PRESS RELEASE

FOR IMMEDIATE RELEASE

APPG on Fair Business Banking granted permission in judicial review of FCA's decision regarding IRHP redress

At a full day hearing on 29 June 2023, the All-Party Parliamentary Group on Fair Business Banking (APPG), represented by Hausfeld, won permission to proceed with its judicial review of the FCA's decision not to act on the findings of independent reviewer John Swift KC in respect of the exclusion of customers from the IRHP redress scheme.

Background

The mis-selling of interest rate hedging products (IRHPs) by banks is one of the UK's largest ever financial scandals. A redress scheme announced in 2012 paid out over £2bn in compensation. However, around one third of complaints relating to over 10,000 sales of IRHPs were excluded by the FSA (the FCA's predecessor), based on a "sophistication" test that used inflexible and arbitrary criteria.

The FCA commissioned an independent review of the IRHP redress scheme, led by John Swift KC, in 2019. The review was extensive: it took two and a half years to complete, at a cost of £8 million. In 2021, the review concluded that the exclusion of those customers was wrong. The review stated - in clear and authoritative terms - that the FSA had been wrong to exclude these sales from the Scheme "*without proper justification, consultation, analysis, or safeguards*".

The FCA's response was published on the same day as the review's findings. The FCA decided that it would not take any further action. The FCA stated that it "*does not consider that the FSA was wrong to limit the scope of the redress scheme to less sophisticated customers and has concluded that it would not be appropriate or proportionate to take further action. Accordingly, the FCA will not seek to use its powers to require any further redress to be paid to IRHP customers*."

The APPG considers that the FCA's decision is flawed and unlawful. Hausfeld acts for the APPG in its judicial review claim, which seeks to review the FCA's decision on the grounds that: (1) that the FCA's decision is irrational and therefore unlawful; and (2) the FCA failed to consult with the excluded customers who were affected before making its decision.

Judgment of 29 June 2023

After a full day hearing on 29 June 2023, Mr Justice Fordham found that both grounds were arguable and should be determined at a full hearing. A copy of his judgment (reported at [2023] EWHC 1616 (Admin)) is here.

The Judge held that "*the substantive ground for judicial review is properly arguable with a realistic prospect of success*" because it is arguable that the FCA'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*".

The Judge was also satisfied that the procedural ground for judicial review was properly arguable with a realistic prospect of success because, in relation to the decision-making process: "*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."

The Judge further noted in the costs judgment referred to below that the case raised "*extremely important issues of law*", such as *"Has this regulator really contracted-out, or engendered a legitimate expectation, as to its ability to take any further regulatory action? Has it done this, in relation to the very cases which were being excluded as ineligible from a redress scheme? Could it even do that, and be understood to do that, given its statutory functions?".*

The High Court also found that the APPG has standing to bring the claim, because it "*clearly has a legitimate, and indeed a targeted, interest in the specific issues. They are inextricably linked with the foundational purpose for which the [APPG] came into existence*".

Cost capping and fundraising

The APPG's claim relies entirely on fundraising through CrowdJustice. Hausfeld and the counsel team instructed for the APPG are working on significantly reduced rates of no more than 25% of their standard rates (absent a greater recovery of costs from the defendant). The fundraising is used to meet these costs and other expenses incurred in the proceedings, such as court fees.

In a separate costs judgment discussing costs capping in the context of a CrowdJustice fundraise (reported at [2023] EWHC 1662 (Admin), copy here) the High Court ordered that if either party to the proceedings is unsuccessful and ordered to pay costs, the costs will be capped at 40%. Therefore, 40% of the funds raised will be held in reserve to cover any costs that the APPG must pay if the claim does not succeed. As a result, the APPG is seeking to raise another £100,000 to cover the costs of the next phase of proceedings.

Press links

For media inquiries, please contact Laurie Woodiwiss (laurie.woodiwiss@parliament.uk)