The APPG seeks to derive a duty to consult and conduct an impact assessment in 2021 from an alleged failure to do these things when the IRHP Redress Scheme was established almost ten years earlier. A decision that maintained the status quo as it had been for many years did not give rise to any such duty. Nor did the Swift Review or its recommendations require the FCA to take soundings from all persons who might have competing views as to what the FCA should do, if anything, following the Swift Review, before making the Decision.

9. The claim arises in circumstances where the FSA's agreement to the IRHP Redress Scheme did not go unchallenged; in 2013, a group of claimants applied for permission to seek judicial review of the FSA's agreement to the IRHP Redress Scheme: R. (Jenkinson and others) v FCA (case number CO/5140/2013). Like the APPG, the claimants argued that some of the criteria by which the customers within the scope of the scheme ("**the Non-Sophisticated Customers**") were identified were irrational. Silber J refused permission because the claim did not *"even arguably reach the threshold for showing irrationality"* ***[MS1/1598]***. He considered that when establishing criteria for identifying the consumers whose sales would be reviewed, the FSA was entitled to specify a financial threshold *"for those who lacked or who were perceived to lack sophisticated financial knowledge"*. The APPG cannot succeed now where Mr Jenkinson and others failed in 2013.

10. In any event, even if the grounds of challenge were otherwise well-founded, it is highly unlikely that the outcome would have been different for the APPG (or those it purports to represent). The Court should therefore refuse to grant any relief and in that regard the FCA relies on ss.31(2A) to (2C) of the Senior Courts Act 1981 (¶¶48-51 below).

B. THE APPG'S COMPLAINTS ABOUT DISCLOSURE

11. The APPG complaints about disclosure are without merit (SFG ¶¶12-15A~~4~~). The FCA disclosed the material facts and the reasoning of the Decision at the permission stage. In fact, at that stage, and in an attempt to resolve the dispute about disclosure, the FCA provided the APPG with more disclosure than it was required to give pursuant to its duty of candour. The FCA therefore does not accept that when drafting its Statement of Facts and Grounds, and the amendments thereto, the APPG could not understand the reasons for the Decision (SFG ¶15~~4~~). It will be noted that the amendments made by the APPG as a result of the disclosure it has demanded have considerably lengthened the SFG (including well beyond the prescribed page limit), but without adding any new grounds of challenge or arguments.

12. Following the grant of permission, the FCA has prepared three detailed witness statements. These have been provided by: (i) Mr Richard Lloyd, a Non-Executive Director who, amongst other things, sat on the Board who made the Decision; (ii) Mr Mark Steward, the FCA's former Executive Director of Enforcement and Market Oversight, who was the FCA's accountable executive in relation to the Swift Review; and (iii) Mr David Geale, the-then FCA's Director responsible for the supervision of Retail Banking, who led on workstreams concerning the FCA's future actions following the Swift Review and co-ordinated the preparation of the FCA's public response to it. Those witness statements, and the documentation accompanying them, provide a comprehensive account of the careful and diligent decision-making process that was followed by the FCA and should be read alongside these Detailed Grounds. In the circumstances, the unfounded allegation that the FCA was (or is) in breach of its duty of candour is denied. The FCA has, with these Amended Detailed Grounds, also filed

and served a detailed statement of Katharine Harle (partner at Dentons, with conduct of this litigation) providing an account of the FCA's approach to the duty of candour and its handling of the persistent demands for disclosure made at every stage of the proceedings by the APPG. The FCA has throughout adopted a pragmatic approach to disclosure, notwithstanding that the duty of candour (which is not a duty of disclosure of documents) has not obliged it to disclose anything like the volume of material demanded by and provided to the APPG.

C. THE REGULATORY SCHEME

13. Mr Steward describes the regulatory landscape in his witness statement in Section A (at ¶¶10-26). The APPG also sets out the relevant regulatory scheme at section V (SFG ¶¶15-41). The APPG's account of the regulatory scheme is broadly agreed, so far as is material, subject to the following corrections and points of emphasis.

The consumer protection objective

14. This is discussed at SFG ¶¶16-20.

    a. In discharging its general functions (as defined in s.1B(6) FSMA) the FCA must, so far as reasonably possible, act in a way which is (a) compatible with its strategic objective of ensuring that relevant markets function well (s.1B(1)(a), (2) FSMA), and which (b) advances one or more of its operational objectives (s.1B(1)(b) FSMA). In making the Decision, the FCA was not discharging a general function. However, the FCA's strategic and operational objectives may, so far as relevant, be taken into account when performing and exercising its other functions. The FCA's statutory consumer protection objective (one of its operational objectives), which was relevant to both the decisions taken in 2012 and 2013 and to the decision in 2021, is now defined as *"securing an appropriate degree of protection for consumers"*[5] (emphasis added) – not, it should be noted, absolute protection. The FCA applies a risk-

[5] From 1 April 2013 see s.1C(1) Financial Services and Markets Act 2000 ("**FSMA**") and before 1 April 2013 see s.5 FSMA, which defined the consumer protection objective as "*securing the appropriate degree of protection for consumers*".

based and proportionate approach to regulation, meaning it uses its understanding of the UK financial system and firms' business models, as well as the intelligence it receives, to target where misconduct would cause the most harm (especially to vulnerable customers or important markets) and where misconduct is most likely to be significant[6].

b. As explained in SFG ¶19, s.1C(2) FSMA identifies some factors to which the FCA must have regard in considering what degree of protection may be appropriate. Those factors have been expanded since 2012, but they have included at all material times, "*the differing degrees of experience and expertise that different consumers may have"* and, *"the general principle that consumers should take responsibility for their decisions"*. The first of these factors is of particular relevance to the question, raised by Ground 1, as to whether, in 2012 and 2013, the FSA was entitled to seek to agree Reviews with the Redress Banks that were confined to consumers that the FSA considered were likely to be more vulnerable.

c. As explained at sub-paragraph a above, the FCA takes, and has always taken a risk-based approach to regulation. It is therefore recognised that on occasions regulatory decisions and judgements must be made where the decision or judgement may not be perfect, but they may still be appropriate.

The regulatory principles

15. The FCA is also under a duty, when discharging its *"general functions"*, to have regard to various regulatory principles including the need to use its resources in the most efficient and economic way and the principle that a burden which is imposed must be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction[7]. As with the operational objectives, ~~W~~whilst the FCA may make decisions falling outside the scope of the statutory

[6] Mr Steward's witness statement ¶14.
[7] From 1 April 2013 see ss.1B(5)(a) and 3B(1) FSMA and before 1 April 2013 see s.2(3) FSMA.

definition of *"general functions"*, the regulatory principles are matters that the FCA is entitled to have regard to more broadly.

The FSA rules that governed sales of IRHPs between 1 December 2001 and 2011

16. These are summarised at SFG ¶¶21-37~~20-36~~. The following points are emphasised.

a. The APPG stresses that the banks owed the same duties (from time to time) to Private Customers (before 1 November 2007) and Retail~~s~~ Clients (from 1 November 2007) under COB, COBS and the Principles for Business ("**the Principles**") (SFG ¶24~~7~~). Those rules are high-level standards that do not specify what must be done to comply with them. Thus, whilst the same duties were owed to all customers in the same regulatory class, what had to be done to discharge the duty would depend on the particular circumstances of the sale and the customer (including the customer's relevant knowledge and experience). As Mr Steward explains in his witness statement, this means that the FCA often distinguishes between different clients within the Retail~~s~~ Clients category (e.g. in the steps it has taken to protect particularly vulnerable customers)[8]. In addition, the principle has been recognised by Parliament and European regulators[9]. This is relevant to the APPG's erroneous contention under Ground 1 that in 2012 and 2013 the FSA was not entitled to distinguish between different customers within the same regulatory class (SFG ¶910~~0~~[10]).

b. Breaches of the Principles are not actionable by consumers. Breaches of the COB and COBS rules are actionable by individual consumers, but not by ~~companies~~any other person acting in the course of their business[11]. Most of the potential victims of mis-selling of IRHPs during the relevant period were companies, or other types of business, acting in the course of business who had no right of action to enforce the COB and COBS rules. This gave rise to a

[8] Mr Steward's witness statement ¶¶86-88.
[9] Mr Steward's witness statement ¶¶84-90.
[10] *"Customers within the same class are entitled to the same level of regulatory protection, as recognised by the designation of regulatory standards under COB / COBS according to the class of customer"*.
[11] Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, reg 3.

significant limitation on the statutory powers available to the FSA in 2012 and 2013, and does today as well (see further ¶18 below).

