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

Case No.: AC-2022-LON-001500

BETWEEN:

THE KING

on the application of

THE ALL-PARTY PARLIAMENTARY GROUP ON FAIR BANKING

Claimant

and

THE FINANCIAL CONDUCT AUTHORITY

Defendant

DEFENDANT'S SKELETON ARGUMENT
For the Hearing on 10-11 December 2024

References to the Core Bundle, the Supplemental Bundle and the Correspondence Bundle are in the form: ***[CB/tab/page]****;* ***[SB/tab/page]****; and* ***[CorrB/tab/page]*** *respectively.*
References to the Re-Amended Statement of Facts and Grounds ***[CB/3/75]*** *are in the form: SFG, §x.*
References to the Amended Detailed Grounds of Defence ***[CB/5/142]*** *are in the form: DGD, §x.*
References to the witness statements are in the form: W/S Surname, §x. References to the APPG's skeleton argument for the hearing are in the form: CSkel, §x.

INTRODUCTION

1. The FCA adopts the APPG's definitions, except that the proactive redress exercise and sales reviews, in which the Excluded Customers did not participate, will be referred to as "the IRHP Reviews", and the IRHP Reviews together with the supporting undertakings given by the Banks (which extended to the Excluded Customers as well) will be referred to as "the Scheme". The Financial Services Authority was renamed "the Financial Conduct Authority" with effect from 1 April 2013, and its powers were reorganised. The FCA will generally refer to "the FSA" in relation to the decisions taken in 2012/2013 when establishing the Scheme, and "the FCA" in relation matters pertaining to the Decision taken in 2021.

2. The APPG does not acknowledge the following important findings of Mr Swift which form part of the context in which the APPG's rationality challenge falls to be assessed:
   (1) The FSA was pessimistic as to the prospects of enforcement action against the Banks and was conscious that it did not have evidence of mis-selling (Ch 3, §53 **[CB/10/386]**).

(2) The FSA was conscious of the need to provide prompt assistance to small businesses in distress (Ch 3, §28 **[CB/10/367]**). The FSA's Pilot Findings Paper published in January 2013, when the final terms of the Scheme were finalised, stated: "The new sophistication test will provide a greater level of assurance that the review will be focused on those small businesses that were unlikely to have had the expertise and skills needed to understand the risks associated with these [IRHP] products." (Ch 5, §18 **[CB/10/481]**).

(3) A voluntary industry-wide scheme and the use of the FSA's statutory powers each had their advantages and disadvantages, and which of them is appropriate depends on the particular context and the objectives being pursued. In June 2012, the FSA sought to ensure that customers who had suffered or were exposed to financial detriment as a result of being mis-sold IRHPs should be swiftly and appropriately compensated. In the circumstances, the FSA found voluntary agreements to be the preferable approach, as it considered them likely to lead to fair and faster redress than consumers might otherwise receive, to be legally enforceable and robust, and not to place unsustainable burdens on its resources given its other priorities and commitments. See Ch 7, §§20 to 21 **[CB/10/575-576]**.

(4) The FSA was aware of the various options available to it before it committed itself to the Initial Agreement. It reasonably evaluated their relative advantages and disadvantages. It was reasonable for the FSA to aim for a voluntary agreement with the first-tier banks, rather than using any of its statutory powers. In principle, a voluntary agreement was a reasonable means by which to address concerns about the sale of IRHPs and was arguably preferable to the alternatives. Mr Swift was "not convinced that delaying entering into the Initial Agreement in order to carry out further investigations pursuant to the FSA's powers under section 166 FSMA would have led to a preferable outcome". (Ch 8, §25 **[CB/10577]**).

(5) The voluntary agreements were an appropriate way to address the FSA's concerns about the sale of IRHPs to those eligible under the scheme. By locking the Banks into a review by reference to an agreed and rigorous set of Sales Standards, the voluntary redress scheme was a "bird in the hand" which meant that eligible customers gained an advantage compared to the use of statutory powers with less certain and slower outcomes. The outcome of the exercise of statutory powers is never guaranteed and there is always the risk of losing if

challenged or having the parameters of any redress scheme narrowed. The negotiation of a voluntary agreement also allowed the FSA greater scope in ensuring redress on the basis of the Principles for Businesses as well as the COB/COBS rules, which may otherwise have entailed lengthy and uncertain legal disputes. The use of a voluntary agreement allowed the FSA to obtain redress in relation to sales going back as far as 2001, avoiding potential limitation issues. See Ch 1, §30 **[CB/10/300]** and Ch 7, §23 **[CB/10/576]**).

(6) The Scheme delivered fair outcomes for those within its scope. Agreeing the Sales Standards avoided many of the problems that those customers may otherwise have encountered: Ch 1, §§55 – 56 **[CB/10/306-307]**. For example, it resolved disagreement with the Banks over what disclosure was required in respect of break costs: Ch 3, §64 **[CB/10/393]**. The FSA deserved credit in respect of these customers: Ch 1, §§55 – 56 **[CB/10/306-307].**

(7) For consumers eligible to receive proactive redress (Category A sales) or to have their sales reviewed (Categories B and C), the Scheme provided outcomes which were likely preferable to what might have obtained through alternative options: Ch 8, §§29, 30(a) **[CB/10/578]**.

(8) The Scheme delivered £2.2bn of redress to eligible customers in respect of 14,000 sales **[CB/10/292** at §1**].**

3. However, Mr Swift's principal conclusion on the scope of the Scheme was that the FSA was wrong to confine it to a subset of Private Customers/Retail Clients which it designated as "non-sophisticated" in accordance with the Sophistication Test: Ch 8, §1 [**CB/10/587**]. The court will no doubt wish to read the part of Chapter 8 which addresses §2 of Mr Swift's terms of reference ("whether the criteria for eligibility to benefit from the Scheme were appropriate …") with particular care [**CB/10/587-607]**, but his criticisms of the Sophistication Test made in that part are summarised in the **Annex** to this skeleton argument.

4. The Swift Report did not address the question whether any steps should be taken to seek to obtain further redress for the Excluded Customers now in light of the findings of the Review. That was expressly excluded from his terms of reference at §4 **[CB/10/695]**. However, the FCA anticipated that the Review would prompt calls for the FCA to take further action to seek to secure redress for them. That was a matter for the FCA alone. By its Decision, the FCA Board concluded, on 30 September 2021

[CB/7/208], that the FCA should not, a decade on from the establishment of the Scheme and up to two decades on from the mis-selling, now seek to exercise its limited remaining statutory powers to investigate the possibility of compelling the Banks to provide redress to the Excluded Customers.

5. In significant part, it reached that view because the FCA did not agree with Mr Swift's opinion that it was inappropriate not to include the Excluded Customers within the IRHP Reviews. In respectfully disagreeing with Mr Swift, the FCA does not detract from the gratitude that it has publicly expressed for Mr Swift's thorough and thoughtful review which will help shape its future work **[CB/9/247** at §1.19**]**. The FCA otherwise accepted 19 of the 21 recommendations of the Review **[CB/9/243]**. It acknowledged in its Response to the Review clear shortfalls in processes, governance and record keeping when decisions about the Scheme were made, and a lack of transparency **[CB/10/246** at §1.10**]**. However, the discharge of its public law duties in 2021 has led it to disagree that the Sophistication Test was inappropriate.

