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8 March 2022

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Dear Dentons

Review of John Swift QC and the Financial Conduct Authority's Response

1. We refer to your letter dated 4 March 2022 (the "**4 March Letter**"), our letter dated 25 February 2022 (the "**25 February Letter**"), and your letter dated 22 February 2022 (the "**22 February Letter**"). Defined terms in this letter take the meaning given to them in our client's Letter of Claim dated 8 February 2022, unless otherwise stated. Any issues, points, or matters in issue as a result of the 4 March Letter, which are not addressed below, are not admitted by our client.

Limitation

2. We reject the assertion that our client has not complied with the requirement to initiate judicial review proceedings promptly, and the suggestion that the limitation period for any claim may have commenced in September 2021 is not credible. If your argument were to be accepted, any public authority could avoid any application for judicial review simply by taking a decision and then waiting for over three months until publicising it. Any argument that our client's claim for judicial review would be time-barred is therefore hopeless. Indeed, we note that it was not raised in the 22 February Letter.

Decisions in 2012/2013

3. The 4 March Letter ignores the central point. The Decision was made in 2021 and it included an assessment of whether or not to exercise the statutory powers available to the FCA to procure further redress in light of the findings and conclusions of the Review. The FCA describes this assessment in the documents published together with the Decision, and in more detail the 22 February Letter (albeit without providing disclosable documents). The FCA elected not to exercise its statutory powers and our client claim that the FCA acted unlawfully and irrationally in making that decision.

4. It is of note that the 4 March Letter fails again to engage with the substance of our client's claims, and instead repeats attempts to obscure the nature of our client's challenge and elide events in

2012/2013 with the Decision. The FCA appears reticent to engage with the subject matter and we infer that it has no compelling response to the primary allegation that it acted unlawfully and irrationally when making the Decision.

Alleged Inaccuracies

The Regulatory Landscape

5. It is perfectly accurate to say that the regulatory landscape remains materially unchanged when comparing 2012/2013 and now. The only example upon which you assert that to be inaccurate is in reference to section 55L of the Financial Services and Markets Act 2000 ("**FSMA**"), which did not come into force until April 2013.

6. However, as we hope the FCA is aware, section 55L FSMA replaced what was section 45 FSMA, and the provisions (in particular for the purpose of the points made by our client, section 55L(2)(c) and (3), and 45(1)(c) and (2)) are materially the same, in that the FCA had the power, of its own volition, to vary or cancel the permissions of a firm if it was "*desirable to…in order to advance one or more of the FCA's operational objectives*".[1] You state that Section 55L is an example that our statement is inaccurate – we assume that any other example you might give would relate to new legislation replacing old, and thus would be similarly rebutted by tracking through the changes to the relevant legislation, as we did at paragraphs 16 to 46 of the Letter of Claim. What is important in respect of the section 55L example that you provide is that section 55L *was* in force when the Decision was made and the use of it ought to have been considered.

7. More generally, we note that you have not suggested that the legislative objectives, remit or obligations of the FCA are materially different now from the legislative framework that applied when the FSA established the Scheme in 2012/13. For these reasons, the conclusions of the Review as to the lawfulness of the Scheme, and in particular the decision to exclude certain customers, have equal application to the Decision.

The IRHP Notional Criterion

8. As to HM Treasury's introduction of the aggregate swap notional limit as a further criterion within the Sophistication Test (supposedly in order to simplify it), we refer to paragraph 61 of the Letter of Claim and paragraph 121 on page 189 of the Review.

Evidence Available to the FCA now and in 2012/13

9. As to the evidence available to the FCA now and in 2012/2013, the FCA's position rests entirely on the assumption that mis-selling rates to so-called Sophisticated Customers were different to the mis-selling rates revealed in the Scheme (the "**Assumption**").