17. The APPG says that, *"[t]o a large extent"*, the appropriate degree of protection for consumers in the context of IRHPs is determined by the consumers' regulatory classification, and that Private Customers and Retail Clients therefore require the same degree of protection (SFG ¶20~~19~~). They go on to say that, given that the Excluded Customers were classified as Private Customers or Retail Clients pursuant to FSMA, they were *"entitled"* to the same degree of protection as other members of the same regulatory class, relying on the view of Mr Swift to the same effect (SFG ¶¶37~~6~~, ~~68-~~69-70, 92~~1~~.2). The contention that the FCA's response to mis-selling is constrained by the regulatory categories in COB and COBS (or in FSMA) finds no support in FSMA and is wrong. It runs contrary to the statute's specification of the factors to which the FCA must have regard in considering what degree of protection may be appropriate, in particular those mentioned in sub-paragraph 14.b above. The APPG confuses two different things throughout its SFG: the sale standards that applied equally to all Retail Clients, and the discretion that FSMA affords the FCA to determine its regulatory priorities including the particular areas of consumer harm it wishes to target, whether and if so how to exercise its powers and how to use its finite resources. Ground 1 is based on this misunderstanding of the regulatory scheme.

The statutory powers to respond to mis-selling

18. These powers are the statutory context in which decisions taken in 2012 and 2013, and the further decision taken in 2021, fall to be assessed. Mr Steward describes these powers in his witness statement at ¶¶15-20, but for present purposes a high-level summary, focusing on the aspects of the powers of particular relevance to the claim, is sufficient.

    a. *Section 404 (consumer redress schemes)* The FCA may, by rules, require relevant firms (including persons authorised by the FCA) to establish a consumer redress scheme where (amongst other conditions) it appears to the FCA that there may have been a widespread or regular failure by those firms to comply with requirements applicable to the carrying on by them of any activity

(essentially the FCA's rules or another legally enforceable obligation), as a result of which consumers have suffered, or may suffer, loss or damage in respect of which a remedy or relief would be available in legal proceedings if brought. When the s.404 power is exercised, the FCA does not itself have to prove breaches or that consumers have suffered losses as a result. The onus is on the firm to review sales, identify any breaches and provide appropriate redress in accordance with the rules made by the FCA for the consumer redress scheme. But a scheme may only be established where 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 (s.404(1)(b)). As already noted (¶16.b above), the Principles are not actionable by consumers and the COB and COBS rules that underpinned the review of the IRHP sales in the IRHP Redress Scheme are not actionable by ~~companies~~any other person acting in the course of business (the category into which most of the potential victims of the mis-selling of IRHPs during the relevant period fell). Nor can a s.404 consumer redress scheme be imposed where the limitation periods for claims have expired. These limitations on the availability of the s.404 power were important considerations in the FSA's decision in 2012 and 2013 to respond to the evidence of mis-selling of IRHPs by concluding voluntary agreements with the Redress Banks (see further ¶20.c below). Also, as Mr Swift acknowledged in his report at p.306, ¶25, exercising statutory powers, such as s.404, can take time ***[MS1/344]***.

b. *Section 382 (restitution orders)* The FCA may apply to the Court for a restitution order if it is satisfied that a person (whether authorised or not) has (amongst other things) contravened a relevant requirement occasioning loss to one or more persons. The FCA must establish the breaches and quantify the loss. The Court may order the person concerned to pay such amount as is just, having regard to the extent of the loss. It is very different from a consumer redress scheme, where the onus is on the firm to review sales and remediate breaches that it discovers. The power is subject to the six-year limitation period for actions for sums recoverable by statute (s.9 of the Limitation Act 1980).

c. *Section 384 (power of the FCA to require restitution)* In the case of authorised firms, the FCA may itself make an order in essentially the same circumstances

(for present purposes) as apply to s.382, except that there is no formal limitation period (see sub-paragraph e below).

d. *Section 55L (imposition of a requirement by the FCA)* Since 1 April 2013 (when the FSA became the FCA), the FCA may impose a requirement on an authorised person if, amongst other reasons, it is desirable to exercise the power in order to advance one or more of the FCA's operational objectives[12]. That could include a requirement on a particular firm to take remedial action in respect of past conduct. The FCA may also impose requirements to establish and operate a redress scheme corresponding or similar to a s.404 scheme.[13]

e. Since the exercise of the powers under ss.384 and 55L does not require an application to the Court, they are not subject to any formal period of limitation. However, the lapse of time and delay since the grounds for exercising the relevant power first arose may be relevant to whether, in the particular circumstances, the FCA may lawfully exercise it and, if so, whether it should do so.

D. FACTUAL BACKGROUND

The IRHP Redress Scheme

19. Mr Steward's witness statement describes the establishment of the IRHP Redress Scheme at ¶¶30-39. In short, by the end of April 2012, the FSA was aware of possible mis-selling of certain IRHPs sold since December 2001 by certain banks to small and medium-sized businesses. It had undertaken an initial information-gathering exercise and considered that there was sufficient evidence of poor practices and consumer outcomes to pursue the matter. In response to the evidence of poor practices, the FSA negotiated and entered into voluntary agreements with the Redress Banks[14] (which

[12] Before 1 April 2013, a similar power existed at s.45 FSMA.

[13] This is contemplated by s.404F(7) FSMA. The interplay between ss.55L and 404 ~~is currently the subject of an appeal to~~ has recently been considered by the Court of Appeal in The Financial Conduct Authority v Bluecrest Capital Management (UK) LLP [2024] EWCA Civ 1125 (~~from the decision of The Bluecrest v FCA [2023] UKUT 140~~ but nothing turns on that in this matter).

[14] HSBC, Lloyds, RBS, Barclays, AIB, Clydesdale, Co-Op Bank, Santander and Bank of Ireland.

included the principal retail banks) for those banks to provide undertakings to the FSA to, amongst other things, conduct the Reviews, overseen by skilled persons appointed under section 166 FSMA. During the negotiations, whilst it presented a robust stance, the FSA considered that it had a relatively weak negotiating position since it faced significant hurdles if it sought to compel redress through its statutory powers (including insufficient evidence to justify exercising its powers without investigation and the fact that a compulsory s.404 consumer redress scheme could only provide redress in respect of legally actionable claims), time was of the essence (many businesses were struggling) and it was increasingly aware that some of the banks had begun to successfully defend claims for redress through the Financial Ombudsman Service and the Court.

19A. The APPG pleads, by amendment to the SFG, a partial account of the development of the IRHP Redress Scheme, and the Sophistication Test within it, at ¶¶47A-52 and 56 by reference to some (but by no means all) of the correspondence between the FSA and the Redress Banks (and the FSA and HM Treasury) in 2012 and 2013. It does not explain why it is necessary or appropriate, for the purposes of its claim, to go beyond the account set out in the Swift Review itself, derived from the same documents (all of which were disclosed precisely because they are the documents referenced in the footnotes to the Swift Review itself). None of the insertions made depart from, or materially add to, the detailed account given in the Swift Review. It is, accordingly, neither necessary nor helpful to extend these Amended Detailed Grounds by reference to other aspects of those documents.

20. In the FSA's judgement, the voluntary Reviews were a better means of securing an appropriate degree of protection for consumers than seeking to use the available statutory powers for the following reasons in summary (see ¶¶4.5-4.6 of the Board Paper ***[MS1/9]***, ¶¶3.21-3.28 of the FCA's published response to the Swift Review ***[MS1/542]-[MS1/544]***, and Annex 1 to the FCA's representations to Mr Swift of 30 March 2021 ***[MS1/813-835]***).

    a. There was a real urgency. Many businesses were facing acute and mounting financial difficulties, including as a result of the substantial payments due under

IRHPs sold between December 2001 and 2011 (many of which would continue in force for years into the future).

b. There was a large number of product sales, and the sales themselves were complex, some business would not have survived had they needed to await a more forensic formal process which would necessarily have been involved in any exercise of FCA powers.

c. The FSA reasonably believed that, within the broad category of Private Customers and Retail Clients, there were some customers (generally smaller businesses) who were less financially sophisticated than others, in terms of their knowledge and experience of financial products, their financial resources and their ability to access professional advice. The FSA therefore considered that it should focus its attention on seeking redress for those in the most vulnerable circumstances who were most in need of urgent help, and on other measures that would redress or mitigate the consumer harm. It believed that voluntary Reviews would provide more certain redress more quickly to those customers. In particular:

    i. The FSA had only limited proof of actual mis-selling. Against a backdrop of rapidly growing harm to many small and medium-sized businesses, the FSA considered that any attempt to exercise statutory powers would take time and involve significantly more resources to gather the evidence and to establish whether the grounds for their exercise could be made out.

    ii. There were likely to be many such customers for whom a s.404 consumer redress scheme could not provide any redress at all because they did not have actionable claims. ~~In asserting at SFG ¶37 that the s.404 power was available in 2012 and 2013, the APPG overlooks the reality of the situation and the limitations of that power in the relevant context. Whilst it is correct that the power was available in the sense it was contained within FSMA,~~ The FSA was not in a position to exercise its s.404 power to achieve what the IRHP Redress Scheme did in relation to the sale of IRHPs in 2012 or 2013.

iii. The FSA also believed that the exercise of statutory powers could result in redress being substantially less than under the voluntary schemes (e.g. in terms of the period of sales covered, the customers included or the failings to be redressed).

d. Many small businesses in particular were experiencing acute financial difficulties in challenging economic circumstances during the global financial crisis, including from the losses some were incurring following IRHP mis-sales. In view of the urgency, the FSA considered that the IRHP Redress Scheme ensured that the banks prioritised the most vulnerable customers.

