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Attention: Ned Beale, Simon Bishop and Rachael Baillie
Hausfeld
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Our ref: AMBL/KH/016731.00076
Your ref: L5082.0001

4 March 2022

Dear Hausfeld

Your client: the All-Party Parliamentary Group on Fair Business Banking
Our client: the Financial Conduct Authority

1.1 We write in response to your letter of 25 February 2022 on behalf of the All-Party Parliamentary Group on Fair Business Banking (**the APPG**), following our letter of 22 February 2022 on behalf of the Financial Conduct Authority (**FCA**). This letter adopts the defined terms in our 22 February letter unless otherwise stated.

1.2 As an initial point we note that the Decision was made in September 2021 and a claim has not yet been issued. Even if the date of the Decision (for claim issuance purposes) is when it was publicised (14 December 2021), we still doubt your client has complied with the requirement to initiate judicial review proceedings promptly.

2 The Decision and APPG's claim

2.1 The majority of matters discussed in paragraphs 4 – 12 of your letter are repetitions of those in Mr Hollinrake MP's 14 January 2022 letter and your letter of 8 February 2022 (**the Letter before Claim**), to which we have already responded. We see no benefit in repeating our client's position. However, the FCA does wish to respond to specific inaccuracies. For the avoidance of doubt our client's position on other matters remains as stated and where we do not comment on a particular point that should not be interpreted as indicating agreement with it.

Challenge to 2012/2013 decisions

2.2 Before getting into detail we make one fundamental point: the contention that the substance of the APPG's proposed claim does not relate to the decisions taken in 2012 and 2013 is unsustainable.

Your attempt to rebut this point reinforces that this is the case.[1] You will be well aware that, in considering delay and limitation, courts look to the decision which in substance is being challenged, not a later acknowledgement of its validity.[2] The APPG's attempt to challenge a decision taken in 2021 on the basis that decisions taken in 2012 and 2013 are alleged to be unlawful falls squarely within the rules and principles that govern time limits and delay in relation to judicial review claims.[3]

Other comments on paragraphs 4 – 12

2.3 The FCA notes the following factual inaccuracies.

(a) Your assertion that the regulatory landscape remains materially unchanged between 2012/2013 and now (paragraph 5) is incorrect.[4] Your continued references to the state of the law in 2012/2013 illustrate that the APPG's intimated grounds are in substance an attempt to challenge decisions taken in that period.

(b) Your statement that "*the £10 million notional swap limit criterion of the sophistication test was introduced by HM Treasury*" (paragraph 8(b)) is also incorrect.[5]

(c) At paragraphs 8(c) and 10 you suggest that the FCA had in 2012/2013, and has, sufficient evidence to exercise its powers without further investigation. For the reasons outlined at paragraph 6.20 of our 22 February letter, this is not accurate either.

2.4 On other matters in paragraphs 4 – 12 of your 25 February letter, the FCA makes four main points.

2.5 First, in respect of paragraphs 5 – 9, the suggestion that the FCA erred in law either in establishing the Scheme or in making the Decision, and the Decision was unlawful, is not accepted. We refer to the FCA's position set out in our 22 February letter.[6]

2.6 Secondly, at paragraph 9 you assert that, by considering its ability to achieve voluntary agreements with firms it regulates in the future, the FCA "*betrays a concerning deference to the Banks that it regulates*". We have explained the reasons for the Decision in our 22 February letter; taking account of the legitimate expectations of the banks was one consideration; this was a matter of the FCA acting lawfully not of "*concerning deference to the Banks*".

2.7 Thirdly, at paragraph 10 of your letter you refer to the broad estimates provided to the FCA Board as to the possible levels of loss of some sophisticated customers. The APPG appears to rely on the 2013 Pilot Review's finding that over 90% of sales assessed were deemed to be non-compliant. It would not have been appropriate for the FCA to rely on this data as an accurate indication of actual possible losses for sophisticated customers because only sales to non-sophisticated customers[7] were assessed for mis-sale.