10. To justify this, the 4 March Letter sets out a series of calculations which have no bearing on what might indicate the mis-selling rates to so-called Sophisticated Customers, including: (i) the proportion of so-called non-sophisticated sales within the entire cohort of customers to whom

[1] https://www.legislation.gov.uk/ukpga/2000/8/section/45/2012-07-20#commentary-c2077898 and https://www.legislation.gov.uk/ukpga/2000/8/section/55L

regulatory protection was owed by the FCA (66%); and (ii) the number of sales in respect of which customers accepted redress (70%). Neither sheds any light whatsoever on whether products were sold in a compliant way and whether loss was suffered on sales to so-called Sophisticated Customers. However, at paragraph 2.9 of the 4 March Letter, these numbers appear to be the basis upon which an enormous leap is made, with no connection to the facts or evidence, by justifying, as a "*reasonable estimate*", a mis-selling rate of between 11% and 33%.

11. Even on the FCA's estimate, the number of non-compliant sales so-called Sophisticated Customers was in the thousands. However, in fact, the Review and the FCA's own statistics reveal that: (i) when conducting the Pilot Review, each Bank was required to include 10 so-called Sophisticated Customers in their review population of up to 40[2]; (ii) the mis-selling rate in the Pilot Review was found to be over 90%; (iii) the full statistics of the scheme show that, of the 18,169 sales reviewed, 16,613 (91%) were deemed to be non-compliant sales, and only (11%) were offered no redress (i.e. only 2% of non-complaint sales resulted in no redress).[3]

12. In this light, there can be no justification for the Assumption, and the FCA's estimate as to potential loss suffered by so-called Sophisticated Customers appears to be profoundly insufficient. However, the FCA nonetheless seeks to justify it on the basis of an illogical and unsustainable interpretation of the relevant statistics. Further, the Assumption appears to operate on the basis that the Sophistication Test was effective, i.e. that it successfully siphoned away a greater proportion of compliant sales from the Scheme. The FCA offers no evidence to justify this, and it is entirely self-serving for the FCA to rely on its Sophistication Test being effective, as a means by which to rebut challenges to the test itself.

13. In relation to what is now COBS 14.3.2R(2)(d), this rule required the banks to inform customers of "*any margin requirements or similar obligations, applicable to* [the IRHP in question]". In the case of every IRHP other than interest rate caps, the banks took a line of credit against the customer to account for potential future margin cash-flows under the IRHP, and the banks were obliged to tell the customer of that fact, in accordance with this rule. However, to the APPG's knowledge, there is not a single case where the customer was informed of this margin credit line. That is perhaps unsurprising given that the banks described IRHPs as instruments to reduce risk, but would – in the same breath – have also had to say that they are instruments which require the bank to give *more* credit to the customer.

Documents

14. We do not consider your client has complied with its duty of candour in relation to the Board Paper and the minutes of the July 2021 Board meeting (and by extension the Assumption Documents, given what you say about the relevance of the Board Paper to the FCA's calculations of potential loss). It is not acceptable for your client to simply describe documents that are relevant to proceedings, and upon which it seeks to rely, to justify the Decision.

15. We refer you to *National Association of Health Stores and another v Department of Heath [2005] EWCA Civ 154*, in which the Court of Appeal ruled, at [46] that "*it seems…entirely inconsistent to tender and rely on a secondary account instead [of the document itself]. The courts would not*

[2] Page 158 of the Review
[3] https://www.fca.org.uk/publication/data/aggregate-progress-final.pdf

allow a private litigant to do this, and in a legal system in which the state stands before the courts on an equal footing with its citizens there is no good reason to allow government to do it" and at [49] that "*The best evidence rule is not simply a handy tool in the litigator's kit. It is a means by which the court tries to ensure that it is working on authentic materials.*"[4]

16. The Board Paper and the minutes of the July 2021 Board meeting clearly fall to be disclosed and our client is hindered in preparing and pleading its case without them. In circumstances where you have drafted a 12-page letter explaining them (presumably at considerable cost) rather than simply handing them over, our client infers that they are sensitive and damaging to the FCA's position.