e. The detailed delineation of the scope of the IRHP Redress Scheme was a result of, amongst other things, the negotiations with the Redress Banks. As noted above, the FSA considered that it was negotiating from a relatively weak negotiating position and it made some concessions, including regarding the scope of the IRHP Redress Scheme, in order to achieve its objective of swiftly securing redress for those it considered to be most in need, as well as securing agreement that the Redress Banks would stop selling structured collars, that they would prioritise customers in financial difficulty and not without exceptional circumstances foreclose or adversely vary lending facilities.

f. The IRHP Redress Scheme did not affect remedies that were otherwise available to the Sophisticated Customers. The Redress Banks were required, pursuant to the undertakings given to the FSA, to handle any complaints fairly and in accordance with their complaints handling procedures and the DISP rules in the FCA's Handbook where they applied. Excluded Customers could also bring legal proceedings if they had actionable claims, although, before agreement was reached, one of the Redress Banks (RBS) had successfully defended two court cases (see Mr Steward's witness statement at ¶76).

g. With these principal considerations in mind, the FSA considered that the IRHP Redress Scheme would provide an appropriate degree of protection for all consumers (including Sophisticated Customers), taking account of, amongst other things, the differing degrees of experience and expertise that different consumers may have had (which, as stated in ¶14.a above, was a consideration to which they were bound to have regard). The view of the FSA at the time is

recorded in the contemporary evidence from 2013 quoted at SFG ¶59: *"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'".*

h. The FCA maintains, in response to Ground 1, that the FSA was entitled to reach that view.

21. The agreement between the FCA and each bank comprised (i) the Initial Agreement, (ii) a Supplemental Agreement varying the Initial Agreement, and (iii) included within both, an undertaking given by each bank's CEO. As explained in Mr Steward's witness statement at ¶¶38-41, under the IRHP Redress Scheme:

a. The Redress Banks agreed to provide redress to those customers with the most complex type of IRHPs (structured collars) who suffered loss without conducting an analysis of whether the bank actually contravened any of the FCA's regulatory requirements. These were referred to as Category A products.

b. For Category B products (which covered all IRHPs except structured collars (Category A) and caps (Category C)), the Redress Banks agreed to review each sale in detail unless the customer opted out of the review and to provide redress for breaches of the relevant regulatory requirements even though the Redress Banks may have had no legal liability for such breaches in relation to many small business customers (e.g. where they are not 'private persons' for the purposes of s.138D FSMA). The Redress Banks also agreed to review Category C products (caps) on the same basis if the customer opted into the scheme, following communication from the relevant bank.

c. The Redress Banks agreed to review all sales made since 1 December 2001 thus ignoring both questions of limitation and the fact that the banks were often not required to maintain records for longer than 5 years under COB or COBS.

d. The Redress Banks agreed to immediately stop marketing the most complex IRHPs to retail clients immediately.

e. The Redress Banks agreed that – except in exceptional circumstances such as, for example, where this ~~is~~ was necessary to preserve the value where the customer's business is failing – they would not foreclose on or adversely vary existing lending facilities without giving prior notice to the customer and obtaining the customer's prior consent.

f. The Redress Banks' CEOs undertook to ensure that their respective banks treated complainants fairly and prioritised customers in financial difficulty. The undertaking to treat complainants fairly was not limited to customers who were seeking redress under the IRHP Redress Scheme. It applied to all customers who made complaints about the sale of IRHPs, and therefore it applied to both Sophisticated and Non-Sophisticated Customers.

The criteria for identifying the Non-Sophisticated Customers

22. The FSA and the Redress Banks negotiated and agreed detailed criteria intended to provide a workable means of identifying the customers who were likely to fall within the category the FSA was seeking to protect ("**the Sophistication Test**"). At SFG ¶¶47~~6~~-60~~59~~, the APPG gives an account of the development of the Sophistication Test and the process by which it was agreed. The development of the test, including its amendment following a pilot review, is also described in Mr Steward's witness statement at ¶32-37. The essential stages by which the criteria evolved in 2012 and 2013 are uncontroversial but the following points should be noted.

a. The Reviews which the Redress Banks agreed to undertake were limited to IRHPs sold to Private Customers (when COB applied) and Retail Clients (when COBS applied) in the period December 2001 to 2011.

b. Private Customers and Retail Clients could be very substantial companies or traders, for example as explained in SFG ¶33 customers fell within the Retail Client category under COBS unless two of the following requirements were met: a balance sheet of €20m, net turnover of €40m and own funds of €2m.

c. The criteria sought to identify those consumers who were likely to be less financially sophisticated and therefore most vulnerable to mis-selling.

d. The criteria focused on the size of the customer and the size of the transaction as proxies for financial sophistication. They were necessarily detailed to reflect the diverse business structures involved. They provided a workable approach for identifying less financially sophisticated consumers in the context of a large-scale redress scheme requiring consideration of thousands of customers and individual sales.

The conduct of the IRHP Redress Scheme in accordance with the agreements

23. The Redress Banks carried out the Reviews, subject to the oversight of skilled persons appointed under s.166 FSMA. The Reviews were substantially completed by the end of 2016. It is estimated that the banks incurred costs of c.£920m in carrying out the exercise. They paid c.£2.2 billion of redress to customers in respect of 20,206 sales. It is one of the largest consumer redress exercises ever undertaken. Since agreeing to the IRHP Redress Scheme, the FCA's view in its dealings with the banks, customers and other interested parties has been that the IRHP Redress Scheme, supplemented by other remedies that may be available to individual customers, provided all consumers with an appropriate degree of protection in respect of the mis-selling of IRHPs by the Redress Banks in the period December 2001 to 2011. That understanding has underpinned the FCA's supervision of the banks' performance of the IRHP Redress Scheme and informed its communications with consumers and other stakeholders. The FCA's assessment that it may be unlawful now for it to seek to compel the Redress Banks to provide redress to Sophisticated Customers in respect of IRHPs mis-sold in the period December 2001 to 2011 was one of the considerations taken into account when making the decision under challenge (see further ¶32.d below).

The Swift Review

24. The IRHP Redress Scheme was the subject of intense scrutiny and criticism, by the APPG among others, dating right back to when it was first established. The decision to confine the IRHP Redress Scheme to Non-Sophisticated Customers was particularly contentious.

25. Following a recommendation by the Treasury Select Committee in June 2015, the FCA committed to having a review of its supervisory intervention on IRHPs for the purposes of identifying lessons that could be learned. The start of the review was deferred pending the conclusion of legal action relating to the IRHP Redress Scheme. On 20 June 2019, the FCA announced that it had appointed Mr John Swift KC to undertake a non-statutory independent review of the supervisory intervention on IRHPs, including an assessment of its actions in relation to the IRHP Redress Scheme.

26. As the purpose of the review was to identify lessons that the FCA could learn from its supervisory intervention, the Terms of Reference expressly stated (at ¶4) that the review was not intended to be a route by which individual cases, or the IRHP Redress Scheme generally, could be re-opened ***[MS1/872]***. Mr Swift stipulated that his report, entitled *"Lessons Learned Review"*, should not be relied upon by any parties other than the FCA for any purpose (p.4, ***[MS1/42]***). He acknowledged that, *"[o]ther people considering the same documents, information and materials might reach different conclusions from those reached by John Swift QC*" (p.3, ***[MS1/41]***).

27. The APPG in these proceedings have singularly ignored those statements as to the purpose of Mr Swift's report. They seek to use Mr Swift's report as a route by which the IRHP Redress Scheme can be re-opened.

28. On 14 December 2021, the FCA published Mr Swift's report, together with the FCA's response. In summary, Mr Swift found that the FCA achieved much of what it set out to do, but considered that the FSA was wrong to confine the IRHP Redress Scheme to a subset of Private Customers and Retail Clients. Mr Swift made a number of recommendations that were intended to enable the FCA to learn lessons from the past.

29. As the APPG acknowledges at SFG ¶88~~7~~, the FCA was entitled, and indeed bound, to decide for itself which, if any, of Mr Swift's recommendations it accepted. After careful consideration, the FCA accepted nearly all of Mr Swift's recommendations. It acknowledged shortfalls in processes, governance and record-keeping in relation to decisions about the IRHP Redress Scheme. However, the FCA disagreed with Mr

Swift's view that the FSA was wrong in 2012 and 2013 to agree to a scheme that was confined to customers who were not sophisticated under the Sophistication Test.

