



Neutral Citation Number: [2023] EWHC 1616 (Admin)

Case No: CO/880/2023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 29th June 2023

Before:
MR JUSTICE FORDHAM

Between:

**THE KING (on the application of
THE ALL-PARTY PARLIAMENTARY GROUP
ON FAIR BUSINESS BANKING**

Claimant

and

THE FINANCIAL CONDUCT AUTHORITY

Defendant

Thomas Roe KC and Anna Lintner (instructed by Hausfeld & Co LLP) for the Claimant
Richard Coleman KC and Simon Pritchard (instructed by Dentons LLP) for the Defendant

Hearing date: 29.6.23

Judgment as delivered in open court at the hearing

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM:

Introduction

1. The target decision, challenged in these judicial review proceedings as being incompatible with public law standards, was announced by the Defendant (“the Authority”) on 14 December 2021. It was published, alongside a report dated 26 November 2021 (“the Report”) by an Independent Reviewer John Swift KC on a Lessons Learned Review, as part of the Authority’s response to the Report (“the Response”). The Independent Review was into the supervisory intervention on interest rate hedging products (IRHPs) by the Authority’s predecessor (the FSA) and then the Authority itself. The Chronology at Appendix 1 of the Report sets out some of the key events between February 2010 and September 2019. The Report and Response are published in the public domain and accessible to anyone who wishes to access greater contextual detail.

Eligibility Criteria

2. One of the questions within the Terms of Reference for the Independent Review was (§5(2)) whether the eligibility criteria under the “redress scheme” (§3) constituting the supervisory intervention (§1) on IRHPs (“the Scheme”) were “appropriate”.
3. The Independent Reviewer’s “main conclusion” (Report p.316) in answering that question – applying a standard of “what was objectively reasonable, appropriate and proportionate in all the circumstances” (p.295) – was that the FSA had been “wrong” to confine eligibility to “a subset of Private Customers/Retail Clients which it designated as ‘non-sophisticated’”, which “avoided, without adequate objective justification” the FSA’s “wider responsibilities to secure redress for all Private Customers/Retail Clients who had been mis-sold IRHPs and to whom banks owed the same regulatory obligations as they owed to ‘non-sophisticated’ customers” falling within the Scheme’s eligibility criteria. The Report had spoken (p.372) of a need for “an objective justification” which was founded on “strong evidence”.
4. Among the key conclusions within the Response, alongside an acknowledgement of “clear shortfalls in processes, governance and record-keeping”, was the Authority’s statement of its belief that the decision to treat sophisticated and non-sophisticated customers differently in the case of IRHPs was justified (Response §3.21). The Authority accepted “objective justification” (§3.20), and “evidence-based” (§3.30). A September 2021 Board Paper recorded (at Annex 2) that the Authority did not agree with the “high ... evidential hurdle”. The stated belief was key in the explanation of the Authority’s reasons (Response §§4.3-4.4) for the target decision not to take any action using the Authority’s powers, to require any further redress to be paid to IRHP customers (§4.2). A first key articulated reason in the Response (§4.3) emphasised the Authority’s disagreement that the limitation on scope had been wrong, considering instead that it had been a reasonable approach to a regulatory aim of swift and certain redress for the most vulnerable which thereby provided “appropriate protection to all the various customers involved”. A second articulated reason why action was not considered appropriate or proportionate (§4.4) emphasised that the Scheme had been a voluntary agreement whose terms had set out “the entirety of the steps” required of the banks. Mr Coleman KC today describes that as being a contract which further action would have breached.