17. The FCA's failure to adhere to its duty of candour and attempt to hinder our client from fully pleading its case will be brought to the attention of the court and our client reserves its right to plead further facts and grounds upon proper disclosure. Our client also reserves its right to refer to this conduct on the subject of costs, because the failure to disclose the Board Paper and the minutes of the July 2021 Board meeting is likely to cause wasted costs, which should be paid by the FCA in any event.

18. Our client's position in respect of its other document requests remains reserved, including in relation to the documents that record the exchanges between the FCA and HM Treasury about the Decision, which the FCA alleges are irrelevant.

Costs and the Claimant

19. The 4 March Letter conflates the issue of standing to bring judicial review proceedings, with the issue of liability for costs.

20. As to standing, the APPG is able to bring judicial review proceedings in its own name and its members do not need to be listed as claimants. As noted in the guidance you have referred to in the 4 March letter, "*The Court may allow unincorporated associations (which do not have legal personality) to bring judicial review proceedings in their own name*". Further, in *Aireborough Neighbourhood Development Forum v Leeds City Council* [2020] EWHC 45 (Admin), the court held, at [29], that in "*private law the individual has to be able to show that they have a legal right which has been infringed, therefore it is fundamental that they have legal capacity to sue. In contrast the critical question in judicial review or statutory challenge is whether the claimant is a person aggrieved or has standing to challenge, which is not a test of legal capacity but rather one of sufficient interest in the decision not to be a mere busybody. The claim is "invoking the powers of the court to exercise its supervisory jurisdiction of the court to quash curb or correct decision of bodies subject to public law. The personal rights of individual applicants, as in the present case, may never be in play", see Brake. Therefore, the legal capacity of the claimant is not a critical component of the court having jurisdiction in a judicial review or statutory challenge*".

21. In this connection we note, in reference to paragraph 3.2 of the 22 February Letter, the FCA did not propose to "*take a point regarding the standing of the APPG to pursue judicial review*". This volte face is not understood by our client.

[4] This approach later being endorsed by the House of Lords in *Tweed v Parades Commission for Northern Ireland [2006] UKHL 53*.

22. As to liability for costs, as set out in the 25 February Letter, the APPG intends to apply for a costs capping order at £0 (the "**CCO Application**"), and intends to withdraw the claim should a costs capping order not be granted. In those circumstances, the issue of liability for costs will be academic and ought not to unduly influence the identity of the claimant.

23. In relation to the CCO Application, our client will provide the court and FCA with all the requisite evidence and will invite the FCA to confirm that it will not resist the CCO Application, once it has been served on the FCA.

Next Steps

24. We are concerned by the content and tenor of the 4 March Letter. We note in particular:

    a. The FCA's refusal to disclose obviously key documents, namely the Board Paper and the minutes of the July 2021 Board meeting, which appears to be an attempt to hinder our client pleading its case;

    b. The FCA's change of position in apparently seeking to have an individual member of our client named as claimant and the demand in paragraph 5 of the 4 March Letter for information as regards donors to our client's Crowd Justice campaign – which appears to be an attempt to discourage our client's members and donors from supporting this claim; and

    c. Your repeated references to the status of the banks as interested parties in this application, which is troubling in circumstances where your firm is well known for having defended the banks in many of the major IRHP mis-selling claims, and names several of the banks party to the Scheme as its key clients.

25. Our client suggests that the FCA should consider whether its approach to this claim is consistent with the conduct to be expected from an experienced, skilled and efficient regulator, one of whose core purposes is to protect the very stakeholders in whose interest this claim is brought. An element of this should be for the FCA to take independent advice as to whether it is appropriate to instruct your firm, the UK's best-known firm for defending banks against IRHP mis-selling claims, to defend this application for a review of the FCA's handling of the Scheme.

26. Subject to that, please confirm by 4pm on 9 March 2022 (i) that you are instructed to accept service of proceedings on behalf of the FCA; (ii) that you will accept service by email; and (iii) the terms of any such email service (including the relevant addresses).

27. As with previous correspondence, this letter will be placed in the public domain.

Yours faithfully

Hausfeld & Co LLP

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