The FCA's decision in light of the Swift Review not to seek to compel the Redress Banks to provide redress to the Sophisticated Customers

30. Notwithstanding that the Review was not intended to re-open the IRHP Redress Scheme, the FCA anticipated that Mr Swift's criticisms about the scope of the IRHP Redress Scheme would lead to calls for it to require the Redress Banks to provide redress to the Sophisticated Customers. The question for the FCA was a relatively narrow one. It was in essence whether the conclusion of the Swift Review that the FSA/FCA was wrong and made a serious regulatory error in agreeing to exclude the Excluded Customers from the IRHP Redress Scheme meant that the FCA should take further action, many years after the agreements between the FSA/FCA and the Redress Banks which established the IRHP Redress Scheme, to seek to require the Redress Banks to provide further redress to Excluded Customers on a basis that was inconsistent with the terms of the Scheme. The FCA was not, therefore, embarking on an entirely fresh consideration, in 2021, of the correct approach to providing redress to customers who had been mis-sold IRHPs between December 2001 and ~~December~~ 2011. Rather, it considered whether the finding of the Swift review regarding the scope of the IRHP Redress Scheme provided good reason for reopening decisions taken many years previously. The FCA's consideration of that question is described in detail in the witness statements accompanying these Detailed Grounds. In short:

    a. Mr Swift was appointed by the FCA's Non-Executive Directors and decision-making powers in relation to the Swift Review were delegated to a subset of the Board, known as the IRHP Board Sub-Committee. In addition, Mr Steward was appointed as the Accountable Executive in relation to the review which meant that he was the senior executive with responsibility for oversight of key projects and reported to, and was accountable to, the Board.

    b. Mr Steward, and his team, met with Mr Swift on three occasions to discuss the proposed or provisional findings in his report. In addition, as part of the protocol for the review, it was agreed that Mr Swift would share a draft of his report to Mr Steward for information and to the FCA to enable it to make representations

in relation to the proposed findings, and that this could be shared with, amongst others, the Board Sub-Committee. The FCA provided representations in response to the draft report. As explained in ¶¶64–67 of Mr Steward's statement, the FCA's representations were carefully developed by the FCA, with the involvement of the executive committee of the Board (known as ExCo), the Board Sub-Committee (which approved the first and second set of representations) and aided by FCA staff with relevant subject matter expertise, and reflected the FCA's position and views on Mr Swift's draft findings.

c. The draft report initially provided to the FCA by Mr Swift contained a provisional finding that the FSA's decision to distinguish between Sophisticated and Non-Sophisticated Customers had breached the FCA's *"regulatory mandate"*. The FCA objected to this finding and made representations accordingly, which ultimately led Mr Swift to remove this particular finding.

d. Given Mr Swift's provisional findings, the FCA recognised that Mr Swift's report would likely lead to public pressure for the FCA to take steps to ensure redress was paid to customers not covered by the Reviews (even if Mr Swift made no such recommendation). In those circumstances, the FCA felt that it needed to consider its position in relation to that issue and its potential response to any such public pressure. In that context, Mr David Geale, who was the Director responsible for the FCA's supervision of retail banks, was tasked with leading a workstream which included that issue. Whilst the ultimate decision-maker on this issue was the Board, before the matter came to be determined by the Board on 30 September 2021, it was subject to extensive governance, with papers being considered by a sub-group of the FCA's Executive Committee and the Board Sub-Committee. In particular, as recorded in the Board Paper referred to at ¶31 below: (1) on 10 June 2021, the Board Sub-Committee expressed the view that the IRHP Redress Scheme was reasonable in its scope and on eligibility; (2) on 21 July 2021, the Board took a similar view when discussing the FCA's draft public response to the Swift Review; (3) on 25 August 2021, a sub-group of ExCo led by the CEO considered an earlier version of the Board Paper and agreed that the IRHP Redress Scheme provided appropriate protection for consumers and recognised that this logically led to the conclusion that it would not be appropriate to take action; and (4) the Board

Sub-Committee expressed similar views in a discussion on 15 September 2021. The Board Sub-Committee and ExCo referred the matter to the Board for decision.

31. At a meeting on 30 September 2021, the FCA's Board considered whether to take further steps for the purpose of using any statutory powers that it might have available to it, to seek to compel the Redress Banks to pay redress to any of the Sophisticated Customers who had been mis-sold IRHPs between 1 December 2001 and 2011. At that meeting, the Board was assisted by a paper ("**the Board Paper**"), which identified the material considerations for deciding whether the FCA should seek to exercise its statutory powers now to secure redress for any Sophisticated Customers ***[MS1/4]***. The Board Paper was prepared by a team within the FCA that had responsibility for advising the Board as to the FCA's public response to Mr Swift's report. Having considered the paper, the Board decided that the reasons not to seek to compel redress from the Redress Banks for the Sophisticated Customers outweighed the reasons in favour of doing so.

32. The Board's reasons may be summarised as follows.

    a. So far as the availability of the FCA's statutory powers were concerned, the Board proceeded on the basis that the power to establish a consumer redress scheme under s.404 was not available because the limitation periods in respect of any claims that consumers might bring against the banks in respect of the mis-sale of IRHPs in the period December 2001 to 2011 were long expired. This is common ground: SFG ¶39~~8~~. Contrary to the APPG's case at SFG ¶40~~39~~, by 2021 an application to the Court under s.382 FSMA was also time-barred (see ¶18 above). In principle, the ss.384 and 55L powers might be available, but there were a number of legal and practical impediments which potentially lay in the way of their exercise (see sub-paragraphs d and e below).

    b. The Board considered whether it should seek to exercise such powers as were available to it under five heads. Considerations (i) to (iv) were ranked in order of importance.

    c. *(i) The FCA disagreed with the Review's adverse findings about the scope of the IRHP Redress Scheme* (Board Paper, ¶¶4.4-4.14 ***[MS1/9]-[MS1/10]*** and

Annex 2 thereto ("Further detail on the reasons why we disagree with the Review's findings on scope")). Mr Swift's conclusion about the scope of the IRHP Redress Scheme was not in itself a good reason to revisit the question of redress for Sophisticated Customers. This part of the Board Paper summarised the reasons why the FCA had reached the view, in the context of making representations to Mr Swift on 30 March 2021 ***[MS1/811-849]***, that the scope of the Reviews was appropriate (see ¶30 above). The IRHP Redress Scheme provided an appropriate degree of protection for consumers essentially for the same reasons that informed the FSA's decisions in 2012 and 2013, as summarised in ¶20 above and in the Board Paper and Annex 2 thereto and as more fully set out in the representations made to Mr Swift on 30 March 2021. The Board Paper indicated (at ¶¶3.3 ***[MS1/7]*** and 4.13 ***[MS1/10]***) that, if that was the Board's view, then it would follow that it was not appropriate to take further action now. Nevertheless, the Board was asked to weigh all the material considerations and it did so.

d. *(ii) The banks have a strong argument that they could reasonably regard the matter of redress for sophisticated customers as already closed* (Board Paper, ¶¶4.15-4.39 ***[MS1/10]-[MS1/15]***). The points considered under this head included that since 2013 the FCA had dealt with the Redress Banks and the public generally on the basis that the IRHP Redress Scheme (and the agreements with the Redress Banks that underpinned it) represented the FCA's response to the issue of the mis-selling of IRHPs between December 2001 and 2011; that the balance of arguments supported the view that the agreements between the Redress Banks and the FSA set out the entirety of the measures that banks were required to take to remedy their mis-selling of IRHPs to customers; that the Swift Review had not disclosed new material facts; that up to 20 years had passed since the underlying sales and ten years since the IRHP Redress Scheme was established; that the limitation periods in respect of the underlying sales had long expired; that any attempt to exercise statutory powers faced a serious risk of potentially successful legal challenge by the Redress Banks (on the basis of legitimate expectation, alternatively on the ground that the FCA had departed without good reason from its long-standing policy that the IRHP Redress Scheme was an appropriate response to the mis-selling of IRHPs, or under the Human Rights Act 1998 (interference with the peaceful enjoyment of

property)); that seeking to require further redress now would make it harder to agree voluntary redress schemes with firms in the future; and that confidence in the FCA as a consistent, orderly and predictable regulator could be undermined. The Board was asked whether it agreed that the balance of the public interest appeared to weigh against seeking further redress now (Board Paper ¶4.39 ***[MS1/15]***).

e. *(iii) Difficulty and complexity of any redress action* (Board Paper, ¶¶4.40- 4.42 ***[MS1/15]***). The FCA did not hold, and had never held, evidence to support the imposition of a redress scheme for the Sophisticated Customers. Given the passage of time and the complexity of the issues involved, establishing sufficient evidence in 2021 about sales between 1 December 2001 and 2011 was likely to be long and complex and possibly futile. Problems in relation to the completeness of evidence, which had been an issue in relation to the Reviews, would likely have become worse.

f. *(iv) Burden on FCA resources* (Board Paper, ¶¶4.43-4.45 ***[MS1/16]***). Any attempt to exercise statutory powers now in relation to the Sophisticated Customers would require the FCA to divert its limited resources from its ongoing work protecting a much larger number of much more vulnerable consumers, including those whose vulnerability had been aggravated by the pandemic.

g. *(v) Reasons for seeking redress for the Sophisticated Customers now* (Board Paper, ¶¶4.46-4.48 ***[MS1/16]***). The FCA estimated that between 11% and 33% of IRHPs sold to the Sophisticated Customers in the period December 2001 to 2011 may have been mis-sold with potential uncompensated losses of anywhere between £200m and £3b.[15] The Board Paper noted other reasons in favour of seeking to take action, in particular demonstrating a willingness to take action to protect customers so that any banks that mis-sell to customers can expect the FCA to make sure that they make full reparation, however long that may take.