Context

5. As to the background and context, the first complaints to the FSA relating to IRHP mis-selling had started in February 2010. By March 2012 there were newspaper articles on the subject and the FSA was in information-gathering mode. On 24 April 2012 more than 40 members of Parliament acted to become constituted as the Claimant (“the APP Group”), whose name at that time was “the All-Party Parliamentary Group on Interest Rate Swap Mis-selling” (Report p.96). All-Party Parliamentary Groups are a familiar feature of the Parliamentary and public landscape. As the evidence explains, they are a forum bringing together members of both Houses of Parliament and from all political parties “around a subject area”. Mr Roe KC submits, and I accept, that they engage public interest issues, with a remit transcending the defending and promoting of the interests of constituents. They are governed by Officers from the House of Commons and House of Lords.
6. Here, as explained in the evidence, the APP Group – established in April 2012 – is supported by a non-profit secretariat and reliant on external funding through monies donated, none of which can go to any officer or parliamentarian. The APP Group’s work is described in the public domain. A snapshot of its annual net income as at 2022 was £15,952.60. There are now some 117 members of the APP Group from the House of Commons and House of Lords. The APP Group broadened its focus and changed its name to “fair business banking” in 2015. In May 2019 the Supreme Court (Lady Hale, Lord Reed and Lord Hodge) gave the APP Group permission to intervene in a case about the reflective loss rule in the law of damages: see Marex Financial Ltd v Sevilleja (All Party Parliamentary Group on Fair Business Banking intervening) [2020] UKSC 31 [2021] AC 39 (at p.43C-D). Lord Sales explained (at §114) that: “In view of the significance of the case, this court granted permission to the All Party Parliamentary Group on Fair Business Banking ... to intervene by oral and written submissions”. The five Counsel team who appeared for the APP Group, to assist the Supreme Court, summarised the purpose of the intervention (p.47B) as being “to draw to the Court’s attention particular practical problems which arise in an insolvency in the case of small private companies, and which make it inappropriate for the courts to impose, as a matter of policy, a no reflective loss rule as wide as that held in the Court of Appeal’s judgment or without real room for exceptions”. The evidence before me of Ms Buchanan – the APP Group’s executive director of Policy and Strategy – refers to another intervention in another case, but the description I have given from Marex is quite sufficient for present purposes.
7. Ms Buchanan’s evidence, filed in these proceedings on behalf of the APP Group, describes its originating “purpose” as being “to bring to the attention of Parliament, the FCA ..., the press and the public the plight of businesses that had been mis-sold IRHPs”. She explains that the APP Group’s work was “instrumental” in “triggering” the information gathering into the mis-selling of IRHPs which led to the Scheme then being established. The Report itself (p.298) describes “the public and political pressure” to intervene from March 2012, the subsequent Parliamentary debates (p.85), and the ongoing political pressure by reference in particular to the formation of the APP Group and the case it was making (p.96). The evidence of Ms Buchanan also explains that the APP Group had raised concerns about the design of the Scheme including in particular the eligibility criteria and ‘sophistication’ test. That is a reference to a narrowing, from an original inclusive scope (Report p.24), by reference

to aspects such as size, turnover and number of employees (Report p.131). There are various descriptions given, at various times. They include ‘deemed understanding’ (p.323) of transaction and risk to describe those becoming ineligible. They also include ‘reasonably considered most at risk’ to describe those becoming eligible (Response §3.28). The Report makes reference (p.21) to the actions of Parliamentarians in the run up to the commitment given in 2015 to a review with independent input. The Report describes the role which the APP Group had in assisting the Independent Reviewer and giving evidence (Report pp.118, 145, 267, 281, 294, 312).