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[1] See your letter at paragraph 5 *("Our client does allege that the decisions of the FSA in 2012 and 2013 were unlawful*"), paragraph 6 ("*the FCA has erred in law when making the Decision to the same extent the FSA did when establishing the Scheme*"), paragraph 7 ("*Our client's challenge is founded upon the FCA erring in law as to the basis upon which the scope of the Scheme was restricted*"), and paragraph 9 ("*[There] is no basis upon which to justify an unlawful decision and to repeat a prior error of law*").
[2] See *R v Newbury District Council, ex p Chieveley Parish Council* (1998) 10 Admin LR 676.
[3] See for example *O'Reilly v Mackman* [1983] 2 AC 237 at 280H-281A, per Lord Diplock *("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*"); and *Trim v North Dorset District Council* [2010] EWCA Civ 1446; [2011] 1 WLR 1901 at paragraph 23, per Carnwarth LJ ("*it is in the public interest that the legality of formal acts of a public authority should be established without delay*"). These considerations are also reflected in some of the broad considerations identified in paragraphs 6.17 – 6.19 of our 22 February letter to which the FCA had regard when taking the Decision.
[4] For example, s55L of FSMA was not introduced until 1 April 2013.
[5] The Report did not make this finding and concluded that the £10m threshold was agreed as part of negotiation with the banks: see Report at Chapter 4, paragraphs 130 – 131; and pages 328 – 329, paragraphs 32 – 33.
[6] And in particular to our comments at paragraphs 6.5 – 6.9 and 7.6.
[7] As determined under the original 2012 criteria.

2.8 The FCA made its estimates of possible loss on the basis of the available information. The exact proportion of mis-sales to sophisticated customers was unknown and so a broad potential range was adopted. Specifically, the FCA considered that across the banks there were over 30,000 sales to retail clients over the relevant time period. Of these, approximately 66% were assessed as non-sophisticated sales and included within the Scheme, of which approximately 70% were offered and accepted redress of £2.2bn. The FCA also considered that redress was paid to sophisticated customers through successful claims, settled litigation or following complaints ranged widely as compared to redress paid to non-sophisticated customers. Customers in reported cases (including non-sophisticated customers) had a relatively low rate of success while a higher percentage of cases brought by sophisticated customers settled.

2.9 Taking the above into consideration, the FCA calculated that a reasonable estimate of the proportion of sophisticated IRHPs that may have been mis-sold could have been between 11% and 33%. From this, a range of possible total unredressed losses across sophisticated customers was estimated at £0.2b-3bn.[8] Even if your client disagrees with the FCA's method of calculation or the precise range, it must be recalled that the key point for the Board was a more general one.[9]

2.10 Fourthly, at paragraph 11 you suggest that there is no case of an IRHP being sold to private customers / retail clients prior to 2009 in which there was compliance with the relevant Conduct of Business Sourcebook (**COBS**) requirement (now 14.3.2R(2)(d)).[10] To our knowledge this is the first time this point has been raised by the APPG.[11] It is not clear how you consider that rule applied to IRHPs or has the impact you claim it does.

3 Documents and other information

Further document requests

3.1 Your further request for documents at paragraphs 13 – 19 of your letter overlooks what we have previously outlined about the nature of requests for information under the Pre-Action Protocol and the duty of candour, which our client has complied and continues to comply with. Neither its duty of candour nor paragraph 13 of the Pre-Action Protocol requires it to provide the documents requested at paragraph 14 of your letter at this stage.

(a) September 2021 Board Paper: the FCA has provided the relevant Board minutes and explained the reasons for the Decision through our letter of 22 February. As you note, the Board Paper has been "*described in detail*". Your client does not need to see the Board Paper to understand why the Decision was taken or to enable your client to formulate its claim. In addition, we note that some of the paper would need to be redacted for reasons of privilege and s348 FSMA.

(b) Minutes of the July 2021 Board meeting: this document was referred to at a single point in our 22 February letter as narrative context and is not of central relevance to the Decision as you assert. The document falls short of the test for disclosure in being "*properly necessary*" under the Pre-Action Protocol.

(c) 'Assumption Documents': in making the Decision, the Board did not have before it calculations or relevant documents aside from what was included in the Board Paper. As in

[8] We note that the upper end of this estimate is broadly consistent with the £2bn-3bn of unredressed losses to which your client has referred: https://www.youtube.com/watch?v=1AJLsSIZ2FQ.
[9] As noted at paragraph 6.21 of our 22 February letter, the Board proceeded on the basis that there likely was some mis-selling to and a sizeable aggregate loss across some sophisticated customers, unaddressed by the Scheme (but possibly addressed through other avenues).
[10] The rule was introduced with effect from 1 November 2007.
[11] And as you note at footnote 1 of your letter, Mr Swift did not refer to the rule when listing the relevant COBS rules.

(a) we have provided sufficient information to allow your client to understand this point without seeing the Board Paper,[12] and the same comments apply as to the redactions that would be required.

Other responses requested

3.2 In respect of paragraph 18 of your letter, we refer to the FCA's response to Ground 3 in the Letter before Claim.[13] The FCA was not required to consult on the Decision. There were no communications with the banks or HM Treasury relevant to the Decision. There were communications with HM Treasury in relation to how the Report was progressing more generally, as well as communications with HM Treasury after the Decision, but these are not relevant.

3.3 As to paragraph 109(b) of the Letter before Claim,[14] the FCA refers to its comments in paragraph 3.2 above and confirms it does not have any relevant documents that fall into this category.

4 Interested parties

4.1 Your client's view that there are no interested parties that should be included in the claim is noted. Our client's position at section 8 of the 22 February letter remains. You say that non-parties will not be bound by the decision but that is not the test (the question of interested parties only arises in the case of non-parties).[15]

4.2 Although we do not know what relief the members of the APPG would seek in any judicial review claim, we note that they contend that the FCA should exercise its powers to require the banks to provide redress (see paragraphs 103 – 106 of the Letter before Claim). We would therefore invite the APPG to consider again the question of interested parties in the light of the correct test.

5 Costs and claimant

Requirement to include one or more members of the APPG as claimant

5.1 To date you have not confirmed who the claimant in any judicial review proceeding would be. You note that you are instructed by members of the APPG. Not only is the APPG not a legal person (as you identify at paragraph 23 of your letter) but All-Party Parliamentary Groups are informal cross-party groups that have no official status.[16]

5.2 The case law and guidance on whether unincorporated associations are able to bring judicial review proceedings is clear that, at a minimum, the APPG ought to be represented by one or more of its individual members (who should be identified on the claim form). Among other purposes this serves to ensure that any orders including costs orders can be made (and enforced) against a specific individual or entity and that there are one or more persons who are responsible for the

[12] An overview of the relevant points in the Board Paper on this issue has been set out at paragraphs 6.21 and 7.8 of our 22 February letter and further elaborated on at paragraphs 2.7 and 2.9 above.
[13] Paragraphs 7.9 and 7.10 of our 22 February letter.
[14] "*Correspondence with HM Treasury, the Banks and any other stakeholders in relation to the Decision and minutes or attendance notes of any calls or meetings with those parties.*"
[15] We remind you that Part A, paragraph 3.2.3.1 of the Administrative Court Judicial Review Guide 2021 (the **Guide**) provides: "*An interested party is any person (including a corporation or partnership), other than the claimant or defendant, who is "directly affected" by the claim. "Directly affected" means "affected without the intervention of any intermediate agency". For example, where a claimant challenges the decision of a defendant local authority to grant planning permission to a third party, the third party is directly affected by the claim because the relief sought would affect their legal rights, so they must be named as an interested party*" (footnotes omitted). We also draw attention to paragraph 3.2.3.3 of the Guide: "*Interested parties must be included in pre-action correspondence and named in the Claim Form. Interested parties must also be served with the Claim Form*" (footnote omitted).
[16] https://www.parliament.uk/about/mps-and-lords/members/apg/.

commencement and conduct of the proceedings.[17] We expect that you will take this into consideration and that any claim issued would comply with this guidance.

Costs-Capping Order and related points

5.3 You have not responded to the direct question at paragraph 3.2 of our 22 February letter as to how the APPG's claim is being funded. This of real concern to our client. We respectfully remind you that the APPG's own duty of candour requires it to be candid about funding, not least because it seeks to rely on its financial position to support a Costs-Capping Order (**CCO**). You have said at paragraph 24 of your letter that the APPG has "*very limited means […] and would not [be] able to meet the costs of the FCA in the event that it does not succeed in its claim*", while acknowledging that any litigation will be funded by donations. It is not clear to us why the APPG considers it has sufficient funding to allow it to bring the claim but not to pay costs in the event of it being unsuccessful. Also, the APPG's Crowdjustice website states that a claim cannot be issued if the funding level is not reached[18] but you note in your letter that you are now preparing the APPG's claim for issuance; it is not clear how these two points are reconcilable. In light of this please:

(a) provide full detail of the source or sources of funding for the claim (including the identify of all substantial contributors and their means), the amount of funds raised to date, the amount the APPG expects to raise and over what period, whether any insurance has been taken out[19] (and, if so, the terms of that insurance and whether it covers an adverse costs order – and if not, why not);

(b) confirm whether the issuing of a claim is dependent on receiving sufficient funding;

(c) advise why the APPG's funding will not be sufficient to pay the FCA's costs; and

(d) inform us what information funders are being given about the claim and in particular whether they are receiving independent advice on its merits.

5.4 You have asked us to confirm, at paragraph 25 of your letter, whether or not the FCA will resist the making of a CCO on a claim being issued. It is premature for the FCA to take a position on this for a number of reasons. First, as you know, such an order can only be made after the claim has permission to proceed. These proceedings have not even been issued; it seems unlikely the claim will receive permission (for the reasons set out in our letter of 22 February) and the FCA does not currently consider that the APPG has raised an arguable claim.

5.5 Further, when the FCA makes decisions on recovering its costs (and any limits on recovery), it must have regard to the principle of efficient and economic use of its resources set out in section 3B(1)(a) FSMA. Any costs which it does not recover may ultimately be passed through to consumers by FCA levy payers. The FCA would not be acting in accordance with this duty by blindly agreeing to a CCO based on the unevidenced assertion that the APPG does not have sufficient resources to meet the FCA's costs in the event that the claim is unsuccessful. As we are sure you are aware, when a court is considering whether to grant a CCO, it must take into account a number of factors,[20] namely:

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[17] We refer in particular to Part A, paragraph 3.2.1.3 of the Guide, which provides that: "*The Court may allow unincorporated associations (which do not have legal personality) to bring judicial review proceedings in their own name. But it is sensible, and the Court may require, that proceedings are brought in the name of one or more individuals, such as an officeholder or member of the association, or by a private limited company formed by individuals. Costs orders may be made against the party or parties named as claimant(s).*"

[18] "*If the £100,000 initial target is achieved, the APPG will commence the judicial review by 13 March 2022 and pursue it to final judgment*": https://www.crowdjustice.com/case/irhp-compensation/.

[19] We note the reference to non-legal costs such as insurance fees on the Crowdjustice page.

[20] Section 88(8) Criminal Justice and Courts Act 2015 and the Guide, Part B, paragraphs 9.8.7.1 – 9.8.7.5. See also the factors listed in CPR 46.17.

(a) the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties;

(b) the extent to which the claimant is likely to benefit if relief is granted;

(c) the extent to which any person who has provided, or may provide, the applicant with financial support is likely to benefit if relief is granted;

(d) whether legal representatives for the applicant for the order are acting free of charge;[21] and

(e) whether the claimant is an appropriate person to represent the interests of other persons or the public interest generally.

5.6 The APPG would be obliged to provide evidence to the Court which is relevant to any of the factors listed above. To date, notwithstanding your client's duty of candour, the APPG has not provided information or documents on any of these factors. Without this information, the FCA is not in a position to make a decision on whether or not it will resist the making of a CCO and could not responsibly provide the confirmation you are looking for.

5.7 Finally, it should be noted that we disagree with your view at paragraph 25 of your letter that a CCO would necessarily be granted because the case has wide public importance.[22] We cannot identify a public interest in the parties and Court incurring significant time and/or irrecoverable costs where a claim is not arguable, is likely to have a limited effect[23] and affects a defined group. Indeed, the public interest points in the opposite direction. Also of note is the requirement that a proceeding must be likely to provide an appropriate means of resolving the issue or issues to be a public interest proceeding.[24] It is not clear that this would be the case here.

5.8 In the event that permission to pursue the claim is granted and an application for a CCO by the APPG falls to be determined, the FCA will consider its position in light of the particularised claim and evidence on the APPG's funding position. In the meantime, the FCA reserves it position regarding security for costs (as foreshadowed in our 22 February letter).

6 Conclusion

6.1 We do not intend to engage in further pre-action correspondence. In view of the claim being out of time and lacking merit or public interest, along with your client's costs position, we would respectfully ask all members of the APPG and the funders of the claim to reconsider their position. We suggest this is particularly important in circumstances where the APPG is actively raising money from the public to fund the proposed litigation.

6.2 We would expect the APPG to draw all correspondence on this matter to the attention of relevant parties, including those funding the claim. We encourage you to publish and include links to our correspondence on the Crowdjustice page.

Yours faithfully

Dentons UK and Middle East LLP

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[21] We note that you are not acting free of charge.
[22] It being a prerequisite of a CCO that the proceeding is a public interest proceeding, see Criminal Justice and Courts Act 2015, s88(6)(a) and s88(6)(7).
[23] As you appear to concede in paragraphs 20 and 21 of your letter when you note that any decision of the Court will not bind the banks.
[24] The Guide, Part B, paragraph 9.8.5.3.