33. As recorded in the minutes to the meeting, the Board considered that the reasons not to seek to compel redress from the Redress Banks for the Sophisticated Customers

[15] See Board Paper, ¶¶1.5 ***[MS1/6]*** and 4.47 ***[MS1/16]***.

outweighed those in favour of doing so ***[MS1/33]***. It concluded that the FCA should not seek to use its powers under ss.55L or 384 to compel any of the Redress Banks to provide redress to Sophisticated Customers who had been mis-sold IRHPs in the period 1 December 2001 to 2011.

E. GROUND 1

Ground 1(i): The FCA was irrational to reject the findings of the Swift Review concerning the Sophistication Test (SFG ¶¶87-99~~86-98~~)

34. Ground 1(i) proceeds on the premise that the FCA acted unlawfully by not accepting that *"the FSA ought not to have adopted the Sophistication Test"* (SFG at ¶87~~6~~). The essence of Ground 1(i) must therefore be that the FCA irrationally believed in 2021 that the FSA/FCA had not acted irrationally in the decisions it made in 2012 and 2013 concerning the Sophistication Test. The FCA's decision in 2021 not to seek to establish a redress scheme in respect of the Sophisticated Customers cannot plausibly be said to be *"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"*[16]. It is well established that irrationality is a particularly difficult hurdle when, as here, the Court is being asked to review the decision of a specialist financial regulator[17]. Judicial caution is especially warranted in the case of a decision not to exercise investigative and regulatory powers which involved the weighing of considerations, including assessments as to the efficacy of exercising such powers[18]. In the context of a non-statutory investigatory review exercise commissioned by and provided to the FCA, the FCA's disagreement with the Swift Review in relation to the Sophistication Test need only be rational and not meet any higher threshold: see R (Evans) v HM Attorney General [2015] UKSC 21, [2015] AC 1787, ¶66 *per* Lord Neuberger. The APPG is wrong in law, at SFG ¶100, to impose a "*cogent reasons*" standard and all the more so

[16] Lord Diplock in CCSU v Minister for the Civil Service [1985] AC 374 at 410G.
[17] See, in respect of the Bank of England, A v B Bank (Governor and Company of the Bank of England intervening) [1993] QB 311, per Hirst J at 329.
[18] See e.g. R v Director General of Telecommunications, ex p Cellcom [1999] ECC 314 at ¶26; R.(Grout) v FCA [2015] EWHC 596 (Admin) at ¶34 to 35; R.(Corner House Research) v SFO [2009] 1 AC 756 at ¶¶30 to 31.

where it is said to apply to the issue of what the FCA should do now, on which the Swift Review expressed no view and was not asked to express any view.

35. First, the FCA denies that it and the FSA acted arbitrarily and irrationally, or at the behest of the Redress Banks and HM Treasury, in agreeing the terms of the IRHP Redress Scheme, which is the premise of the first limb of Ground 1. The FCA makes the following points.

    a. The reasons for acting as it did in 2012 and 2013 have already been summarised in ¶20 above. Those reasons were rational. In particular, in the circumstances outlined in that paragraph, it was open to the FSA to decide to enter into voluntary agreements with a view to stopping continuing and future harm, as well as compensating the most vulnerable customers whom it believed were most in need of protection. As the Swift Report found, the FSA's approach enabled it to secure a *"'bird in the hand'"* (p.305 at ¶23 ***[MS1/343]***).

    b. It was rational for the FSA to agree to criteria to identify those most vulnerable customers.

    c. The criteria themselves were rational.

        i. The APPG may disagree with where the FSA drew the line in 2012 and 2013 between the likely Sophisticated and Non-Sophisticated customers, but that does not make the line irrational. Although, after the passage of time, the FCA does not have evidence that explains why all of the changes to the Sophistication Test were made in the course of the negotiation (see sub-paragraph e below), it believes that all such changes were within the range of reasonable responses to the perceived consumer harm and were agreed with a view to providing an appropriate degree of protection for consumers in accordance with the approach outlined in ¶20 above.

        ii. As described in Mr Steward's witness statement at ¶84, and as recorded in Annex 1 to the representations made to Mr Swift on 30 March 2021 at ¶¶3.25-3.29 ***[MS1/824-825]***, the use of thresholds based on financials, the number of employees and the size of transactions as a proxy for financial sophistication is a widely accepted facet of financial

regulation[19]. The inherent logic in such criteria is that customers with greater financial resources are more likely to understand the financial ramifications of an investment (and so less likely to have been mis-sold to) and to withstand the financial impact if their investment loses. They are also more likely to have access to the resources necessary to obtain expert advice before purchasing the product and, where appropriate, to bring legal proceedings for mis-selling.

iii. At SFG ¶498, the APPG argues that the Companies Act Test "*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*", but that is not correct. In the FCA's expert judgement, the criteria were a reasonable proxy for sophistication in the context of IRHPs and therefore helped to quickly identify those who were likely to be at more risk of mis-selling, as well as the consequences of mis-selling.

d. In entering into the agreements with the banks, it was rational for the FSA to make such trade-offs concerning the Sophistication Test as it considered necessary and appropriate in order to obtain the Redress Banks' agreement to the IRHP Redress Scheme and to secure what it considered to be an appropriate degree of protection for consumers. The Sophistication Test was just one aspect of the IRHP Redress Scheme, each element of which was disadvantageous to the Redress Banks (see the summary at ¶21 above). Any assessment of the appropriateness of the IRHP Redress Scheme must involve an assessment of the scheme in the round, taking account of all its elements and the circumstances that prevailed when it was devised in 2012/2013. At SFG ¶976, the APPG says that there is no *"evidence that the Banks … would not have agreed"* to a scheme including the Sophisticated Customers and *"no evidence that the FSA sought to negotiate on this point at all at the time of originally excluding the [Sophisticated Customers]"*. That is beside the point, even if it were true (which

[19] This is the case in both European and UK legislation and UK regulation: for example under the Markets Financial Instruments Directive, the Investor Compensation Schemes Directive, the Financial Promotions Order, and eligibility for the Financial Ombudsman Service and the Financial Services Compensation Scheme under the FCA's rules.

is denied). The FSA reasonably considered in 2012 and 2013 that the agreements, including their scope, provided an appropriate degree of protection to consumers and therefore agreed to them, rather than choosing to try to negotiate further, incurring further delay and risk. As the Swift Review found, there was concern within the FCA that at least two of the first-tier banks (HSBC and RBS) would not agree to the voluntary scheme.[20]

e. The APPG are wrong to claim, in reliance on a document relating to a meeting held on 20 May 2021, quoted at SFG ¶84A, that the FCA *"internally admitted that it could not dispute"* that it acted in a manner that was arbitrary, irrational and without objective justification or at the behest of the Redress Banks and HM Treasury (SFG ¶954). As is apparent from the document quoted at SFG ¶84A, the FCA recognised when considering its representations to the Swift Review that there were gaps in its records from 2012 and 2013 and that recollections of the relevant staff had faded, with the consequence that it would be difficult to dispute Mr Swift's account of the primary facts. That does not amount to an acceptance that the FSA acted irrationally in 2012 and 2013, or require the FCA to accept all of the judgements and conclusions Mr Swift drew from those facts as to how the FSA should have approached its regulatory functions. As stated, Mr Swift himself was clear that he was not assessing the legal rationality of the FCA's decision-making, in terms which indicated that he would be less able to assess whether the FSA's actions had been "*appropriate*" if he applied that legal standard[21]. The APPG errs in conflating Mr Swift's application of a different test with that of rationality. Moreover, as for the alleged interference in its decision-making by HM Treasury, Mr Swift found that the creation and development of the IRHP Redress Scheme remained under the control of the FSA, that the FSA's decisions were *"those of an independent body"* (p.314 at ¶46 and p.392 at ¶60 ***[MS1/430]***), and that, although there was some evidence that HM Treasury sought to influence the FSA in connection with the likely cost of the Reviews to the Redress Banks, the evidence did not suggest that it was the cost of the scheme to the banks that persuaded the FSA to agree to the limitations on eligibility. None of the documents referred to by

[20] Swift Review, ¶74 at p.128.
[21] Swift Review ¶2 at p.295.

the APPG in its amendments – all of which were considered by Mr Swift – provide support for the contention that the FSA acted "*at the behest of*" or were "*heavily influenced by*" HM Treasury (SFG, ¶¶95.2, 97). Rather the documents quoted by the APPG support precisely what Mr Swift found. In any event, it is not open to the APPG in these proceedings to seek to contradict the findings of the Swift Review. Given Mr Swift's findings about the FSA's independence in 2012/2013, it is to be inferred that the FSA, as expert regulator, genuinely considered that the IRHP Redress Scheme provided an appropriate degree of protection for consumers in all the circumstances.

36. Secondly, this ground proceeds on the fallacy that the Sophisticated Customers were prima facie entitled to the same level of protection by the FCA as other Private Customers and Retail~~s~~ Clients (SFG ¶¶910~~0~~ and 921~~1~~.2; see also the extract from the Swift Review quoted at SFG ¶943~~3~~). That is wrong for the reasons explained in ¶14.b and 17 above. The FCA's judgements should be reasoned, based on evidence (including the FCA's experience and common sense) and objectively justified. They were in this case. If the APPG are arguing for a more stringent test at SFG ¶954~~4~~, that has no basis in law.