8. In broad terms, the basic picture is that the Scheme had led, by the end of 2016, to the payment of some £2.2 billion redress relating to 20,206 mis-sales of IRHP to those falling within the scope, with scheme costs at a level of £920m. The eligibility criteria which excluded customers on grounds of ‘sophistication’ are said to have constituted some 34% of the overall cases, and some 10,604 IRHP sales (elsewhere described as 10,577). The Authority’s “guess” is that the level of redress for the excluded cases could range from some £350m to £3.2bn.
9. The concerns about the nature of the regulatory intervention had led to the public confirmation in June 2015 of the Authority’s intention to perform a lessons learned exercise including independent oversight. Four years later in June 2019, the Authority appointed Mr Swift KC (QC as he then was) as the Independent Reviewer, supported by a specialist team (Report Appendix 10). The Terms of Reference (§4) recorded that the Review was “not intended to be a route by which the redress scheme or individual cases can be reopened”. Mr Swift KC was chosen to be appointed, to conduct the Lessons Learned Review, because of his standing and specialist expertise including years in independent practice with past regulatory experience in the public sector.
10. The processes by which the Independent Reviewer arrived at his 392-page Report (excluding Appendices) included considering the representations which had been made by the Authority. The Authority’s position involved seeking to persuade the Independent Reviewer that the eligibility criteria, and the sophistication test in particular, had been an appropriate and a reasonable response, adopting a (familiar) type of “proxy”, in the context and circumstances. Emphasis was also placed on a paper refusal of permission for judicial review in August 2013 in a case called Jenkinson CO/5140/2013 which had found, beyond argument, that narrowed eligibility was open to the FSA/Authority and reasonable.
11. Having made its extensive representations, the Authority was also aware of the substance of the conclusions which the Independent Reviewer was proposing to reach many months before December 2021. The substance of the Response and decision as to no further action appears to have crystallised by at least September 2021.
12. The Independent Review, which the Authority had commissioned, ran for 2½ years. The published costs incurred by the Authority of the review were £8.6m including £1.5m spent by the Authority on legal advice and other support for itself (Response Annex 1). That would have included the legal assistance in making the representations to seek to persuade the Independent Reviewer as to the appropriateness and reasonableness of the regulatory intervention in terms of eligibility and scope.

The Claim

13. The proposed claim for judicial review involves a substantive (reasonableness) ground and a procedural (fairness) ground. The APP Group wishes to test its contentions that the target decision to take no further action for the reasons advanced is incapable of withstanding scrutiny under the supervisory jurisdiction of the High Court. The Authority contests the viability (arguability) of the claim, by reference to the unarguability of the substantive and procedural grounds, and also invoking the ‘highly likely: not substantially different outcome’ test of statutory materiality pursuant to s.31(3C)(3D) of the Senior Courts Act 1981 (see Administrative Court Judicial Review Guide 2022 at §12.10.1). The Authority also contests the APP Group’s standing and capacity (at least absent the addition of an individual co-claimant) to bring the claim. It raises a delay objection linked to the contention that this is, in “substance”, necessarily a collateral challenge, years out of time, whose “real target” is the same regulatory response unsuccessfully challenged in Jenkinson. The first question I have had to decide is whether to grant permission for judicial review. The parties were agreed that I should hear all the arguments on that issue as a first stage and, if possible, reach and articulate a view today, before moving on to the other issues if they arose, as they do.

Permission

14. I am going to grant permission for judicial review. I am satisfied that the threshold of arguability is crossed in relation to both judicial review grounds, and that the ‘highly likely’ test for refusing permission for judicial review, invoked by the Authority, is not satisfied. There is, in my judgment, no ‘knockout blow’ or procedural bar. That is all I have decided. The question is not whether the Authority has an arguable defence, but whether the APP Group has an arguable claim.

Standing

15. In my judgment, the APP Group plainly has a “sufficient interest”. I do not accept that the Authority has pointed to ‘obviously better-placed challengers’, still less those whose existence makes it appropriate to deny the APP Group standing to bring the claim. The APP Group clearly has a legitimate, and indeed a targeted, interest in the specific issues. They are inextricably linked with the foundational purpose for which the APP Group came into existence. The APP Group is, as I have indicated, also clearly interwoven into the relevant contextual background and sequence of events. That interweaving reflects the legitimacy of the interest of the Parliamentarians concerned, cognisant of their role in promoting policy outcomes in the interests of customers and the public interest as they see it.
16. This is a challenge brought by the APP Group squarely within its field of interest: cf. Good Law Project v Prime Minister [2022] EWHC 298 (Admin) §21. This is a Claimant who can demonstrate a “particular interest in the matter complained of” (Good Law §24). There is clearly a “reasonable” and “legitimate concern” (§25) and a “particular interest” (§26). None of that, in my judgment, is undermined by the suggestion that there are or would be obvious better-placed challengers (§28). Viewed at this permission stage (§17) this case falls squarely within the description of a group which “represents the interests of others, who may not be well placed to bring the action” (§20). In my judgment, this case is also covered by the idea of “public

interest” standing, where a group “claiming to represent the wider public interest” (§20). There is no problem of legal capacity of an unincorporated association (see JR Guide §3.2.1.3, on the authority of Aireborough Neighbourhood Development Forum v Leeds City Council [2020] EWHC 45 (Admin) there cited). As to whether it is “sensible” or that the Court should “require” in the present case that an individual member or office-holder be made a co-claimant, in particular for the purposes of any appropriate costs order (JR Guide §3.2.1.3), that was a course taken in Aireborough but also held there to be unnecessary to the validity of the claim (see §36). Whether to take that step in the present case is, in my judgment, inextricably linked to the question of whether to grant the zero cost capping sought by the APP Group.