6. It appears from the APPG's skeleton argument that the issues may be significantly narrower than the statements of case suggest.[1]

   (1) Mr Swift made no finding that the FSA acted unlawfully in 2012/2013 **[CB/10/566]**, §§2-3. In 2013, a judicial review of the terms of the Scheme, and the Sophistication Test in particular, was brought on rationality grounds and permission was refused on the papers in *R (Jenkinson & ors) v Financial Conduct Authority* (CO/5130/2013). Nevertheless, the APPG repeatedly alleges in the SFG that the Sophistication Test was irrational and unlawful (see in particular §§49, 53, 53.1, 79 and 95 **[CB/2/39-61]**). The FCA's position is that any such collateral attack on decisions taken over ten years ago would be an abuse of process **[CB/5/144** at §6**]**. It appears that the APPG (rightly) no longer advances that position (**CSkel** §7 "the APPG does not, by this claim, seek to challenge the lawfulness of the Scheme itself; nor does its case rely upon establishing that the Sophistication Test was unlawful"), though curiously it asserts (wrongly) that it was the FCA that put in issue the legitimacy and

[1] However, the **CSkel** places considerable, and unusual, reliance on the judgment granting permission of Fordham J: [2023] EWHC 1616 (Admin) **[CB/15/904]**. The FCA respectfully observes that a decision on permission, considering only arguability and with considerably less material and time than this Court will have, is of relatively limited value. In particular, the way Fordham J characterises how a ground might be put is nothing to the point if that is not how the claim is in fact pleaded (including as re-amended).

rationality of the Sophistication Test (**CSkel** §§7 – 10). But it then goes on to assert, inconsistently with its disavowal of advancing any challenge to the lawfulness of the Sophistication Test, that the FSA did not act rationally in agreeing to the Sophistication Test (**CSkel** §12). Subject to any further clarification of the APPG's position, the FCA proceeds on the basis that the lawfulness of decisions taken by the FSA in 2012/2013 when it established the IRHP Scheme are no longer in issue, and any question of abuse has fallen away.

(2) The APPG alleges in the SFG §95.2 **[C/2/61]** that "as the Review found" the Sophistication Criteria were formulated "at the behest of the Banks and HM Treasury". Whilst the APPG has relied on this allegation to support wide-ranging disclosure requests, understandably it does not now appear to be at the forefront of its case (see now the passing reference at **CSkel** §36.1 in relation to Ground 2 only). Mr Swift found in terms that, "the creation and development of the Scheme remained under the control of the FSA and its decisions were those of an independent body" and that "the evidence does not suggest that it was the cost of the Scheme to the banks that persuaded the FSA to agree to the limitations on eligibility (even if these limitations did in practice result in a reduction of the banks' costs)" **[CB/10/585**, §46**]**. In other words, the FSA in 2012/2013 discharged its regulatory duties, as it understood them to be, independently and in good faith.

7. For the reasons outlined more fully below, the Court will be invited to dismiss the claim for the following reasons in summary.

(1) In taking the Decision, the FCA was entitled to form the view that the Scheme had provided an appropriate degree of protection for consumers, notwithstanding the admitted failings of processes, governance and record keeping in 2012/2013. At the core of the FCA's disagreement with Mr Swift's opinion regarding the scope of the Scheme, and in particular whether it was appropriate to subdivide the Private Customer/Retail Client group into sophisticated and non-sophisticated customers for the purposes of the Reviews, are matters of regulatory policy, judgement and expertise, on which it is reasonably open to the FCA to disagree with Mr Swift's opinion. These include the appropriateness of targeting regulatory intervention where it is judged to be most needed – a question quintessentially for the regulator – and the weight to afford to competing factors in the assessment of the FSA's conduct in

2012/2013. Moreover, there were compelling reasons militating against the FCA's seeking to take further steps in light of the Swift Review, including legal and evidential obstacles in the way of seeking to provide further redress for the Excluded Customers, which in the FCA's judgement outweighed the consideration that the Excluded Customers might obtain further redress.

(2) Fairness did not require the FCA to consult on a question that preserved the status quo and in relation to which the FCA was already aware of the concerns of Excluded Customers. The APPG does not attempt to address how the applicable standard of conspicuous unfairness is surmounted.

(3) Relief should in any event be denied pursuant to s.31(2A) of the Senior Courts Act 1981 as it is highly unlikely that the outcome for the APPG would have been any different, and granting relief would not serve any exceptional public interest.

THE REGULATORY SCHEME

8. The regulatory scheme applicable to IRHPs is not in material dispute. It is set out in the SFG, §§16-42 **[CB/3/81-88]** and the DGD, §§13-18 **[CB/5/147-152]** and is discussed in W/S Steward, §§10-26 **[CB/19/926-931]**. A full account of the law and applicable regulatory scheme is also given in Chapter 2 of the Swift Report **[CB/10/310-351]**. The focus here is on points that are relevant to the APPG's core contention under Ground 1 that all Private Customers/Retail Clients "are prima facie entitled in all circumstances to the same level of protection by the FSA" (SFG §92).

9. First, the "Conduct of Business Sourcebook" ("COBS"), which came into force from 1 November 2007, brought much larger companies into the retail category subject to enhanced regulatory sales standards than had been the case under the previous rules in force until 31 October 2007 ("COB"). The Retail Client category can include a company (including one that was part of a group) that does not meet at least two of the following three criteria: (i) balance sheet total of €20m; (ii) net turnover of €40m; and (iii) own funds of €2m. These thresholds do not apply on a group basis (under COB they did). For example, a special purpose vehicle turning over tens of millions, which might itself be part of a substantial group of companies, could fall within the Retail Client category.

10. Secondly, FSMA itself does not contain "the same level of protection" for all Retail Clients/Private Customers.

    (1) A breach of COB/COBS is actionable by only some Private Customers/Retail Clients, namely by individuals (provided the loss was not suffered in the course of carrying on a regulated activity), or by other persons (provided the loss was not suffered in the course of carrying on a business): s.150 FSMA (and after April 2013, s.138D FSMA), read with the Financial Services and Markets Act 2000 (Rights of Action) Regulation 2001, reg.3.[2] As Mr Swift noted, a right of action for breach of the COB/S was generally unlikely to be available for corporate Private Customers/Retail Clients: Ch 2, §103(a) **[CB/10/346]**.

    (2) FSMA s.225 provided for the establishment of an ombudsman scheme under which certain disputes of eligible complainants may be resolved quickly with minimum formality by an independent scheme, known as the Financial Ombudsman Scheme ("**the FOS**"). Complaints under the compulsory jurisdiction are to be determined by what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case (s.228). The ombudsman is not confined to legal standards but may have regard to matters such as regulatory rules, standards, guidance and good practice: the FCA Handbook, DISP 3.6.4R. At the material time, by reason of rules made by the FSA pursuant to FSMA, eligible complaints were natural persons acting outside of business, and "micro-enterprises" (companies with fewer than 10 employees and turnover of less than €2m; the thresholds have since been raised): see the FCA Handbook, DISP 2.7 and W/S Steward at §84. The availability of redress from the FOS is a substantial advantage for a sub-class of smaller businesses falling with the Private Customer/Retail Client category.

    (3) Thus, the FSMA regime already afforded greater "protection" to a sub-class of Private Customers/Retail Clients prior to the creation of the IRHP Scheme. The FSA's/FCA's statutory obligations in 2012/2013 and in 2021, and in particular the rationality of the FCA's view (in 2021) that the FSA was entitled to target its regulatory intervention at a sub-group of the Private Customers/Retail Clients, falls to be considered in that context.

11. Thirdly, in 2012/2013 the FSA had a range of powers under FSMA that were potentially available (see DGD, §18 **[CB/5/150-152]**). However, their use was subject to legal and

[2] The Regulations were made so as to come into force contemporaneously with the substantive provisions of FSMA on 1 December 2001, as part of a coherent scheme with FSMA itself.

evidential conditions that limited their availability as a means of providing urgent redress to those the FSA believed to be most in need of regulatory intervention. A s.404 consumer redress scheme could provide redress only for those consumers who had legally actionable claims. Such a scheme could not provide redress for claims that were time-barred (an important consideration given that the mis-selling dated back to December 2001, when FSMA came into effect) or for breaches of the COB/COBS rules alone (save for the consumers who had a right of action, see §10(1) above). Restitution under ss.382 and 384 would have required the FSA to gain evidence to prove breaches and quantify loss to standards that could survive legal challenge in the Court/Tribunal (respectively), as would the imposition of a requirement under s.45 FSMA (now s.55L) to establish and operate a redress scheme for each individual bank (considered at the time by the FSA: see the internal briefing paper of 28 January 2013 **[SB/64/496]**).

12. Fourthly, it is common ground that, in deciding whether and how to exercise its powers, the FSA in 2012/2013 (and the FCA today) were entitled to take into account, among any other relevant matters, (i) its statutory consumer protection objective of securing an appropriate degree of protection for consumers, and in doing so have regard to "the differing degrees of experience and expertise consumers may have" and "the general principles that consumers should take responsibility for their decision" (see now FSMA s.1C), and (ii) the statutory regulatory principles that it use its resources in the most efficient and economic way and that a burden which is imposed be proportionate to its benefits, considered in general terms, which are expected to result from the imposition of that burden (see now FSMA s.3B(1)) (DGD, §§14 – 15 **[CB/5/147-148]**).

13. Fifthly, as Popplewell LJ has recently observed, Parliament has afforded the FCA, as the specialist and expert regulatory body, a wide measure of subjective discretion in seeking to achieve the defined statutory objectives. See *Financial Conduct Authority v BlueCrest Capital Management (UK) LLP* [2024] EWCA Civ 1125 at §83.

14. Sixthly, it follows from the previous points that the regulatory scheme does not contemplate that all breaches of the COBS/COB rules (or of any other rules made by the FCA) will be remediated, or that the same remediation options will be available to all Private Customers/Retail Clients. Parliament has provided consumers with a direct right of action in only limited circumstances, and questions as to the circumstances, manner and extent to which the FSA/FCA should intervene in response to evidence of potential mis-selling is a question for the regulator, taking account of its statutory

objectives, the regulatory principles and its regulatory priorities, and subject to the usual public law controls. Whether or not in any particular instance the FCA adopts the categories used in COBS, or any other differentiation, is to be assessed by reference to the rationality of that choice in the particular context, without any gloss on the scope of its discretion.

15. Seventhly, it follows from the previous points that the core proposition of law on which the rationality challenge (ground 1) is found is misconceived. The APPG asserts that "[t]he Review explained that all Private Customers / Retail Clients who fell within the remit of the FCA had the same rights and were owed the same obligations by the Banks, and the FCA had the same corresponding duty to protect those rights" (SFG §67 **[CB/2/50]**) and that "[t]he Excluded Customers were *prima facie* entitled in all circumstances to the same level of protection by the FSA (and are now *prima facie* entitled to the same level of protection by the FCA) as other Private Customers / Retail Clients (including those deemed to be 'non-sophisticated' and included within the Scheme)" (SFG §92.2 **[CB/2/60]**). These propositions are wrong in a number of respects. (1) The COB/COBS rules give rise to rights and obligations between consumers and firms only in the limited circumstances where they are actionable by the consumer (see §10(1) above). Otherwise, they are regulatory obligations, not private obligations. (2) The FSA owed no duty to the Excluded Customers to protect their "rights". As stated, the exercise of its statutory powers is subject to ordinary public law principles. (3) The apparent suggestion that, in deciding how to exercise its powers, FSMA requires the FSA/FCA to take as its starting point, or to operate a presumption, that ordinarily Private Customers/Retail Clients ranging from individuals and small companies to very substantial private companies (in some cases part of an even larger group) should receive the same degree of regulatory protection is wrong, and conflicts with Parliament's specification of the matters to which the FSA/FCA must have regard in considering what degree of consumer protection may be appropriate (see §12 above).

THE IRHP REDRESS SCHEME, THE SOPHISTICATION TEST AND THE SWIFT REVIEW

16. When interest rates fell to historically low rates in the wake of the financial crisis, many IRHPs in effect locked customers into paying interest on their loans above market rates, and liable to pay very significant "break costs" if they wished to terminate the product before its term had expired. Small businesses in particular were suffering financial

distress as a result. The FSA had not, however, conducted formal investigations to establish the validity of complaints of mis-selling, still less the scale of it in the retail banking sector. Accordingly, there was a particular impetus in the summer of 2012 to take steps which would provide the quickest possible form of practical benefit to the widest number of affected customers. That constitutes the essential backdrop to the particular focus of the FSA in June 2012 on encouraging the Banks to agree to participate in a voluntary redress scheme in relation to IRHPs, rather than engage in lengthy and uncertain statutory regulatory processes. See: W/S Steward, §§28-31 **[CB/19/931-932]**; Swift Report, Ch 3 **[CB/10/352-382]**.

17. The APPG's account of the negotiations at **CSkel** §12 overlooks some important context. The FSA's focus on the impact of mis-selling on less sophisticated customers in particular can be traced back to the early stages of the formulation of its policy, prior to the commencement of the discussions with the four first-tier Banks on 9 June 2012. By 19 May 2012, the FCA was contemplating the possibility of seeking voluntary redress for all structured collars and reviews of other IRHPs limited to "sales to more vulnerable categories of consumers such as schools and charities" (Swift Report, **[CB/10/371]** at §§35-37). The first draft of the Initial Agreement that the FSA sent to the Banks on 25 June 2012 identified "customer sophistication" as a factor that could contribute to poor outcomes for customers (**[CB/10/699]**). Nevertheless, the FSA in that draft sought to make the Reviews available to all Private Customer/Retail Clients. However, as Mr Swift found, three of the four first-tier Banks proposed that the Sophistication Test (as then formulated) apply to all IRHPs **[CB/10/396** at §69**]**, and there was concern within the FSA that at least two of the first-tier Banks (HSBC and RBS) might not agree to the voluntary agreement (**[CB/10/399** at §74**]**). It was against that background that the FSA, following a meeting of its Conduct Business Unit Supervision Committee on 26 June 2012, and discussions within the FSA that evening and on the morning 27 June 2012, agreed to apply the sophistication criteria to all IRHPs within the Reviews [**CB/10/396-397**].

18. However, the FSA obtained significant concessions from the Banks in relation to the approach to the conduct of the Reviews in respect of eligible complaints. In particular, the Scheme involved: (i) disregard of limitation; (ii) in effect an irrebuttable presumption that all Category A IRHPs (structured collars) had been mis-sold; (iii) the application of sales standards going beyond the less-specific COB/COBS rules, despite

considerable opposition from the Banks **[CB/10/297]**; (iv) detailed presumptions to be applied for the purposes of determining redress (e.g. the rebuttable presumption that a customer would not have purchased a product with break costs greater than 7.5% of the notional value of the IRHP in a pessimistic but plausible interest rate scenario **[CB/10/284]**); and (v) an independent oversight function – at the expense of the Banks – through the role of the skilled persons appointed under FSMA s.166. Two elements of the Scheme benefited all Private Customers/Retail Clients: the Banks agreed to stop marketing structured collars, and each Bank's CEO undertook that all complainants would be treated fairly **[CB/10/712]**, supported by obligations in the Agreement that the Bank notify Excluded Customers of their right to complain (see clauses 3.2 and 3.8.1 **[CB/10/717-718]**). The Banks incurred costs of c. £0.7bn operating the Scheme **[CB/8/223]**, §4.26.

19. Ultimately the present claim concerns the Excluded Customers by reference to the final form of the Scheme, such that it is not necessary to focus on the detailed discussion of the original formulation of the Sophistication Test and its reconsideration following a pilot period. The Sophistication Test as implemented following the Supplemental Agreement in January 2013 is to be summarised as a matter of common ground in the List of Issues and is not repeated here. All of the thresholds and tests used in the Sophistication Test were adopted by the FSA in negotiations at the time as imperfect, but acceptable, proxies for sophistication (i.e. a customer's ability to understand the risks of IRHPs, including to obtain advice). Indeed, one of the particular concerns the FSA had in the light of the pilot scheme, which included a review by the FSA of 173 sales to non-sophisticated customers, and a further 133 sales to check the application of the Sophistication Test, was that the test was including and excluding the wrong sorts of customers, such that farms, care homes and bed and breakfast customers were being caught by the original form of the test (often because of the use of the number of employees as a criterion), but that special purpose vehicles created by large corporate groups to hold assets were not: see, e.g., the Swift Report **[CB/10/444]**, §80 and the FSA's pilot findings **[SB/70/526, 533-534]**.

20. Mr Swift KC provided drafts of his Report during the course of 2021, to which the FCA made representations, e.g. **[CB/11/765]**.[3] The FCA's representations were carefully

[3] Oddly, **CSkel** §13 characterises the ordinary process of making representations in response to a draft as the FCA succeeding in "watering down" the findings, rather than Mr Swift recognising that the representations made had force and reaching the independent view that he should accept them.

developed by the FCA, with the involvement of the executive committee (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: W/S Steward, §§64-67, 93-123 **[CB/19/951-957]**. Those representations set out the FCA's understanding (in 2021) of the FSA's reasons in 2012/2013 for responding to the mis-selling of IRHPs in the way that it did, and its view that the Sophistication Test was appropriate.[4] Mr Swift did not take issue with the facts set out in those representations, and they form part of the materials on which the rationality of the Decision is to be assessed. The substance of the Report was effectively finalised by the summer of 2021, with the final Report document provided on 26 November 2021: W/S Steward, §§61-125 **[CB/19/941-958]**.

THE DECISION

21. The Decision was taken by the Board on 30 September 2021 (not in March 2021, per **CSkel** §26.7). It concluded that "the reasons not to seek to compel redress from the banks for sophisticated customers outweighed the reasons in their favour", such that the FCA "should not seek to use its s55L or s384 powers" to compel the Banks to provide redress to the Excluded Customers: Minutes, §§5.5-5.6 **[CB/7/209]**. That Decision was made by reference to a detailed Board Paper of the same date **[CB/8/215].** It was the culmination of careful consideration given by the FCA over several months, including the FCA's Executive Committee and the Board Sub-Committee. The internal consideration, and the various levels of governance and decision-making within the FCA which contributed to consideration of this question, leading up to the Decision are set out in detail in W/S Geale, §§9-47 **[CB/20/963-974]**.

22. The Board Paper identified the following matters among others.
    (1) Some 34% of IRHP sales had been excluded from the Scheme on the basis of the Sophistication Test, resulting in criticism and complaints from those excluded (and others on their behalf) on the basis that doing so was unfair, with a sense of injustice and significant loss: §§1.3-1.4. There would have been mis-selling to the Excluded

[4] **CSkel** §26.6 makes an irrelevant reference to a document exhibited by Mr Steward in which a junior member of the project team expressed the view in February 2021 (i.e. before the FCA had received the first draft of the Swift Report, at an early stage of considering its position in relation to criticisms that it was anticipating that Mr Swift might make) that there should not have been a sophistication test. That was not the settled view of the FCA team that assisted the Board or of the Board.

Customers to an unknown degree, but potentially 11 to 33%, with total losses anywhere between £0.2bn and £3.2bn, but reduced by some £0.15bn by litigation settlements and complaint outcomes: §§1.5-1.7.

(2) Attention was drawn to Annex 3, which reported on the FCA's analysis of the information it had obtained about the complaint outcomes for the Excluded Customers. Only 12 to 15% of the Excluded Customers had exercised their right to make a complaint to the relevant Bank. Though the uphold rate varied significant between Banks, it averaged 11% overall. Although the Banks succeeded in 12 out of the 14 cases that went to judgment, 63% of the 193 legal claims brought by Excluded Customers resulted in payments being made by the relevant Bank, mostly by way of settlement.[5] None of the Banks' decisions on a customer complaint had been overturned by the FOS. The FCA had no clear evidence of unfair complaints handling (only prima facie very low uphold rates of some Banks which might be explicable), but it could not state definitively that all (or a majority) of complaints handled outside the Scheme were handled fairly on the information available. There were pros and cons to undertaking further work in this context **[CB/8/235-242]**.

(3) Although the Swift Report does not address whether action should now be taken, its findings that the Sophistication Test was wrong would likely prompt calls to do so: §2.1.

(4) The FCA could have available to it the powers under s.384 and/or s.55L. Consideration should be given to the consumer protection objective, and whether use of a power was required to secure an appropriate degree of consumer protection (s.1C FSMA). The conclusion on this depended on whether the FCA considered that the FSA had, in 2012/13, failed to provide an adequate degree of protection in formulating the Scheme. The FCA had insufficient evidence at this point to prove loss in relation to the Excluded Customers: §§3.1-3.6.

(5) The paper identified five material considerations, the first four of which weighed against taking action and were addressed in order of importance, and the fifth weighed in favour of taking action: §§4.2-4.3.

(6) First, the FCA's considered view, as set out in the representations made to Mr Swift, was that it did not agree with Mr Swift that it had been wrong to apply the

[5] The suggestion at **CSkel** §27.3 that there is no evidence that Excluded Customers could pursue legal claims and complaints is wrong.

Sophistication Test to the IRHP Reviews. In the context of negotiations, and one in which the FSA held a relatively weak hand without sufficient evidence of mis-selling but needed swift action to provide redress to the most vulnerable customers in real financial difficulty, differentiating between customers by reference to differing degrees of risk and of experience and expertise (as well as the statutory principle of consumer responsibility for their own actions), did reasonably provide an appropriate degree of protection, notwithstanding that any criteria would operate as a blunt tool. The FCA could not surrender its own judgement on this issue to that of a non-statutory review: §§4.4-4.14.

(7) The Board's attention was directed to Annex 1 which summarised the Review's adverse findings on the Scheme's scope and to Annex 2, which summarised the position the FCA had advanced in its representations to Mr Swift.[6] That emphasised that there was no evidence that the Banks would have agreed to a wider scheme, or that statutory powers could have been used to create one, or that a better outcome would have been achieved. Taking the "bird in the hand" was a reasonable decision, and consistent with the refusal of permission in *Jenkinson*. It was agreed that differentiating within a consumer category should be reasoned, evidence-based and objectively justified, but that test was met in relation to the Scheme and the Swift Report appeared to pose too high a threshold **[CB/8/234]**. This was a reference to Mr Swift's recommendation that: "The FCA should aim to ensure that persons within the same category are treated consistently: where rules exist for the protection of all within a defined class, regulatory intervention should not be restricted to benefit only a subset of that class unless there is an objective justification founded on strong evidence and tested through consultation" **[CB/10/642]** and that this meant that different treatment of customers in the same category was exceptional **[CB/10/595, §23]**.[7]

(8) Secondly, the Banks would have a strong argument that they could reasonably regard the matter of redress for IRHP mis-selling as closed. The Banks were likely to have a legitimate expectation to that effect, and in any event the FCA could be said to have adopted a policy in this context from which it could not depart without good reason. The matters which indicated a legitimate expectation would equally weigh heavily against there being a good reason now to depart from the policy:

[6] The representations themselves of 30 March 2021 are at [**CB/11/765**]. See in particular Annex 1 thereto.
[7] As set out above, §14, if by this Mr Swift intended to convey a rule of general application it is not consistent with the scope of the FCA's statutory discretion.

§§4.15-4.16. There would need to be an overriding public interest and compelling circumstances to act now: §§4.37-4.39. In particular:

(a) The terms of the Agreements on balance probably prevented the FCA from taking further action now: §§4.18-4.26.

(b) In any event, the FCA's approach to the formulation of the Scheme and its subsequent conduct indicated a clear and conscious approach to secure redress only for customers who were eligible to participate in the Reviews, and that the scope of the redress scheme was settled: §§4.27-4.28.

(c) There had been a considerable passage of time. All mis-selling claims and complaints would now be well outside the applicable limitation periods (which had expired many years previously), such that the Banks were entitled to assume finality. There would now be considerable evidential difficulties in establishing the factual position on mis-selling in individual cases on both sides (which had already been the case within the Scheme and had been addressed by agreed evidential presumptions): §§4.30-4.36.

(9) Thirdly, it would in 2021 be even more difficult and complex than under the Scheme, given the passage of time, to prove mis-selling, for which the FCA has never held the evidence to support formal regulatory action. Further investigation would need realistically to be able to produce results which would justify taking action: §§4.40-4.42.

(10) Fourthly, any formal action would divert extensive FCA resources that would otherwise be focussed on mitigating risk in other areas of the retail market, and from the FCA's work on protecting consumers who for the most part were far less sophisticated than the Excluded Customers, and "who are many more in number and whose purchases are far removed from large loans and derivatives". The latter group was especially vulnerable as a result of the pandemic, and it was not obvious that seeking to take further steps to obtain redress for the Excluded Customers was an appropriate prioritisation: §§4.43-4.45.

(11) On the other hand, fifthly, taking investigatory steps would show the FCA was prepared to act, even after a delay, and that all mis-selling by the banks should be the subject of full reparation. There was a significant potential financial impact on the excluded cohort which had not been redressed and would not otherwise be redressed. Even if likely to fail, there might be justification for engaging in an "heroic failure". However, the FCA was not obliged to secure protection for all customers: §§4.46-4.48, 9.3.

(12) The paper recommended that the FCA's powers should not be used, and no further inquiries commenced, and that, on balance, any decision on the issue be announced alongside the publication of the Report: §§6.1, 7.2-7.3. The ExCo and Board Sub-Committee views to similar effect were also summarised: §§10.1-10.5.

23. There was, accordingly, detailed information and analysis before the Board, which it carefully considered and agreed with unanimously: W/S R Lloyd, §§56-60 **[CB/21/996-997]**. The FCA's Response to the Review set out the position of the Board, explaining that, "most important[ly]", the FCA did not agree with Mr Swift that the Sophistication Test was wrong or had not provided appropriate protection to all customers, including swift and certain redress to the most vulnerable: §4.3 **[CB/9/267]**. It went on, "in any event", to say that "it would not now be appropriate or proportionate for us to take further action now", given that the Scheme was voluntary and set out the "entirety of the steps it required the banks to take", such that seeking to extend the Scheme now would make it harder to agree voluntary schemes in the future: §4.4. The Response was produced by senior officials of the FCA and approved by the Chair (Mr Randall): W/S Geale, §52 **[CB/20/976]**. It reflected the thinking of the Board: e.g. W/S R Lloyd, §59 **[CB/21/997]**.

GROUND 1: THE RATIONALITY CHALLENGE

24. In the light of the detailed account of the Decision and the supporting documentation, and the wider regulatory and factual context, the FCA submits that the rationality of the FCA's Decision not to take further steps to seek redress for the Excluded Customers ought to be apparent. The FCA relies upon those matters when making the following summary points in response to Ground 1.

25. First, it is well-established both that rationality is a high standard, and that the courts will be particularly respectful of discretionary decision-making exercised by an expert regulator. As to the former, the law remains as set out by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410G that an irrational decision is one which is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".

26. The wide discretion afforded to the FCA under FSMA has already been mentioned (§§13-15 above). Moreover, the Decision not to proceed further with the use of the FCA's statutory powers for the Excluded Customers in 2021 was one not to carry out the necessary preliminary investigation into the scale of mis-selling to that cohort. A decision by a regulator not to investigate a matter will be capable of being impugned as irrational only in "highly exceptional" cases, for good constitutional and institutional reasons: *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756 at §§30-31 *per* Lord Bingham. **CSkel** pays no regard to these principles.

27. Secondly, the recommendations and reasoning of the Swift Report are accepted to be rationally relevant considerations to the Decision. However, there is no dispute that the FCA had regard to the Swift Report: the Decision arose precisely because of its terms. The FCA is not, however, fettered to accept the entirety of the Swift Report and may depart from it so long as it is rational to do so: no higher threshold applies. The ability to depart from a prior finding or assessment by a different body was summarised by Lord Neuberger in *R (Evans) v HM Attorney General* [2015] UKSC 21, [2015] AC 1787 at §66. The test is a contextual one reflecting the relative roles and advantages the different bodies have, with particular weight attributed to the allocation of respective functions within the applicable statutory scheme. But this case is not like *Evans*, or the cases analysed within it, where an adjudicative body has carried out a statutory function to make findings of fact and assessments, and a different public body is exercising statutory powers under the same scheme in considering how to respond.

28. In the present context, the only entity exercising statutory functions is the FCA: that is who Parliament has determined should wield the relevant powers and which has the relevant expertise. Even where legislation provides a power to seek advice from a different, experienced, body the statutory decision-maker is entitled to reject a rational recommendation on the basis of its own, rational, assessment, and it is not necessary to identify a deficiency in the advice: *Secretary of State for Justice v Sneddon* [2024] EWCA Civ 1258 at §§24, 29-31 *per* Lady Carr CJ. The position is even stronger where the advice is provided on a non-statutory basis, as the Swift Report was, and where that advice was not directly concerned with the issue before the decision-maker. The ordinary rationality test applies, and not any artificially higher one. In so far as *R (A) v Newham LBC* [2008] EWHC 2640 (Admin), [2009] 1 FCR 545 may suggest otherwise,

it does not reflect the law established by the subsequent authorities, and the approach advanced in **CSkel**, §§26.1-26.3 is wrong in law.

29. Thirdly, the FCA recognises that because the Decision is in part predicated on a view that the adoption of the Sophistication Test in 2012-13 for the Scheme provided an appropriate degree of protection for consumers in the circumstances then pertaining, the Court is required to some degree to consider the circumstances of 2012-13, as the FCA understood them to be in 2021 when it made the Decision. However, the Court will be astute not to engage in an exercise of reviewing the FSA's decision-making in 2012-13. The FCA did not seek to re-conduct that exercise for the purpose of reaching the Decision.[8] The FCA accepts the essential facts as to what happened in 2012/2013 set out in the Swift Report, supplemented by those set out in the FCA's representations to Mr Swift as to the FSA's objectives and rationale for acting as it did in 2012/2013 **[CB/11/765]**. There is no justification for the incomplete exercise carried out at **CSkel**, §12, criticising the detailed development of the negotiations leading to the Sophistication Test (which is set out in the Swift Report in any event); the complaint ultimately concerns only the final form of the Sophistication Test adopted in January 2013 (which set the scope of the Excluded Customers).

30. Fourthly, rather, the focus is and can only be on the decision-making of the FCA in 2021. To the extent that the Decision involves consideration of the Sophistication Test and the approach to the Excluded Customers, it does so through a 2021 lens. To take a simple example of the distinction, Mr Swift's observation that he had seen no contemporaneous evidence to suggest the FSA analysed or justified the concessions it made in the course of the negotiations with the Banks by reference to the consumer protection objective (§10 **[CB/10/590]**) is irrelevant to the present challenge. The issue is whether the FCA in 2021 had regard to the consumer protection objective in FSMA s.1C when reaching the Decision. It plainly did (e.g. the Board Paper, §3.3 **[CB/8/218]**) and there is no complaint to the contrary.

31. Fifthly, as appears from the Board Paper **[CB/8/215]**, the FCA's Response to the Review **[CB/9/243]**, and its representations to Mr Swift **[CB/11/765b]**, the FCA's disagreement with Mr Swift regarding the appropriateness of the Sophistication Criteria reflects a number of matters on which the FCA was entitled to reach its own view.

[8] See, e.g.: W/S Watts §12 **[CB/24/1025]**.

(1) *The flexibility that FSMA afforded the FSA in 2012/2013 to prioritise consumers that it considered were most at risk of mis-selling.* The Board Paper expressed the FCA's disagreement with Mr Swift that differential treatment of customers within the Private Customer/Retail Client category had to be justified by reference to "strong evidence" and should be regarded as exceptional (see §22(7) above). He considered that all customers within the same category should ordinarily receive the same degree of regulatory protection from the FCA **[CB/10/588** at §§4-5**] [CB/10/596** at §23**] [CB/10/643**, Recommendation A2**]**. The FCA's decisions must be rational, and the nature and strength of the evidence and inquiries required rationally to support them will depend on the circumstances. Since Mr Swift was expressly not applying the legal standard of rationality in his assessment of the FSA's approach its regulatory intervention in 2012/13 (**[CB/10/566]**, §§2-3), it would not be appropriate seek to characterise this aspect of the FCA's disagreement with Mr Swift as a contention that he acted "unlawfully or unreasonably", as implied in **CSkel** §26.1. However, the FCA considers that Mr Swift's opinion as to how the FCA should approach regulatory interventions, and the varying vulnerability of affected customers, does not reflect the breadth of the discretion it possesses to target that intervention where it considers it is most needed (see §§13-14 above).

(2) *Regulatory policy.* In any event, Mr Swift recognised that the FSA's decision to prioritise the less sophisticated customers was a matter of regulatory policy **[CB/10/577** at §27**]**. As such, the appropriateness of the FSA's decision (in 2012/2013) was quintessentially a question on which the FCA, as expert regulator, was entitled to reach its own view when making the Decision in 2021.

(3) *Quantitative criteria as a proxy for sophistication.* In questioning the validity and rationale for the quantitative eligibility criteria, and in characterising them as "arbitrary", Mr Swift made no reference to the fact that quantitative criteria are well-established in the financial services regulatory scheme as a proxy for sophistication (i.e. a consumer's ability to understand the risks of a financial product, including by taking advice). The FCA drew his attention to this in its representations **[CB/11/778-779]**, but he did not address it in his report. Mr Steward's unchallenged evidence at §§84-90 **[CB/19/948-950]** is that a variety of pieces of financial services legislation, both domestic and EU, use company size criteria as a proxy for sophistication and the need for protection, including the FOS scheme. As a matter of commonsense, the Excluded Customers cohort

is more likely to have a greater proportion of such cases than those within the Scheme because of the greater resources available to them (e.g. the unsuccessful claimants *Green & Rowley v Royal Bank of Scotland* [2013] EWCA Civ 1197, [2014] Bus LR 168 at §7, an IRHP mis-selling claim against RBS, who were found to be intelligent and experienced property developers who had no difficulty in understanding the product, and would have had access to specialist legal and financial advice in any event). The FCA is entitled to take that view, based on its regulatory experience and commonsense, without obtaining "evidence that they [the criteria] did in fact distinguish between customers based on the likelihood that they were mis-sold IRHPs" (cf **CSkel** §27.1). Mr Swift's criticisms of the paucity of evidence that the criteria were properly tested by way of impact assessments by reference to the consumer protection objective (see Annex below, §§4-5) does not undermine their rationality as broad markers of the likelihood that customers would have access to the expertise and skills to understand the risks associated with IRHPs. Further, notwithstanding Mr Swift's comments on the absence of contemporaneous evidence, it is clear from his narration of the facts that the consumer protection objective was ingrained in the FSA's entire approach to establishing the IRHP scheme: see for example the references to the contemporary documents recording that the FSA's objective of achieving fair and reasonable outcomes for consumers **[CB/10/459** at §116**]** and to its view that the final scheme had achieved that **[CB/10/472** at §140**]**.

(4) *The relevance of the subjective test to the FSA's objectives.* Mr Swift's criticisms of the subjective test (see Annex below, §7) appear to assume that the FSA's objective in 2012 was to provide redress for all instances of mis-selling. But in fact, it was a relevant criterion given the FSA's objective of providing redress for those small businesses that were unlikely to have had the expertise and skills needed to understand the risks associated with IRHP products.

(5) *The criticisms of the FSA's approach to the negotiations.* Mr Swift considers that the FSA should have taken the potential agreement "off the table" if the Banks were not prepared to include all Private Customers/Retail Clients within the Reviews, even if that meant putting at risk or even losing entirely the benefits that the FSA had achieved for the less sophisticated customers that it

was seeking to protect **[CB/10/595** at §23**]**.[9] The FCA made the point in its representations that if, having taken the agreement off the table, the FSA had been unable to achieve a satisfactory result by other means (which the FCA considered entirely possible because of the uncertainly regarding the availability of statutory powers and the extent of the redress that could be used if they were exercised), it would have had to return to the table with an even weaker negotiating position **[CB/11/772** at §3.5(e)**]**. Mr Swift does not address this point in his report.

(6) Standing back, the FCA's respectful disagreement with Mr Swift in relation to the scope of the Review reflects competing views as to how the FSA should have managed its regulatory priorities in 2012/2013, the utility of the criteria for identifying customers who were less likely to have understood the risks of IRHPs, and whether the FSA adopted appropriate negotiation tactics. These are all matters on which, on a correct understanding of the FSMA scheme, there is room for reasonable disagreement on the FCA's part with Mr Swift's opinion.

32. Sixthly, any scheme whose scope is not applied on an individual case-by-case assessment, and thus which applies a system of rules to govern access, will necessarily result in some hard cases which fall on either side of the line.[10] Even in the more intrusive context of proportionality assessments, the Supreme Court has emphasised that use of rules and pre-determined categories means that: "there will inevitably be hard cases which would be regarded as disproportionate in a system based on case-by-case examination". See *R (P, G & W) v Secretary of State for Justice* [2019] UKSC 3, [2020] AC 185 at §50 *per* Lord Sumption. This applies with even greater force in a rationality challenge.

33. Seventhly, contrary to **CSkel** §26.5, there is no conflict between the FCA's acceptance that its regulatory judgements must be objectively justifiable and evidence-based, and its acknowledgement in §35(c)(i) of the DGD **[CB/5/166]** – in a passage that the APPG fails to accurately represent at **CSkel** §26.5.2 – that "although, after the passage of time, the FCA does not have evidence that explains why all the changes to the Sophistication

[9] See also the first draft of the report which appears to advocate a hardline approach regardless of the consequences for the less sophisticated customers whom the FSA was seeking to protect **[SB/86/1081** at §28**]**.

[10] Although the FCA cannot comment on the particular facts, it may well be that the case set out in W/S M Lloyd **[CB/22/1003]** is such an instance. That is a matter of regret, but it does not undermine the rationality of the Decision, or indeed of the original Scheme.

Test were made in the course of the negotiations … it believes that all such changes were within the range of reasonable responses to perceived customer 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 [which summarises the FSA's reasons for acting as it did in 2012/2013]". The FCA's understanding of the FSA's regulatory objectives and priorities in 2012/2013, of the context in which it acted (including its weak bargaining position, lack of evidence and uncertainty over the availability of its statutory powers), and of the recognised utility of size-based criteria as markers of sophistication in the financial services industry, are all evidence on which it reached this judgement.

34. Eighthly, the complaints advanced by the APPG against the rationality of the Decision that it was not appropriate to pursue further redress options in 2021 pay no regard to the legal and practical realities of seeking to compel the Banks to provide further redress in the present circumstances. The Board Paper did not definitively conclude, and the FCA was not required to decide, that there were insuperable legal and practical barriers to the exercise of statutory powers in 2021. Rather, the FCA had regard, as it was required to do, to the legal and practical obstacles that which were likely to undermine the validity and effectiveness of any use of regulatory power in 2021. The Board Paper recognised that legal objections to the FCA now taking action might arise by reference to a claimed legitimate expectation, or the duty to follow a policy absent good reason, or compliance with the Convention right to property, or bare irrationality, as well as the difficulties of obtaining evidence to support the exercise of statutory powers. All of these fell to be considered in a context where the Scheme had been agreed by reference to a particular scope, had been implemented and had been complied with by the Banks (at huge cost to the Banks and huge benefit to customers), without any prior indication by the FSA/FCA that it would seek to exercise its powers for those not covered by the Scheme.

35. Finally, the matters now raised in **CSkel**, §§31.1-31.3, cast no doubt on the rationality of the Decision. The Excluded Customers could have no legitimate expectation that the FCA would treat itself as bound by any external review; no representation to that effect is cited (because there is none) and given that Swift Review was not asked and did not address the present issue, any such expectation would be irrelevant in any event. That is also the answer to the assertion that the resources expended on the Swift Report "will

be seen as having been wasted"; the FCA has obtained much of value from the Report, but its purpose was not to recommend further redress now and it rightly did not do so. The FCA agrees that the redress framework should not hamper a stable and predictable trading environment, lest that undermine its statutory objectives; but that is simply another way of putting the concerns relied on by the FCA in the Decision.

GROUND 2: THE FAIRNESS CHALLENGE

36. The pleaded focus of Ground 2 in the SFG is a consultation challenge. Where Parliament intended to impose on the FCA a duty to consult, it has made provision for that effect in FSMA: see, in particular, the general duty in s.1M and, e.g., ss.137J, 137K, 138I, 187B and 330. The APPG does not suggest that any statutory duty to consult was engaged in the context of the Decision. In the absence of a statutory duty to consult, or any legitimate expectation of consultation arising from promise or practice, such a duty will only be imposed at common law where it would be conspicuously unfair not to do so: *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin), [2015] 3 All ER 261, §98(2), approved in *R (MP) v Secretary of State for Health and Social Care* [2020] EWCA Civ 163, [2021] PTSR 1122, §36 *per* Newey LJ. The **CSkel** does not engage with these directly relevant authorities, and instead relies, at §§33-34, on authorities concerning the *Tameside* duty of inquiry, which forms no part of the pleaded Ground 2 **[CB/3/122-124]**. The *Tameside* duty is also not an aspect of procedural fairness, which is the allegation of Ground 2: see *Plantagenet Alliance* at §100 for the relevant principles.[11]

37. There was no conspicuous unfairness in the FCA not carrying out a consultation exercise prior to reaching the Decision. The FCA was acutely aware that those in the excluded cohort were dissatisfied with the scope of the Scheme, including customers who had suffered material financial loss, and considered that the FCA should act in their cases; the Board Paper noted all of this directly, and it was a large part of the premise for the Swift Review in any event. The Board Paper drew attention to a reasonable worst-case scenario as to the extent of the loss suffered by the Excluded Customers (up to some £3bn). It had identified, in Annex 3 to the Board Paper, evidence (and gaps in the evidence, including as to the scale of mis-selling) of the extent to which the excluded cohort had been able to recover redress through the complaints process, litigation and/or

[11] *R (ASK) v Secretary of State for the Home Department* [2019] EWCA Civ 1239, §§63-63 is not an authority to the contrary, as the contrast with §65 makes clear.

the FOS (as summarised in §22(2) above). The FCA was plainly aware of everything listed in **CSkel**, §36, because they all arise from the Swift Report or the FCA's own decision-making. The Swift Report recorded evidence it had been provided of dissatisfaction on the part of customers and of the APPG itself: e.g. **[CB/10/287]**, §7 and **[CB/10/562-565]**. The FCA specifically considered in June 2021 whether it should consult on the issue of taking further steps on redress, but formed the view that it was not necessary since it was already well aware of the nature of the issue, and that doing so could provoke market speculation and uncertainty: see the internal FCA email exchange on 10 June 2021 [**CB/117/1392**]; the Board Paper [**CB/8/229** at §7.2iii)]; and W/S Geale, §15 **[CB/20/964]**. The Board was of the same view: W/S R Lloyd, §§63-66 **[CB/21/998]**. There was, in the circumstances, no unfairness. The same matters render it impossible to assert that it was irrational for the FCA not to seek more information before reaching the Decision.

RELIEF

38. Section 31(2A) of the Senior Courts Act 1981 requires the Court to refuse to grant relief if it considers it highly likely that the outcome for the APPG would not have been substantially different had the conduct complained of not occurred, unless the court considers that it is appropriate to disregard this requirement for reasons of exceptional public interest (s.31(2B), in which case the court must certify that the condition has been satisfied (s.31(2C). This issue is developed in detail in the DGD, §§48-51 [**CB/5/177-183]**. In short, although the Board did not itself decide that, if the FCA was unable to disagree with the Swift Report's view of the Sophistication Test, it would nonetheless have declined to take further action, it is at least highly likely that that would be the outcome on any remittal given the weight of the legal and practical obstacles in the way of the FCA now exercising statutory powers to seek to compel redress on behalf of the Excluded Customers. The FCA's Response to the Review properly conveyed that concern at §4.4 **[CB/9/267]**.

39. The legal obstacles have already been addressed above as one factor that the Board took into account (§34). The Agreements comprising the Scheme were enforceable contracts between the FSA and each Bank (as Mr Swift found (**[CB/10/647]** at §§13-14), which have been complied with by the Banks. Clause 6 **[CB/10/768]** probably preserved the FSA's right to act so long as it was consistent with the bargain the Scheme comprised and its understanding of the concerns which led it to agree the Scheme (recital A, clause

8);[12] the FCA's subsequently regretting the Sophistication Test, and the bargain it struck, because of the criticisms made of it by the Swift Report would not be a material change of circumstances.[13] Whilst the APPG criticise the FCA for reformulating its case as to the contractual effect of the Agreement, it notably refrains from disclosing what consideration it says that the FCA provided in exchange for the Banks' respective promises.

40. In any event, whether or not the FCA was contractually bound is less significant than the expectation and/or policy the Agreements set out, reaffirmed by the FCA in its dealings with all interested parties in the intervening period, and the context they provide for any later decision to act inconsistently with their terms, which must be rational and proportionate. The Agreements, and the FCA's subsequent dealings with the Banks, make it highly unlikely that the FCA would or could act inconsistently with them, absent the most compelling circumstances, which are not present. The Board Paper and the FCA's Response to the Review were right to emphasise that given the considerable difficulties posed by the passage of time, the changes of position on the part of the Banks and the absence of any direct recommendation from the Swift Report, the FCA would not have a sufficiently compelling reason to justify regulatory action and to defend an appeal against that decision.

41. The Court will therefore be invited to dismiss the claim, and in any event to refuse relief, and to award the FCA its costs.

RICHARD COLEMAN KC
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3 December 2024

[12] The Agreements are to be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean: see *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 at §§14-30 (*per* Lord Clarke), *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at §§14-23 (*per* Lord Neuberger) and §§76-77 (*per* Lord Hodge) and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at §§10-13 (*per* Lord Hodge). This involves a consideration of the words used in their documentary, factual and commercial (or regulatory) context. The context includes the object of the contract, objectively ascertained: *Prenn v Simmonds* [1971] 1 WLR 1381 at 1385, *per* Lord Wilberforce. Where there are two possible constructions, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business (or regulatory) common sense (see *Rainy Sky* at §§21, 28 and 30; *Arnold* at §76; *Wood* at §§10-11).

[13] If clause 6 had some different meaning, it is realistic that the Agreements contained an implied term that the FCA would not seek to use its statutory powers in respect of IRHP mis-selling outside of the scope of the Agreement, as a matter of business efficacy and/or obviousness: *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742.

Annex to the FCA's skeleton argument: Mr Swift's criticisms of the Sophistication Test

(1) Mr Swift considered that, in applying the Sophistication Test, the FSA avoided, without well-evidenced objective justification, its wider responsibilities to secure redress for all Private Customers/Retail Clients who had been mis-sold IRHPs, including those who met the Sophistication Test (i.e. the Excluded Customers"), to whom the Banks owed the same regulatory obligations they owed to the eligible customers (§1 **[CB/10/587]**).

(2) In Mr Swift's view, all Private Customers/Retail Clients had rights which the FSA had a corresponding duty to protect, and were entitled to equal regulatory protection; there was no proper basis for differential treatment of different customers within that category (§4 **[CB/10/588]**). Where the FCA considers that there is an objective justification for limiting the scope of redress only to certain persons within a defined category, there should be proper consultation with stakeholders before taking any such action, which had not happened in relation to the exclusion of Sophisticated Customers (§6 **[CB/10/588]**).

(3) To the extent that the FSA's objective was to secure redress only for customers other than those who knew or should have known about the risks of IRHPs, it failed to find a mechanism appropriate to that objective: it relied on a complex mix of quantitative criteria never properly tested for their suitability for that task, as well as an alternative qualitative test (§1 **[CB/10/587]**).

(4) There was no clear evidence as to how the Companies Act size test was identified as appropriate and no clear evidence of any impact analysis having been undertaken (save for a very basic exercise in relation to the revisions to the Scheme) (§17 **[CB/10/593]**).

(5) The £10 million value test was an arbitrary figure, with minimal underpinning or impact assessment, albeit it significantly higher than the threshold suggested by the Banks (§32 [CB/10/600]).

(6) It was never clear, nor obvious, why customers who fell on the wrong side of the quantitative criteria should be excluded from the Scheme (§§16, 41 [CB/10/592, 603]).

(7) Nor was it inappropriate to exclude customers on the basis that they had sufficient knowledge and experience to understand the IRHP that they purchased (the subjective test), as that did not relieve the Banks of their obligations under the rules (§18 [CB/10/593]).

(8) Mr Swift had seen no contemporaneous evidence to suggest the FSA analysed or justified the concessions it made in the course of the negotiations with the Banks by reference to the consumer protection objective, (§10 [CB/10/590]).

(9) The FSA fell short in failing sufficiently to resist the Banks' efforts to raise the eligibility threshold, and to agreeing significant additional restrictions on eligibility without proper justification, consultation, analysis or safeguards (§40 [CB/10/602]).

(10) The FSA appears to have proceeded on an impressionistic view that certain kinds of Private Customers/Retail Clients were deserving of regulatory protection, whereas others were not, without ever expressly articulating or testing that approach (§41 [CB/10/603]). On that basis, it adopted and varied the eligibility criteria, often at the instigation of the Banks, with only a vague understanding of the real-world impact these changes would have on businesses that had been mis-sold IRHPs (§41 [CB/10/603]).