37. Thirdly, no individuals had an entitlement to be treated in any particular way by the FSA. No individual had an entitlement to be within the scope of a past business review, or either of the other reviews, agreed between the FSA and the Redress Banks.

38. Fourthly, the FCA was entitled to believe in 2021, as it believed in 2012 and 2013, that it was reasonable, in the circumstances prevailing at that time, for it to focus its attention on seeking to secure redress quickly, by voluntary agreements with the banks, for those who it considered were likely to be in the most vulnerable circumstances among a wider class of customers who were potentially mis-sold IRHPs. The Swift Review concluded that the IRHP Redress Scheme "*delivered fair outcomes for those customers within its scope…Most eligible customers therefore obtained redress that met the objective of the Scheme and in all likelihood was 'better' from their perspective than any outcome they could have achieved outside the Scheme*": p.35, ¶55. As set out above, the FCA's

ability to exercise its statutory powers, and to obtain swift and certain redress for all customers who may have been mis-sold IHRPs during the period December 2001 to 2011 was constrained (see ¶20 above). Further:

a. At SFG ¶965, the APPG suggests that the FCA's reasons for continuing to believe that the criteria for determining sophistication was a reasonable approach "*entirely misses the point*" because *"as is now known from the Review, the Sophistication Test did not work as a tool for identifying 'less sophisticated customers'"*. That is not a valid conclusion to draw from the Swift Review. It appears to proceed on a misunderstanding of what the criteria sought to do. They sought to identify those customers who were *likely* to be less financially sophisticated. It was not the aim of the IRHP Redress Scheme to identify every instance of mis-selling of IRHPs, and those who did not satisfy the criteria for Non-Sophisticated Customers remained able to pursue mis-selling allegations and claims for redress against the Redress Banks through complaint routes outside of the review and by litigation and many did so.

b. The FCA, drawing on its experience as the regulator, reasonably believes now, as it believed in 2012 and 2013, that during the relevant period (2001 to 2011) there was a correlation between the size of a business and its vulnerability to and arising from mis-selling of IRHPs, and that the size of the IRHP transactions and vulnerability were similarly correlated (see in this regards ¶¶3.26, 3.27 and 3.38 of the annex to the representations made to Mr Swift on 30 March 2021 ***[MS1/824, 827]***).

c. At SFG ¶976, the APPG argues that the FSA *"trade[d] away the regulatory protections of nearly 35% of relevant transactions"* but this is not correct, and in any event mischaracterises the true nature of the IRHP Redress Scheme, because (i) the FSA judged in 2012/2013 that its ability to exercise its statutory powers to provide swift and certain protection to the entire cohort of customers who may have been mis-sold IRHPs during the period December 2011 to 2011 was constrained, (ii) the FSA judged in the circumstances that the voluntary IRHP Redress Scheme agreed with the Redress Banks, focused as it was on consumers who were more likely to be vulnerable, was the best means of securing an appropriate degree of protection for consumers, and (iii) the IRHP

Redress Scheme did not involve the loss of any *"regulatory protections"*. Instead, by agreeing to conduct the Reviews for certain customers, the Redress Banks were agreeing to take specific steps in relation to a particular cohort of customer whom the FSA considered to be most at risk of being the victims of mis-selling or of suffering from the consequences of mis-selling.

d. At SFG ¶965, the APPG complains that it has not been provided with papers relating to the FCA's *"Project Board"*. This complaint is misconceived because it was the Board (and not the *"Project Board"*) who decided, in September 2021, not to seek to compel redress from the Redress Banks for the Sophisticated Customers. Nevertheless, the FCA has addressed the APPG's complaints about disclosure at ¶11 above.

39. Finally, as stated Mr Swift has acknowledged that other people considering the same documents, information and material might reach different conclusions from those he has reached (see ¶26 above). As this emphasises, the FCA's disagreement is not about Mr Swift's summary of the factual events but with the judgement he reached in the Review about the appropriateness of the Sophistication Test. The allegation that the FCA has acted irrationally in disagreeing with one aspect of Mr Swift's conclusions finds no support in Mr Swift's report.

Ground 1(ii): The FCA acted irrationally in deciding to do nothing further (SFG ¶¶100-10599-104)

40. If the APPG fails on Ground 1(i) then the claim must fail on Ground 1(ii) as well because Ground 1(ii) is predicated on the *"findings and conclusions of the [Swift] Review"* (see SFG ¶10099). Therefore if, as the FCA contends, it acted rationally in disagreeing with the conclusion of the Swift Review in relation to the appropriateness of ~~in agreeing~~ the Sophistication Test as one element of the IRHP Redress Scheme in circumstances where its ability to exercise its statutory powers to secure swift and certain redress for all the victims of IRHP mis-selling during the period December 2001 to 2011 was constrained, then the APPG's argument at Ground 1(ii) does not arise at all.

41. By Ground 1(ii) the APPG argue that the FCA's decision *"to do nothing further"* was irrational. The FCA understands that this purports to be a challenge to the FCA's decision not to seek to compel the Redress Banks to provide redress for the Sophisticated Customers or to ask the Redress Banks to provide voluntary redress. At SFG ¶1032, the APPG claims that the FCA justifies its decision not to seek to compel redress from the Redress Banks for the Sophisticated Customers *"on the sole ground set out at paragraph 4.4 of the Response"*. This is not correct (as is in fact now acknowledged at SFG ¶103A). When making its decision, the Board carefully weighed all of the material considerations and decided, as it was entitled to do, that it would not be appropriate to seek to exercise its statutory powers and to compel redress: see ¶33 above.

42. At SFG ¶¶1043.5-1043.7, the APPG challenges the statement in the Board Paper that the Redress Banks have a strong argument that they could reasonably regard the matter of redress for Sophisticated Customers as already closed (the points considered under this head are summarised in ¶32.d above). The APPG overlooks the significance of the FCA's dealings with the banks, customers and other interested parties since the IRHP Redress Scheme was established over ten years ago. The FCA was entitled to take into account potential grounds of challenge to any attempt to exercise statutory powers (and the facts that could support such a challenge). Similarly, the elapse of time since both the underlying sales (December 2001 to 2011) and the IRHP Redress Scheme was established and the expiry of limitation periods was plainly a relevant consideration. The APPG may disagree with the weight that the Board gave to these particular considerations, but that does not make the Board's decision irrational.

42A. As to the matters now relied upon in SFG, ¶¶104A-104AD, none of these additions by amendment sustain the APPG's case.

a. It is not the FCA's case that the agreements with the Redress Banks precluded it from taking disciplinary or any other form of regulatory action in respect of the mis-selling of IRHPs during the relevant period after the agreements were entered into. That is evident from the terms of clause 6 itself. That the FSA

made clear to the Redress Banks at the time – including in the documents quoted in the SFG – that it was not intending to fetter itself adds nothing.

b. None of the documents quoted in the SFG suggest that the FSA informed the Redress Banks in 2012/2013 that it considered that it could exercise its statutory powers to seek to require the Redress Banks to provide redress to Sophisticated Consumers after the banks had performed their obligations under the agreements with the FCA merely on the grounds that it had changed its mind about the appropriateness of the Sophistication Test.

c. In any event, to the extent that the APPG relies on the documents and email exchanges between the FSA and the Redress Banks in 2012, these were not before the Board when taking the Decision (or those FCA officials who produced the Board Paper which informed it): witness statement of Mr Watts. Given the terms of clause 6, there was no need for such an exercise. The FCA addresses the meaning and effect of clause 6 at ¶50 below.

d. Similarly, ¶104AD's assertion that ¶4.4 of the Response to the Review was "*demonstrably incorrect*" is itself an error, demonstrable from the very passages quoted and said to be the justification for it. The APPG identify no passage which shows the FSA indicating to the Redress Banks in 2012 that it would "*seek to extend the Scheme, or take further steps, to include or assist the excluded customer*", or that the FSA believed it had given any such indication. It had not and it did not. Nor does the evidence referred to at ¶¶104A to 104AB support the allegation that there was no rational basis on which it could be said that the Redress Banks had a strong argument that they could reasonably regard the matter of redress for Sophisticated Customers as already closed (the second of the material considerations identified in the Board Paper), and that it was irrational for the FCA to rely on this as a reason to take no further action. None of the evidence from 2012/2013 cited by the APPG touched on the question of whether the FCA in 2021, several years after the agreements had been performed and the redress exercise completed, might exercise its statutory powers to require the banks to provide redress to Sophisticated Customers merely because the FCA had changed its mind about the appropriateness of the Sophistication Test in light of the Swift Review.