Delay/Collateral Challenge

17. In my judgment, the delay and collateral challenge (or abuse of process) points are bad ones. The question of taking action was specifically considered, as is reflected in the Response (§4.1). There was a decision on that (§4.2), as a public authority. That, says Mr Coleman KC, was a choice. So was convening the Independent Review. It was a decision taken in light of the changed circumstances of the Report and its reasoning. It was, properly, addressed notwithstanding the Terms of Reference (§4.1). This claim is one whose viability depends on whether the APP Group can satisfy the Court that the December 2021 decision of the Authority – in light of its reasons and in the context of the Report – was itself an unlawful decision. If such a claim – with its target decision – lacks viability, permission would stand to be refused on grounds of non-arguability. But if the claim is arguable, I cannot see how there can be any justification in shutting it out on delay, collateral challenge or abuse of process grounds. There are points made by the APP Group about the arbitrariness of scope of the Scheme, but they can only have legal traction alongside and with the Report and its findings (as it is put in the judicial review grounds: “the findings of the Review”). They do not and could not stand alone. There are also points made by the Authority about stability and reliance by the banks on a settled position. I can see that those are relevant to the reasonableness of the target decision (Response §4.4), but that goes to arguability.

Substance

18. I am satisfied that the substantive ground for judicial review is properly arguable with a realistic prospect of success, and that it is not answered by the statutory materiality test. It is arguable that the decision to take no action is based substantially on an underlying merits-disagreement as to the appropriateness of the eligibility criteria, maintaining the position that was advanced to the Independent Reviewer. That merits-disagreement is described as underpinning the first main reason given (Response §4.1). But it also clearly features in relation to the second main reason (§4.2), where the underlying thinking (seen in the September 2021 Board Paper) recorded that the banks would have a ‘substantive legitimate expectation’ (§4.15) whose defeat could not convincingly be justified by a regulator itself taking the position that the regulatory response in 2012/2013 had been appropriate (§4.39).
19. Pausing there, there is in my judgment an arguable legal issue about whether such a legitimate expectation – or contractual entitlement – arose. These themselves, on the face of it, engage questions of law. The Authority’s position in the Response (§4.4) and underlying materials (Board Paper §§4.25-4.26) did not describe a clear breach of

contract; and nor does the Authority's pleaded summary grounds of defence on this point. I have not been persuaded by Mr Coleman KC's attempts orally today to show me that the position regarding breach of contract can justify a clear conclusion in his favour, for the purposes of the 'highly likely' test. On the basis of the materials that he showed me I can see as justified the position as it was described in the September 2021 Board Paper, insofar as there was an identification of arguments. But I cannot accept for the purposes of today that the breach of contract analysis is correct, or even probably correct, or for that matter that the arguments appear to favour the banks. On examination of the contract argument it became clear that a critical part of the analysis related to clause 6 of a contractual document (Board Paper §4.22) which would, as I saw it, involve reading words that are not present into that provision (so that "any matter" would need to be read as "any other matter") and/or giving it a meaning which raises obvious questions about why it would be needed to be included within the contractual document at all.

20. All of this has been linked to the Authority's statutory operational objective of "consumer protection" now found in the Financial Services and Markets Act 2000 section 1C(1): securing "an appropriate degree of protection for consumers". The core underlying reasoning of the Authority is a merits-disagreement, in this regulated setting, in applying an objective justification test (which it accepts) with an evidenced-basis (which it also accepts). The Authority has reasoned that, given its position on the merits as an evaluative judgment as regulator that this was "an appropriate degree of protection for consumers", it follows as a matter of "logic" that further intervention action could not be justified, without the Authority "surrendering" the inalienable regulatory function entrusted to it by Parliament (September 2021 Board Paper §§3.3, 4.12-4.13).
21. It is arguable, in my judgment, that the Authority's decision not to accept the finding of the Independent Reviewer on the wrongfulness of the eligibility criterion cannot withstand reasonableness scrutiny, including as to legally adequate reasoning, grappling with the Independent Reviewer's analysis in a decision which "adds up", free of error of reasoning robbing the decision of logic. These points arise in a particular context of having set up an Independent Review to report on the lessons to be learnt, with the value of the identified independence and expertise. The Independent Reviewer's decision is not said by the Authority to have been unreasonable or unlawful. One question is whether to 'depart' from it on the basis of a merits-disagreement is a course which satisfies contextually-applicable standards of common law reasonableness. Another question concerns the nature of the Independent Reviewer's reasoned conclusions, and then an analysis of the nature and cogency of the reasons of the Authority, applying a reasonableness test and the standard of legal adequacy of reasons. There may be a distinction to be drawn, in any event, between 'agreeing' with a conclusion and 'accepting' it. There would be no difficulty in seeing that distinction if a regulator or another type of public authority were faced with an evaluative conclusion of a judicial authority. Mr Coleman KC has accepted – for the purposes of this permission stage – that in principle an authority could 'accept' a reasoned decision of an Independent Reviewer, without necessarily 'agreeing' with it. His point is that the Authority is not obliged to do so. In this case the Authority as regulator was faced with an evaluative conclusion – for the purposes of learning lessons – by an Independent Reviewer which it had established for that very purpose.

22. If there is an unreasonableness or inadequacy of reasoning in the decision – a position which I have concluded is arguable – I cannot see, based on the picture as it stands at this permission stage, that it is answered on a highly likely outcome basis, whether by reference to the contract or legitimate expectation points or otherwise.

Procedure

23. I am also satisfied that the procedural ground for judicial review is properly arguable with a realistic prospect of success, and that it too is unanswered by the statutory materiality test. I see difficulties for the APP Group in arguing that, simply because the Independent Reviewer in the Report found that there should back in 2012 and 2013 have been consultation and an impact assessment, it follows for that reason that common law fairness (or reasonable sufficiency of enquiry) required that of the Authority when acting in the autumn of 2021. But I can see that there may be an arguable contextual link. If I were hearing the substantive hearing of this case today, the aspect of the procedural ground for judicial review which I think would be a focus on the part of the Court would be this. The Authority plainly took a deliberate procedural decision to secure a temporal alignment between the publication of the Report, the publication of the Response, and the publication of the decision on whether to take any further action. The Authority did that, moreover, specifically thinking about the prospect that there would be voices calling for it to take action, and specifically for ‘presentational’ and other reasons. The implications of that procedural design of the sequence of events eliminated the prospect of voices – informed, empowered and able to reference the detailed reasoning of the published Report – having the opportunity to persuade the decision-maker prior to the outcome, and before minds were made up. Viewed in that way and in that setting, it is in my judgment arguable that standards of fairness (and reasonable sufficiency of enquiry) have not been met. In my judgment, the highly likely outcome test cannot stand as an answer. Mr Coleman KC’s arguments about maintaining the ‘status quo’, against the backcloth of the Terms of Reference, and so on, have not persuaded me that there is nothing in the procedural ground.

Other Issues

24. Having given my reasons in relation to the permission issue, in line with the sequence for the use of today’s hearing that both Leading Counsel favoured (as did the Court), I can now move against that backcloth to hear the submissions which Counsel wish to make – further to their written submissions – on the other aspects of the case which fall for my decision today.

Later

25. I am going to Order a reciprocal costs cap, applicable to both parties, set at 40% of the funds raised by the APP Group for this claim (currently £101,130). I am going to extend time for the Defendant’s Detailed Grounds of Resistance and Evidence to 29 September 2023. I will give my reasons for these decisions, and the decision I need to make about joinder of an individual co-Claimant, in a second judgment which will be circulated in draft and handed-down in the usual way.

29.6.23