43. At ¶104C the APPG claims that, *"[t]aken in the round"*, the FCA's disclosure shows that it adopted *"reasoning which would reach a pre-ordained result"*. If the APPG intends to allege that the FCA did not give genuine consideration to the question whether it should seek to exercise its statutory powers to compel the Redress Banks to provide redress to Sophisticated Customers, that is denied. The Board was free to make whatever decision it considered appropriate. Indeed, as explained at ¶32.g above, the Board Paper included a section setting out the *"reasons in favour of seeking redress"*. That section was not, as alleged by the APPG, *"self-serving and circular"*. Moreover, contrary to the APPG's claim otherwise, the section expressly referred to the estimated scale of potential harm suffered by the Sophisticated Customers as a result of mis-selling (see ¶32.g above). The FCA was not legally obliged to consider the question of redress for Sophisticated Customers following receipt of Mr Swift's report. To suggest that it did so, only to reach a pre-ordained decision, defies common sense.

Ground 2: The decision is procedurally unfair (SFG ¶¶106-109~~105-108~~)

44. This Ground is premised on the *"findings of the Review"* (SFG ¶109~~8~~) and therefore depends on the allegation that the FSA acted unlawfully in 2012 and 2013. For the reasons explained above, that premise is wrong.

45. In any event, there was no obligation to consult before taking the decision under challenge. The principles applicable to a duty to consult were collated by the Divisional Court in R (Plantagenet Alliance Ltd) v Secretary of State for Justice [2014] EWHC 1662 (Admin), [2015] 3 All ER 261 at ¶98; see too R (MP) v Secretary of State for Health and Social Care [2020] EWCA Civ 163, [2021] PTSR 1122 at ¶36. In the absence, as here, of any statutory duty to consult, or any promise or established practice of consultation, the APPG must show that there was conspicuous unfairness in the FCA not having consulted. That standard is not met.

    a. As stated, the question for the FCA was a narrow one, namely whether the FCA should seek to require the Redress Banks to provide further redress to Sophisticated Customers in light of the alleged serious regulatory error regarding the scope of the IRHP Redress Scheme. The APPG does not identify any requirement in FSMA to consult when deciding not to seek to compel

further redress from the banks[22], nor any basis for suggesting that an obligation to consult arose under common law, including from a legitimate expectation. The decision maintained the status quo as it has been for ten years. Rights were not affected. Burdens were not imposed. Benefits were not taken away.

b. The fact that the Swift Review recommended that, where the FCA considers that there is an objective justification for limiting the scope of a remedy to only certain persons in the same class, it should allow stakeholders an opportunity to make representations (SFG ¶109~~8~~) did not create an obligation on the FCA to consult. Mr Swift's remarks related to future redress schemes, not to the FCA's decision to maintain the status quo in relation to the IRHP Redress Scheme.

c. In any event, the FCA received and considered representations over many years to the effect that Redress Banks should be required to provide redress to the Sophisticated Customers. Further, the public had had the opportunity to provide evidence and representations to Mr Swift on, amongst other things, the appropriateness of the Sophistication Test, which was extensively considered in the Swift Review and in the resulting report. The FCA reasonably estimated and took into consideration the amount of the uncompensated losses that could have resulted from the alleged error (see ¶32.g above). In the circumstances, the FCA reasonably considered it had sufficient information to make a decision and that a consultation would not have assisted its decision-making.

46. Similarly, whilst it is not clear what the APPG means by *"a full impact assessment"* (SFG ¶109~~8~~), the FCA was under no obligation to conduct an impact assessment when considering whether or not to exercise its statutory powers.

a. The APPG does not identify any requirement in FSMA to produce any such assessment[23].

[22] In certain circumstances (which are not relevant here), FSMA does require the FCA to consult. For example, s.138I(1) FSMA: *"Before making any rules, the FCA must (a)consult the PRA, and (b) after doing so, publish a draft of the proposed rules in the way appearing to the FCA to be best calculated to bring them to the attention of the public"*.

[23] In certain circumstances (which are not relevant here), FSMA does require the FCA to prepare an impact assessment. For example, s.138I(2) FSMA: *"The draft [of proposed rules that are being published] must be accompanied by (a) a cost benefit analysis …"*

b. In any event, as the Board Paper demonstrates, the Board did have regard to the potential redress that would be paid if the FCA was successful in exercising its statutory powers to implement a redress scheme for the Sophisticated Customers. At SFG ¶1098, the APPG says that at the date of the Decision the FCA was aware that IRHPs were mis-sold in over 90% of cases. The FCA understands that the APPG is referring here to an estimate made in 2013 in relation only to Non-Sophisticated Customers. In 2021, the FCA estimated that between 11% and 33% of IRHPs sold to Sophisticated Customers in the period 2001 to 2011 could have been mis-sold.[24] The Board took that potential impact into account when making its decision (see ¶32.g above).

c. The legal (and factual) basis for the assertion at SFG ¶106.2 that procedural fairness requires the FCA not to "*place disproportionate weight on the views and demands of the Banks*" – an aspect of the substantive decision-making and not the procedure followed – is neither explained nor understood. The apportionment by the FCA of weight to the views of others is a matter to be challenged on rationality grounds alone: e.g. Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 (HL), 780 *per* Lord Hoffmann. There is no such claim.

47. Prior to the FCA's Board making the Decision, the FCA gave consideration to whether there should be some form of consultation in relation to the question of whether the FCA was minded to seek to take further action following the Swift Review, but it was decided not to do so since the nature of the issue meant that it was able to consider all relevant considerations before reaching a final decision without one (Mr Geale's witness statement at ¶15).

[24] Board Paper, ¶1.5 ***[MS1/6]***.

G. RELIEF SHOULD IN ANY EVENT BE REFUSED UNDER S.31(2A) OF THE SENIOR COURTS ACT 1981

48. The FCA invites the Court to consider whether, if the conduct complained of had not occurred, the outcome for the APPG would have been substantially different: see s.31(2A) of the Senior Courts Act 1981. If, on considering that question, it appears to the Court to be highly likely that the outcome for the APPG would not have been substantially different, then the Court must refuse to grant relief (s.31(2A)(a)), save that the Court may disregard the requirement in s.31(2A) if it considers that it is appropriate to do so for reasons of exceptional public interest: s.31(2B). If the Court grants relief in reliance on s.31(2B), it must certify that the condition in that sub-section is satisfied: s.31(2C).

49. The FCA's Board did not consider what it would have done if it had accepted Mr Swift's criticisms concerning the Sophistication Test, and in particular if it had decided that the measures taken in 2012 and 2013 had not provided an appropriate degree of protection for consumers. Instead the Board considered and weighed all the material considerations, set out in the Board Paper, which included its view on those criticisms. The Board Paper contained very strong indications that seeking to exercise statutory powers to compel further redress would not be appropriate. In particular, the Board Paper stated at ¶4.14 that, even if the FCA were to agree with the conclusion of the Swift Review regarding the scope of the IRHP Redress Scheme, the second head of material considerations, labelled (b), provided *"a particularly tricky hurdle"* ***[MS1/10]***. It is self-evident that the considerations grouped under that head, summarised at ¶32.d above, would make it highly unlikely that the FCA could require the Redress Banks to provide further redress many years after the Redress Banks had provided redress in accordance with the agreed IRHP Redress Scheme simply because it concluded (based on the Swift Review) that the scope of the IRHP had not been appropriate. That would undermine the stability and predictability of the regulatory scheme and likely make it harder to agree voluntary remediations with firms in future. As the Board Paper stated at ¶4.33, strong justification would be required to exercise the available statutory powers, given (i) the public interest in allowing firms to achieve finality in respect of

past transactions and in the FCA's not taking steps, many years after the agreements between the Redress Banks and the FSA had been entered into, that were inconsistent with the agreed basis on which the Redress Banks would pay redress in respect of IRHPs that had been mis-sold between 2001 and 2011 (see further ¶50 below); (ii) the fact that legal claims against the Redress Banks would be statute-barred (as well as the exercise of some of the FCA's powers); and (iii) the evidential problems that arise with the passage of time. No such compelling reasons or strong justification were identified in the Board Paper. Although not spelt out in the paper, it is highly unlikely that any inadequacy in the Sophistication Test, even if accepted by the FCA, could reasonably be considered to justify, ten years on, action in circumstances where no new material facts had emerged since the Redress Banks and the FSA agreed to the terms of the IRHP Redress Scheme, and where the Redress Banks were not responsible for any alleged regulatory error made by the FSA.

49A. The position is reflected in the following passage in ¶4.4 of the FCA's Response to the Swift Review:

> "*... 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.*"

49B. This passage of the Response was approved by Mr Steward, Mr Geale, Mr Randell (the-then chairman of the FCA) among others (see ¶¶50 to 57 of Mr Geale's witness statement). Although it was not put before the Board, it reflected the view of the FCA team responsible for assisting the Board in its consideration of whether to try exercise its statutory powers to require the banks to provide redress to the Sophisticated Customers.

50. So far as the effect of the agreements between the FSA/FCA and the Redress Banks establishing the IRHP Redress Scheme is concerned, in the present circumstances where the Redress Bank have performed the agreements, the agreements would probably ~~prohibit~~ preclude the FCA from exercising its regulatory powers to require

the Redress Banks to pay redress in a manner inconsistent with the undertakings given by the Banks, pursuant to which the Redress Banks undertook to carry out a review in accordance with the terms of the Appendix to the undertakings, merely because the FCA had changed its mind about the appropriateness of the Sophistication Test in light of the Swift Review. The FCA will rely on the agreements and undertakings for their full terms, meaning and effect. In summary, the difficulty arises because the FSA/FCA and the Redress Banks agreed that redress would be provided to Sophisticated Customers in accordance with the terms of the IRHP Redress Scheme, and that complaints made by other customers would be considered under the firm's usual complaints handling procedures and, if applicable, DISP (see clauses 1 and 2 of the agreements and the undertakings and Appendices thereto). In particular:

a. The agreements were entitled *"Agreement Relating to Sales of Interest Rate Hedging Products"*. As the Swift Review found[25], ~~T~~they ~~were intended by the FSA and the Redress Banks to have~~ had contractual effect, as is apparent for example from clause 9 (Rights of persons other than Parties) and clause 10 (Governing Law).

b. The agreements summarised the relevant background as follows, at Recital A: *"The FSA has found evidence of poor practices in the Firm's sale of interest rate hedging products (as defined in Clause 15 below) to retail clients or private customers (as defined in the FSA's Glossary of Definitions for the purposes of the Conduct of Business sourcebook) on or after 1 December 2001 (the 'Relevant Business'), and is concerned that such practices, combined with product complexity, customer sophistication and sales incentives may lead to poor customer outcomes."*

c. Recital B stated that the parties had conducted settlement discussions in relation to Relevant Business on a without prejudice basis.

d. Recital C stated: *"The relevant FSA decisions makers and [the CEO of the Bank] have approved the terms of this settlement between the Parties to the Agreement on behalf of the FSA and the Firm respectively."*

[25] E.g. Swift Review, ¶¶13-14, p.376.

e. ~~Clause 5 of the agreements provided: *"The Parties agree that all future statements or actions (including any responses to questions) relating to or connected with the subject matter of the Undertaking will be consistent with the content of this Agreement and Undertaking generally."*~~

f. Clause 8 of the agreements provided: *"This is a unique solution to a specific set of FSA concerns. It is agreed between the Parties that nothing in this Agreement or the discussions to do, including all related correspondence, is to be regarded as establishing a precedent for the FSA's approach in the event of similar matters or issues arising in respect of other aspects of the Firm's business."* ~~Clause 5, therefore, appears expressly to prohibit the FCA from taking actions inconsistent with the agreements, the undertakings and the Appendices. If the FCA were now to purport to exercise a regulatory power requiring the Redress Banks to provide redress to customers mis-sold IRHPs between 2001 and 2011 on some basis other than that out in the agreements, the Undertakings and the Appendices – including as regards the scope of the IRHP Redress Scheme – it would probably act in breach of clause 5.~~

g. ~~Further or alternatively, it is probably an implied term of the agreements that the FCA will not take any such action. As evidenced by the recitals to the agreements, the FSA and the Redress Banks intended~~ Given that the agreements were bilateral contracts arising from settlement discussions in relation to the poor practices in the Redress Banks' sale of IRHPs to Retail or Private Customers in the relevant period, and not merely unilateral undertakings provided by the Redress Banks to the FSA, their relevant effect falls to be considered on the basis that the FSA provided some consideration for the Redress Banks' promises to carry out the IRHP Redress Scheme. The FSA must therefore have promised, as part of the agreements, to refrain from doing something by way of consideration for the Redress Banks' promises. The likely effect of the agreements, as a matter of necessary implication, was to settle the question of the FCA's entitlement to exercise any powers available to it under FSMA to require the Redress Banks to provide redress to customers who had been mis-sold IRHPs between December 2001 and 2011 on the grounds of the FSA's concerns regarding mis-selling that the agreements were intended to address (as referred to in Recital (A) and clause 8). Further or alternatively, it

is likely that the agreements contain an implied term that the FCA would not seek to use any statutory powers available to it under FSMA to require the Redress Banks to provide redress to customers who had been mis-sold IRHPs between December 2001 and ~~December~~ 2011 on the grounds of the FSA's concerns regarding mis-selling that the agreements were intended to address (as referred to in Recital (A) and clause 8). The implication of such a term is necessary to give the agreements business and/or regulatory efficacy and/or was so obvious that it went without saying (see Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another [2015] UKSC 72, [2016] AC 742)[26]. Otherwise, nothing would be settled by the agreements and the intentions of the FSA and the Redress Banks would be defeated.

h. Clause 6 of the Agreement provided under the heading, *"Future Action"*: *"Nothing in this Agreement prevents or in any way limits the FSA from taking disciplinary action or any other regulatory action in respect of any matter or business involving the Firm."* It is unlikely that a reasonable party aware of the information reasonably available to the Redress Banks and to the FSA/FCA when they entered into the agreements, and in particular the background summarised in the recitals referred to above, would have understood, at the time the agreements were entered into, ~~understand~~ these general words to mean that, after the agreements have been performed, the FCA could require the Redress Banks to provide redress on a basis that was inconsistent with the terms of the undertakings and the Appendix, simply because it had changed its mind in light of the Swift Review as to the appropriateness of excluding the Sophisticated Customers from the Reviews. Clause 6 probably preserved the FSA's right to exercise its regulatory powers only in so far as was consistent with the IRHP Redress Scheme agreed with the Banks, or in the event that there was a material change of circumstances that could not reasonably have been in the FSA's contemplation at the time of the agreements were agreed. For example, the FSA/FCA retained the power to bring disciplinary proceedings or to vary a firm's authorisation on account of a firm's conduct in relation to the mis-selling of IRHPs or of any failure to comply with the terms of the agreements and the

[26] The Supreme Court in *Marks & Spencer* was considering the principles that apply to the implication of implied terms into commercial contracts. The FCA's case is that the same principles apply to the agreements between the FSA and the Redress Banks.

undertakings. ~~Furthermore, if the Redress Banks had been in repudiatory breach of the agreements, and the FCA had accepted the breach, with the consequence that the agreements were discharged, then the agreements would not have restricted the exercise of the regulatory powers.~~ By way of further example, if the carrying out of the IRHP Redress Scheme, or other developments, revealed some unforeseen issues of conduct going to whether the FSA would have agreed to enter into the agreements at all (such that it was no longer a "*solution to a specific set of FSA concerns*", per the first sentence of clause 8), clause 6 would have likely preserved the ability of the FSA/FCA to exercises any powers available to it under FSMA to seek to require the Redress Banks to provide redress to Sophisticated Customers. However, in the present circumstances, where (i) the agreements continue to govern the relationships between the FCA and the Redress Banks as regards the provision to redress to customers mis-sold IRHPs between December 2001 and ~~December~~ 2011, (ii) those agreements have been performed and (iii) there has been no material change of circumstances, it is unlikely that clause 6 entitles the FCA to undermine the agreed basis on which the Redress Banks would review sales, provide redress and handle complaints.

i. Further, and in any event, even if it is the case that the terms of the agreements would not per se fetter the FCA's exercise of its statutory powers so as, in substance, to revisit the scope of the IRHP Redress Scheme to require the banks to provide redress to the Sophisticated Customers, the agreements and their performance through the scheme would nonetheless constitute a factor of highly significant weight in a challenge to the public law legality of any such FCA decision. Such a decision would fall to be taken almost a decade after the agreements had begun to be performed by the Redress Banks, without material complaint by the FCA, at significant financial cost to the banks and benefit to consumers, where individual transactions would be long past any applicable limitation period, in circumstances where the FCA had simply changed its mind about the appropriateness of the Sophistication Test in the light of the Swift Review. In short, whether or not the agreements precluded any further action in relation to Sophisticated Contracts as a matter of contract law, the nature and terms of those agreements would generate a sufficiently strong legal challenge – in view of the other considerations outlined in ¶¶4.15 to 4.39 of the Board

Paper and summarised in ¶32.d above, and the need for the FCA to take rational decisions in context – to render any such option highly unlikely to be adopted.

51. The Court should infer, therefore, that it is highly unlikely that the outcome would have been any different for the APPG if the conduct complained of in respect of the taking of the Decision had not occurred and, further, that the FCA would be bound to reach the same conclusion if the Decision was reconsidered (such that any alleged error in the reasoning that led to the Decision was immaterial to it). There is no reason of exceptional public interest why relief should nonetheless be granted.

H. CONCLUSION

52. The FCA maintains that in 2012 and 2013 the FSA responded rationally and appropriately to concerns that the Redress Banks had mis-sold IRHPs between 1 December 2001 and 2011. The measures taken by the FSA resulted in the Redress Banks paying over £2 billion of redress to the most vulnerable consumers on whom, in the FCA's judgement, it was appropriate to focus its resources. The FCA continues to believe, as it did over ten years ago, that the IRHP Redress Scheme provided an appropriate degree of protection for consumers. Nevertheless, even if the grounds were to be made out, it is highly unlikely that the outcome would have been different for the APPG and there is no public interest reason why it should proceed.

RICHARD COLEMAN K.C.

SIMON PRITCHARD

RICHARD COLEMAN K.C.

CHRISTOPHER KNIGHT

STATEMENT OF TRUTH

The Defendant believes that the facts stated in these Amended Detailed Grounds are true. I am duly authorised by the Defendant 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:

Position:

Date: