UT Neutral citation number: **[2022] UKUT 00151 (TCC)**

UT (Tax & Chancery) Case Numbers: UT-2020-000211 onwards

**Upper Tribunal**
**(Tax and Chancery Chamber)**

References determined on the papers

**Judgment given on 15 June 2022**

**Before**

**UPPER TRIBUNAL JUDGE HERRINGTON**

**Between**

**BARCLAYS PARTNER FINANCE APPLICANTS**

Applicants

**and**

**THE FINANCIAL CONDUCT AUTHORITY**

Respondent

**and**

**CLYDESDALE FINANCIAL SERVICES LIMITED**
**T/A BARCLAYS PARTNER FINANCE**

Interested Party

**Representation:**

For those Applicants forming the Azure and Barclays Action and Support Group: Mr Ivor Williams, representative
For those Applicants known as the Rebbeck Applicants: Ms Adriana Stoyanova, European Lawyer
Other Applicants in person
The Respondent in person
Hogan Lovells International LLP, Solicitors, for the Interested Party

DECISION

## Introduction and Background

1. This decision concerns 104 references (the "References") of the determination of the Financial Conduct Authority ("the Authority") made under s 28A of the Financial Services and Markets Act 2000 ("FSMA") on 3 August 2020 (the "Validation Order").

2. However, the subject matter of the References has a long history. On 17 May 2017 the Interested Party on the References, Barclays Partner Finance ("BPF") asked the Authority to allow it to enforce, and keep money paid to it under, certain unenforceable loan agreements by asking for a validation order under s 28A of FSMA. The application for that validation order related to 1,482 regulated credit agreements entered into by BPF as lender between 1 April 2014 and 24 April 2016 (the "Regulated Agreements") under which the total amount payable was in the region of £47 million.

3. It should be noted that the Regulated Agreements were entered into in order to finance the purchase of timeshare contracts at a resort in Malta. All of the Applicants alleged that they were given a "hard sell" by the Azure Group and encouraged to take out regulated loan agreements to purchase the timeshares with the promise that the timeshares would rapidly increase in value which could quickly be sold for profit, and the loans repaid. They allege that these promises have failed to materialise, consumers have largely been unable to re-sell their timeshare packages and have been left significantly out of pocket and with outstanding loans. The consumers contend that misrepresentations were made to them during the sales process by the Broker and that the Regulated Agreements (and the underlying timeshares) were mis-sold.

4. The Regulated Agreements are "borrower-lender-supplier" agreements (as defined in Article 60 L (1) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO")). The agreements financed the acquisition of timeshare accommodation from a group of companies, known as "Azure". BPF informed the Authority that the Regulated Agreements were brokered by an unauthorised broker within Azure known as Azure Services Limited ("the Broker") in breach of the general prohibition set out in s 19 FSMA against persons carrying on regulated activities in the United Kingdom without authorisation by the Authority or an applicable exemption from authorisation applying.

5. Under s 27 (1) (d) (i), (1A) and (2) FSMA the fact that the Regulated Agreements were made in consequence of something said or done by a third party in contravention of the general prohibition rendered the Regulated Agreements unenforceable against borrowers and entitled those borrowers to recover money or property transferred to BPF under the Regulated Agreements.

6. Following BPF's application, a validation order was made on 5 February 2018. At that time, the Authority considered that it was just and equitable to allow the Regulated Agreements to be enforced and for the money paid under them to be retained.

7. References were made by a number of consumers to the Tribunal challenging that validation order and saying that the Broker had mistreated them and that there had been widespread mis-selling of the timeshare accommodation that had been financed by the Regulated Agreements.

8. The Authority did not seek to defend the references. Before the Tribunal could consider the matter in substance, the Authority accepted that the Authority should take into account detriment suffered by consumers as part of the relevant circumstances it must take into account in deciding whether it

was just and equitable to make a validation order. The Authority accepted that it had failed to do this when making the original validation order.

9. Accordingly, after a hearing at which the Tribunal heard arguments from the Authority, BPF and various consumers as to the basis on which the matter should be remitted to the Authority for it to reconsider its decision to make a validation order, in a decision released on 1 August 2018, *Chickombe and others v Financial Conduct Authority* [2018] UKUT 0258 (TCC) ("the 2018 Tribunal Decision"), the Tribunal sent the case back to the Authority directing that it look at the application for a validation order again, taking into account the Tribunal's findings that:

(1) there was evidence of potential consumer detriment, most of which was not taken into account by the Authority in making its decision to issue the Validation Order;

(2) consumer detriment is a relevant factor to be taken into account in deciding whether to issue a validation order under s 28A (3); and

(3) The Authority acted unlawfully in fettering its discretion by the narrow manner in which it took into account evidence of consumer detriment when deciding to issue the Validation Order with a consequence that such decision was one that could not be reasonably arrived at.

10. Accordingly, the Authority obtained and analysed additional evidence and other materials, considered representations made by BPF, and reconsidered its decision to make a validation order.

11. By a notice of determination under s 28B (1) FSMA dated 3 August 2020 (the "Notice") the Authority decided to grant BPF the Validation Order in relation to the Regulated Agreements under s 28A (3) FSMA.

12. However, the Validation Order was made subject to conditions under s 28A (9) FSMA. The Authority was satisfied that it was just and equitable to make the Validation Order with such conditions.

13. The conditions required BPF to refund all interest and charges paid by consumers under the Regulated Agreements. They also prohibited BPF from charging any further interest under the Regulated Agreements. BPF was also required to appoint an independent expert, known as a "Skilled Person", to assess whether each Regulated Agreement was affordable for the consumer when it was made. If the Skilled Person concluded that it was not, BPF would be required to cancel the agreement, refund all remaining payments made under it together with interest and remove any adverse credit entries on the consumer's credit file in relation to the agreement. BPF could not enforce a Regulated Agreement until it had satisfied the Authority that the affordability assessment carried out by BPF in relation to the entry into that agreement was adequate.

14. Most of the Applicants who made references against the Validation Order were represented by one of two groups. The first group, known as the Azure and Barclays Action and Support Group was represented by Mr Ivor Williams, who was one of the Applicants. I shall for convenience refer to this group as the "Williams Group". The second group was comprised of clients of Ms Adriana Stoyanova, a lawyer. This group is described by Ms Stoyanova as the "Rebbeck Applicants", Mr Rebbeck being one of the Applicants Ms Stoyanova advised, and I will use that term for convenience to describe this group. In addition, there were a small number of Applicants who represented themselves.

15. The Applicants challenged the making of the Validation Order broadly on the basis that (i) the Authority's reconsidered decision to issue the Validation Order failed to give any or adequate reasons as to why the balance of justice and equity required the Regulated Agreements to be enforced at all,

rather than enforced pursuant to a validation order with conditions and (ii) the Authority's reconsidered decision failed to adequately investigate and/or failed to give adequate weight to the mis-selling of the Regulated Agreements.

16. In addition, the Williams Group requested that the Authority direct BPF to compensate the Applicants for any losses that they had sustained as a result of entering into the Regulated Agreements, pursuant to the provisions contained in s 27 FSMA. I will return to that issue ("the Compensation Issue") later.

17. As discussed later, BPF have implemented a remediation plan which has resulted in all the Regulated Agreements being cancelled. Consequently, the consumers concerned have been refunded all payments they have previously made under the Regulated Agreements. In the light of that I now need to decide how the references are to be determined. For the reasons set out below, I have now decided that proceedings in respect of references that are the subject of this decision should be brought to an end.

18. I pay tribute to the hard work that both Mr Williams and Ms Stoyanova have put in on behalf of the Applicants that they represent. I am sure that their efforts have in no small part contributed to the decision made by BPF, as described later, to go beyond the terms of the Validation Order and refund the principal monies paid by consumers under the Regulated Agreements without there being any need for the Skilled Person to assess whether any particular agreement was affordable or not. Mr Williams has been unsuccessful in his efforts to persuade me that the Tribunal can deal with the Compensation Issue under the terms of the current references, but, as discussed later, the Compensation Issue remains a live issue to be determined and ultimately the Tribunal may have a role on a fresh reference if the Compensation Issue is not otherwise settled.

**Relevant Legislation**

19. Section 27 FSMA provides as follows, so far as relevant:

> "(1) This section applies to an agreement that—
>
> (a) is made by an authorised person ("the provider") in the course of carrying on a regulated activity,
>
> (b) is not made in contravention of the general prohibition,
>
> (c) if it relates to a credit-related regulated activity, is not made in contravention of section 20, and
>
> (d) is made in consequence of something said or done by another person ("the third party") in the course of—
>
> (i) a regulated activity carried on by the third party in contravention of the general prohibition, or
>
> ….
>
> (1A) An agreement to which this section applies is unenforceable against the other party.
>
> (2) The other party is entitled to recover–
>
> (a) any money or other property paid or transferred by him under the agreement; and

(b) compensation for any loss sustained by him as a result of having parted with it.

(3) "Agreement" means an agreement–

(a) made after this section comes into force; and

(b) the making or performance of which constitutes, or is part of, the regulated activity in question carried on by the provider."

20. As I found in the 2018 Tribunal Decision, it was common ground that s 27 applied so as to make the Regulated Agreements unenforceable in this case because although BPF was an authorised person and entered into those agreements in the course of carrying on a regulated activity which was not being carried on in contravention of s 20 FSMA, the Regulated Agreements were brokered by the Broker who was not an authorised person and therefore was acting in breach of the general prohibition in s 19 FSMA.

21. It is to be noted that s 27 not only provides that a relevant agreement is unenforceable but also that the other party (that is the consumer in this case) is entitled to compensation for any loss sustained by him in having parted with any money under the loan agreement.

22. Section 28A FSMA provides as follows:

"(1) This section applies to an agreement that—

(a) is entered into in the course of carrying on a credit-related regulated activity, and

(b) is unenforceable because of section 26, 26A or 27.

(2) The amount of compensation recoverable as a result of that section is—

(a) the amount agreed by the parties, or

(b) on the application of either party, the amount specified in a written notice given by the FCA to the applicant.

(3) If on application by the relevant firm the FCA is satisfied that it is just and equitable in the circumstances of the case, it may by written notice to the applicant allow—

(a) the agreement to be enforced, or

(b) money paid or property transferred under the agreement to be retained.

(4) In considering whether to allow the agreement to be enforced or (as the case may be) the money or property paid or transferred under the agreement to be retained the FCA must—

(a) ….

(b) if the case arises as a result of section 27, have regard to the issue mentioned in subsection (6).

(5) ….

(6) The issue is whether the provider knew that the third party was (in carrying on the credit-related regulated activity) either contravening the general prohibition or contravening section 20.

(7) An application to the FCA under this section by the relevant firm may relate to specified agreements or to agreements of a specified description or made at a specified time.

(8) "The relevant firm" means—

(a) ….

(b) in a case falling within section 26A or 27, the authorised person concerned.

(9) If the FCA thinks fit, it may when acting under subsection (2)(b) or (3)—

(a) limit the determination in its notice to specified agreements, or agreements of a specified description or made at a specified time;

(b) make the determination in its notice conditional on the doing of specified acts by the applicant."

23. It can therefore be seen that s 28A provides rights to both the consumer, in this case the Applicants, and the authorised firm, in this case BPF, in circumstances where the operation of s 27 FSMA means that a regulated agreement is unenforceable and the consumer thereby is entitled to recover compensation.

24. Thus, in this case, as regards the consumer's right, the effect of s 28A (2) is that the consumer can seek to agree the amount of compensation with BPF or, if agreement is not reached either BPF or the consumer can ask the Authority to determine the amount of compensation payable.

25. As regards BPF's right, the effect of s 28A (3) is that BPF must apply to the Authority for an order allowing the relevant agreements to be enforced, which the Authority may grant if it is satisfied that it would be just and equitable to do so, subject to any conditions it may impose.

26. It will be apparent from the way that I have expressed these rights, that they are separate rights, and each has to be independently invoked. The fact that a consumer has invoked the compensation process does not of itself invoke the validation process and the converse also applies. The relevant party must start the process independently of the other and there does not appear to be any time limit within which the relevant process must be invoked. Thus, for example, the claim for compensation could be made sometime after there has been an application by the lender for a validation order.

27. However, one issue, which I consider later, is what effect the making of a validation order has in relation to a right to compensation which has not yet been invoked. The issue is whether the fact that the Authority has through a validation order permitted the agreement to be enforced has any effect on any claim for compensation that may be made after the validation order has been made and any challenge to that order through proceedings on a reference to this Tribunal dismissed.

28. Section 28B FSMA makes provision for decisions by the Authority on an application for a validation order or in respect of a claim for compensation to be referred to the Tribunal in the following terms:

"(1) A notice under s28A (2) (b) or (3) must –

(a) give the FCA's reasons for its determination, and

(b) give an indication of –

(i) the right to have the matter referred to the Tribunal that is conferred by subsection (3) and

(ii) the procedure on such a reference.

(2) ….

(3) a person who is aggrieved by the determination of an application under section 28A (2) (b) or (3) may refer the matter to the Tribunal."

29. The wording of s 28B reinforces the position that the right to claim compensation and the right to seek a validation order are entirely separate matters. It is clear that the right to refer the compensation question to the Tribunal only arises if, pursuant to s 28A (2) (b) FSMA, the amount of the compensation has been determined by the Authority and set out in a written notice given by the Authority to the applicant. That situation will only apply if the amount of compensation has not been agreed between the parties. The fact that there may have been a separate reference of the decision to grant a validation order does not appear to have any effect on that position.

**Events following the making of the References**

30. Pleadings in relation to the references were filed during the first half of 2021 and the Tribunal identified the issues to be determined on the References and the manner in which they were to be determined. The Tribunal made proposals as to how the various issues that had been raised in the pleadings should be determined, with all of the issues essentially relating to legal matters being dealt with in one hearing and a further hearing relating to the circumstances of individual applicants where the Skilled Person had determined that the loan agreement was affordable for the consumer concerned and therefore the conditions prescribed by the Validation Order had been fulfilled.

31. However, before substantive progress could be made on these proposals, on 16 June 2021 the Authority notified the Tribunal by letter that BPF had decided to take the following action in relation to all loans affected by the Validation Order:

(1) All payments made to date will be refunded, the agreement will be cancelled and it will pay 8% simple interest on the refunds;
(2) it will remove any adverse entries on the consumer's credit file in relation to his or her agreement.

32. As the Authority said in its letter, this approach would result in the cessation of the Skilled Person's review of the agreements subject to the Validation Order. As the Authority correctly said, there would be no need for the review to continue in circumstances where all consumers affected by the Validation Order received remediation in line with what would have happened had the Skilled Person's report resulted in the Authority concluding that the affordability assessments conducted by BPF were inadequate. As mentioned at [13] above, the conditions applied to the Validation Order meant that if the Skilled Person concluded in relation to an individual consumer that the affordability assessment carried out by BPF was inadequate then BPF would be required to cancel the agreement, refund all remaining payments made under it together with interest and remove any adverse credit entries.

33. The Authority went on to say:

> "The FCA also considers that the above approach, in effect, gives consumers everything they can reasonably expect from the References and the underlying process of the determination of BPF's application for a validation order. In these circumstances, the References are rendered academic and fall to be dismissed if they are not withdrawn."

34. The Authority then referred to the right to claim compensation as follows:

> "Some consumers may argue that they are entitled to more than what is proposed by BPF because they also wish to seek compensation. However, this is not something which fell to be considered by the FCA in its assessment of BPF's application for a validation order. The Decision Notice was given under a different regime from the various regimes that allow consumers to seek compensation. In particular, the Decision Notice was given under s 28A (3) … FSMA. By way of contrast, the provisions in section 28A of FSMA which allow consumers to make a claim for the quantification of compensation appear in s 28A(2)(b), the FCA considers that the present proceedings are not the appropriate forum for seeking such compensation, and that the Tribunal does not in any event have jurisdiction to award it.
>
> The Tribunal will note, in any event that, in addition to the remediation programme, BPF has indicated that it will inform consumers that if they consider the amount refunded (as set out above) does not cover all the loss and inconvenience they have suffered because of this issue and if they feel they want to make an additional claim, BPF will consider this."

35. The Authority proposed, in case there were concerns that the remediation programme would not be implemented, that the Tribunal consider staying all the references pending notification from BPF and the Authority of the implementation of the remediation programme in relation to each of the consumers who made a valid reference.

36. The Tribunal sought representations from the Applicants and BPF regarding the Authority's proposal that the references be stayed pending completion of the remediation programme.

37. The Williams Group responded accepting BPF's offer to move straight to remediation in respect of all loans affected by the Validation Order and supporting the stay in proceedings until the remediation programme had been completed.

38. However, Mr Williams disputed the statement by the Authority that the offer gave the consumers everything they can possibly expect from the references. He said that refunding the amount of the loans did not compensate for the years of stress and anxiety, financial hardship and other difficulties experienced by consumers affected. He suggested that the Skilled Person assess the level of compensation each individual should receive to cover losses suffered and that the Tribunal should oversee that process. Mr Williams said that although BPF's statement that BPF would consider any additional claims for compensation appeared a positive approach, he said that BPF's past approach to affected consumers did not inspire much confidence.

39. Therefore, at this stage the Authority had made it clear that it regarded the question of compensation as being separate from the proceedings relating to the Validation Order and that the Compensation Issue had to be resolved outside those proceedings. BPF took the same view, but had made it clear that it was prepared to consider compensation claims. Mr Williams had made it clear that he wished the question of compensation to be determined within the context of the current proceedings.

40. It would have been possible at this stage formally to have started the process for assessing compensation whilst the separate remediation process was put into place. From the Authority's statement it would appear that it was envisaging that individual consumers would make claims directly to BPF. Such claims might of course have been agreed between BPF and the relevant consumers as envisaged by s 28A (a) FSMA and, if they were not, could be made the subject of an application to the Authority under s 28A (b) FSMA. However, neither the Authority nor BPF proposed at this stage any process by which such an exercise could be undertaken; in view of the

considerable number of consumers seeking compensation through the Williams Group it would appear that a process applicable to all the relevant consumers whilst taking account of their individual circumstances might have been developed rather than leaving individual consumers to make claims. BPF made it clear in its response to Mr Williams's representations that BPF would assess any claim to compensation on an individual basis and would not deal with Mr Williams as their representative.

41. The Authority said in its response to Mr Williams's representations that the proper avenue for invoking the compensation regime was, if agreement could not be reached with BPF, to make an application to the Authority as envisaged by the legislation.

42. What both the Authority and BPF said was technically correct but without any clearly defined process for assessing compensation it is perhaps unsurprising that Mr Williams was pressing for the matter to be determined through the current Tribunal proceedings even though, as I find later, that approach was not a course open to the Tribunal because of the way that the legislation works.

43. In its response, BPF observed that the best outcome that the applicants could achieve from the Tribunal proceedings was the remittance of the Validation Order to the Authority for reconsideration, according to the powers given to the Tribunal under s 133 FSMA, as I explained in the 2018 Tribunal Decision. BPF also observed that the best outcome the applicants could achieve from any reconsideration decision by the Authority is a decision not to grant the Validation Order at all. BPF therefore said that a decision not to grant the Validation Order at all would have exactly the same consequences for applicants as BPF's offer to provide full remediation and consequently the Authority was right that BPF's decision not to rely on the Validation Order means that the applicants have achieved everything they could reasonably expect **from the references** (emphasis added).

44. On 24 August 2021 the Tribunal wrote to the parties having considered the representations referred to above. The Tribunal observed that its jurisdiction in relation to the current proceedings was limited to considering whether or not the Authority should be asked to reconsider the terms of the Validation Order and accordingly in these proceedings it had no jurisdiction to consider claims for compensation, observing that, as the Authority had pointed out, there may be other proceedings open to the applicants in that regard. The Tribunal directed that the Authority and BPF provide a detailed plan for the implementation of the process in the light of which the Tribunal would make further directions for the conduct of the current proceedings.

45. On 7 September 2021 Hogan Lovells International LLP, on behalf of BPF, set out in a letter to the Tribunal ("the Remediation Process Letter") the remediation process and its timeline, which had been agreed with the Authority. In broad terms, a letter would be sent to the customer setting out a breakdown of the refund calculation and what the customer needed to do in order to receive the refund. The refund letter would confirm that BPF would cancel the relevant loan and remove any entries at credit reference agencies in relation to the loan. The refund letter also said that if the customer felt that the refund did not cover all their losses and inconvenience and they wanted to make an additional claim, BPF could arrange for independent help to be provided, free of charge, by the well-known professional services firm, BDO LLP.

46. On the basis of the Remediation Process Letter, the Tribunal was satisfied that it was appropriate to stay the proceedings on the references to allow the remediation process to take its course. On 9 September 2021 the Tribunal directed as follows:

> (1) The current stay of proceedings was to remain in place in relation to a reference until the Authority notified the Tribunal in relation to the applicant concerned that all steps set out in the Remediation Process Letter had been completed.

(2) Promptly upon receipt of such notification the Tribunal would request the applicant concerned to inform the Tribunal whether or not they wish to withdraw their reference.

(3) If the applicant notified the Tribunal that they wished the reference to be withdrawn then the Tribunal will consent to such withdrawal.

(4) If the applicant informed the Tribunal that they wished to continue with their reference the applicant must at the same time indicate the grounds on which they wish to continue with the reference. The Tribunal will then consider whether those grounds have a reasonable prospect of succeeding, seek representations from the Authority and Barclays Partner Finance in respect of that issue and then determine what further directions to make.

47. The tenor of those directions demonstrate a predisposition to the conclusion that once the remediation process had been completed successfully in relation to a particular applicant, then that applicant would have nothing more to gain from pursuing the reference. Accordingly, the expectation was that in those circumstances the applicant should either withdraw their reference or it would be struck out on the grounds that it had no reasonable prospect of succeeding, unless the applicant was able to demonstrate to the satisfaction of the Tribunal that there were grounds that had a reasonable prospect of success.

48. The remediation process appears to have gone smoothly. On 29 March 2022 the Authority notified the Tribunal that the process had been completed in respect of 104 applicants. The Tribunal was subsequently notified that a further two applicants were sent refund letters and accordingly the Tribunal understands that there currently remain only a very small number of applicants in respect of whom the remediation process has not been completed.

49. Accordingly, on 6 April 2022 the Tribunal wrote to all of the applicants concerned (or their representatives) informing them that the stay of the proceedings in respect of their references had come to an end and the Tribunal needed to take steps to deal with outstanding matters in accordance with the directions made on 9 September 2021. The applicants were requested to inform the Tribunal within the next 14 days whether or not they wish to withdraw their references, and, if they wish to continue with the reference, provide the information required according to the terms of the September 2021 directions.

50. Ms Stoyanova has notified the Tribunal that she has instructions to withdraw the references of all of those applicants that she represents and from whom she was able to obtain instructions. As discussed below, I propose to give consent to the withdrawal of those references in accordance with Rule 17(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules").

51. On 20 April 2022 Mr Williams sent grounds on which the Williams Support Group relied in support of their opposition to their references being withdrawn. Mr Williams said that issues concerning fraud, unlawful activities, criminal offences and failures both by BPF and the Authority, along with serious regulatory failures surrounding the activities of the Broker have not been fully dealt with and that the Tribunal proceedings are the appropriate forum to deal with these issues.

52. Mr Williams also reiterated his previous expressed view that the remediation process has not given consumers everything they could reasonably expect and expressed disappointment with the view taken by the Authority that the compensation regime under s 28A (2) (b) FSMA had not been invoked. Mr Williams contends that the Williams Group did invoke the process in its response to the Authority's Statement of Case but, if deemed necessary, the necessary notice was given through this latest response. Mr Williams observes that no consumer who has made a compensation claim has

received any compensation, nor have they received any indication of when a decision will be forthcoming.

53. It is therefore necessary for me to consider whether the grounds advanced by Mr Williams have a reasonable prospect of succeeding, and I will therefore turn now to that question in the context of my consideration as to how to determine the outstanding references.

**Discussion**

***Introduction***

54. In the context of considering Mr Williams's representations, I have given further thought as to whether the process of either permitting applicants to withdraw their references or striking them out was in fact the appropriate way to proceed in the light of the Compensation Issue being outstanding.

55. My concern was to ensure that the right to claim compensation was not prejudiced by any decision made in these proceedings to dismiss the current references. I raised the question as to whether it would be better to allow the references and remit the matter to the Authority for reconsideration on the basis that BPF was no longer seeking to enforce the agreements, thus leaving it open to the Authority to withdraw the Validation Order on reconsidering its decision. In those circumstances, that would clearly allow the compensation process to take its course on the basis that the agreements concerned continued to be unenforceable. I put that proposal to the parties and sought representations, the outcome of which is discussed later.

56. Furthermore, at first sight an outcome whereby the Validation Order is revoked is consistent with what has actually happened in practice as a result of these references being made. In effect, the references have been successful because as a result of BPF's decision to implement the remediation process the Regulated Agreements can no longer be enforced because the agreements have been cancelled. Furthermore, the consumers have received back everything they paid to BPF under those agreements and the consumers have been relieved of the obligation to make any further payments. That is exactly what would have happened had the Validation Order not been made. In those circumstances, pursuant to s 27(a) FSMA, the consumers would be entitled to recover any money paid by them under the agreement. It would then still be open to the consumers to claim compensation for any further loss suffered, pursuant to s 27(2)(b) FSMA.

***Grounds advanced***

57. I will first deal with the grounds advanced by Mr Williams on the basis of which he contends that the current proceedings should continue.

58. Mr Williams clearly has no confidence that either the Authority or BPF will deal with the Compensation Issue fairly.

59. Clearly, he believes that what he perceives as BPF's failure to address in the past the many concerns which he has raised on behalf of members of the Williams Support Group as a result of the losses that he says have been incurred as a result of fraudulent representations made by the Broker as to the merits of the timeshare investments, gives rise to serious doubts as to whether adequate compensation payments will be made.

60. As regards the role of the Authority, Mr Williams points to the statement that the Authority made as to the right to claim compensation in its letter of 16 June 2021, as set out at [34] above. Mr Williams says that this statement is very disappointing and reads more like a statement prepared by BPF's legal

team in their defence, and not one from a regulator who is supposed to protect consumers seeking redress and compensation. He points out that the Williams Support Group did in fact invoke the compensation process in its Reply to the Authority's Statement of Case. Mr Williams sees the Authority's statement that BPF will consider additional losses as being simply an "ex gratia" gesture. He observes that to date no one who has made a compensation claim has received any compensation, nor have they received any indication of when a decision will be forthcoming.

61. I should make it clear that I express no view as to whether any consumer has in fact suffered losses which give rise to a right to claim compensation from BPF. As mentioned below, those are matters to be determined in due course through the process laid down by the legislation. It may be that if consumers are dissatisfied with the outcome of that process in terms of what BPF are prepared to offer or what the Authority determines to be the appropriate outcome if agreement with BPF cannot be reached that the Tribunal will have a role in due course on a fresh reference. In those circumstances, it would be inappropriate of me to make any further comment on the merits of Mr Williams's allegations regarding the mis-selling of the timeshares and the loan agreements.

62. However, I have considerable sympathy with Mr Williams's objectives. He clearly wants the Compensation Issue to be progressed and feels that the Tribunal is best placed to deal with that matter fairly. He sees no reason why the Tribunal cannot in effect go on and deal with the issue now in the context of the current proceedings.

63. It was not clear to me how the Compensation Issue was being addressed following the implementation of the remediation process, which is why when seeking representations on my proposal as outlined at [55] above, I asked the Authority for clarification as to whether the Authority was intending to proceed on the basis that the compensation procedure had been invoked. By that question, I did not mean whether process could be dealt with in the context of the current proceedings, but how it was being progressed in the light of the clear indication from Mr Williams that, at least as far as the Williams Support Group is concerned, compensation was being sought , an indication that was made as long ago as March 2021 when the Williams Support Group filed its Reply to the Authority's Statement of Case.

64. It is undoubtedly the case, as the Authority recognises, that the compensation procedure and the validation order regime are linked in so far as information gathered in respect of one regime may be relevant to the determination of an application under the other regime.

65. However, to what extent the Authority had given any consideration to the question of whether the compensation procedure was being invoked until it made the statement in its letter of 16 June 2021 as set out at [34] above is not clear. Its statement in that letter to the effect that compensation was not something which fell to be considered by the Authority in its assessment of BPF's application for a validation order suggests that the fact that there may be claims for compensation was not something that was on the Authority's radar at that time. In its Statement of Case the Authority, in denying that the Tribunal had jurisdiction to deal with the question of compensation in the context of the current references stated that the separate jurisdiction regarding compensation in s 28A (2) FSMA "has not been invoked, as there has been no application to the Authority to set an amount of compensation payable."

66. In fact, the question of compensation was something that could have been raised as long ago as 2017, in the context of BPF's original application for a validation order. It seems to me that it is highly desirable that where possible, the two separate processes should run in parallel. That could result in decisions on whether to issue a validation order and whether to award compensation to be taken together as closely as possible so as to avoid unnecessary delay.

67. In this case, the Authority clearly did not consider that it was any part of its role to ascertain whether or not affected consumers would wish to make a claim for compensation when making its decision on an application for a validation order. I can understand why BPF would not seek to solicit requests for compensation, bearing in mind its own commercial interests, but, as Mr Williams pointed out, the Authority has a wider role in the context of its consumer protection objective.

68. I appreciate that the structure of this part of FSMA puts the Authority in a very difficult, and somewhat conflicted position. The general public, not unnaturally, regards the Authority as a bulwark of consumer protection. Nevertheless, the process of challenging a validation order puts the Authority in direct conflict with consumers and it is obliged to defend its decision to grant a regulated firm the right to enforce its agreements, who the consumers believe, at least in this case, to have acted against their interests. A similar position arises if the Authority is asked to assess compensation.

69. That may explain why the Authority appears to have acted purely reactively in relation to the Compensation Issue and has not sought actively to take any steps to ascertain the extent to which claims were likely to be made and whether that process could be coordinated with its decision-making on the application for a validation order. The result is, however, in this case that, at least from Mr Williams's perspective, the Authority has come across as being broadly unsympathetic to the Compensation Issue and I can understand why that impression was given by the tone of the Authority's statement of which Mr Williams complains. It is perhaps unrealistic to expect individual consumers to raise the compensation issue of their own volition as they are unlikely to have much knowledge themselves of these rather complex provisions of FSMA and it is apparent that, understandably, Mr Williams, as a lay person was not able to appreciate how distinct the two regimes are.

70. It should be noted that the s 28A regime relates only to credit-related agreements. Where other regulated agreements are found to be unenforceable (such as an agreement to purchase shares or other investments) the relevant regime as set out in s 28 FSMA does not give a role to the Authority. In those cases, the amount of compensation recoverable is determined by the High Court if it is not agreed, and it is for the High Court to make a decision as to whether it is just and equitable in the circumstances for the agreement to be enforced.

71. It is not for me to express a view as to whether and how, if at all, the current process should be changed but it is clear from this case that Mr Williams has some confidence in the Tribunal's procedures. Tribunal proceedings are more informal than court proceedings and the losing party generally does not bear the risk of having to pay the winner's costs.

72. I am aware that Mr Williams has been raising some of the concerns that he has about how this matter has been handled with the Treasury Select Committee, and it may be that he wishes to draw the observations that I have made in this decision to the attention of that Committee, the relevant Government department or Members of Parliament more generally.

73. Despite Mr Williams's strong view that I should allow the references to proceed to deal with the Compensation Issue and my sympathy with the position that if I do not do so further delay will occur whilst the process laid down in s 28A (2) (b) FSMA is followed, I have no doubt that I have no power to do so in the context of the current references.

74. As I have explained at [26] above, the process for challenging a validation order and the process for obtaining compensation in respect of an unenforceable agreement are entirely separate and give rise to separate decisions which have to be challenged through those different processes.

75. The current proceedings relate purely to the references brought against the Validation Order. In relation to those references, accordingly, the Tribunal's only powers are to decide whether to dismiss the references on the grounds that the Authority's decision to grant the Validation Order was one that was reasonably open to it, or to allow the references on the basis that the decision was not reasonably open to the Authority. If the Tribunal was of the latter view, its only power would be to ask the Authority to reconsider its decision.

76. It is clear from the wording of s 28A (2) (b) FSMA that the Tribunal's jurisdiction in relation to a claim for compensation only arises in circumstances where the Authority has made a decision on the amount of compensation which is recoverable as a result of any losses sustained by the consumer that fall within the scope of s 27 (2) FSMA. The need for the Authority to make a decision on the amount of compensation will itself only arise if the parties, that is in this case the relevant consumer and BPF, have failed to agree the amount of compensation payable.

77. The Tribunal's jurisdiction to consider the matter arises, by virtue of s 28 (3) FSMA, when there has been a determination of an application for compensation made to the Authority under s 28 (2) (b) FSMA. In those circumstances, either the consumer, or in this case BPF, can refer the matter to the Tribunal for its determination when either is dissatisfied with the amount of compensation that the Authority has determined.

78. Therefore, it is clear that unless and until the Authority itself makes a determination as to the amount of compensation payable I have no power to consider a claim for compensation, even though there are proceedings underway in the Tribunal challenging a validation order in respect of the same agreements in respect of which compensation for loss is sought. Attractive though it might be to streamline the process by waiving the prior steps in the process that s 28 (2)(b) and (3) FSMA state have to be followed, it does not lie within my power to do so. The Tribunal can only exercise powers that have been given to it by Parliament. In relation to this legislation, Parliament has not sought fit to give me any flexibility on the matter.

79. Consequently, I conclude with regret that I have no power in the current proceedings to consider the grounds advanced by Mr Williams on behalf of the Williams Support Group in relation to the Compensation Issue and those grounds have no reasonable prospect of succeeding in the proceedings which I am currently concerned with, namely the proceedings challenging the Validation Order. As I said earlier, I make no finding as to whether or not any of the claims for compensation are justified and which ultimately may have to be considered by the Tribunal if references are made following any determination made by the Authority in accordance with s 28(2)(b) FSMA.

80. I come to the same conclusion in relation to the reference made by Mr Richard Iroanya, who is not part of the Williams Support Group but who has raised similar grounds.

81. Mr Williams also advanced further grounds relating to allegations of criminal behaviour on the part of the Broker, failure of oversight on the part of the Authority and other breaches of relevant consumer credit legislation. For the reasons that I have given above, I cannot consider any of these grounds. As I have said, the only issue that I was able to consider on these references was the reasonableness of the decision to grant the Validation Order. Some of the matters that Mr Williams relies on in his additional grounds may have been relevant to the decision that I would have had to have taken in respect of the Validation Order, but I no longer have to take a decision as to the reasonableness of the Validation Order in the light of the fact that the remediation process has been completed. I do not have the power to continue the proceedings to determine matters which it is no longer necessary to do because of the way that events have unfolded. It is well established that courts

and tribunals cannot consider matters which have become academic in the context of the proceedings that they have to determine.

***How to determine the current proceedings***

82. As I have decided that none of the Applicants have demonstrated that there is any legal basis on which I can continue with the current proceedings I must decide how to bring them to an end.

83. The Authority does not consider that a decision by the Tribunal to dismiss the present references as academic would prejudice the right of the applicants to apply under the compensation procedure because the right to apply for a specification of recoverable compensation exists independently of the right to apply for a validation order. The Authority confirms that any application under the compensation procedure would be assessed by the Authority on its merits.

84. The Authority is of the view that it would not be appropriate to remit the decision to make the Validation Order to the Authority. In its view, in order for the Tribunal to remit the references, it would need to make findings on issues of fact or law and matters to be taken into account bearing on whether the decision under challenge was one that was not reasonably open to the Authority and that such findings would realistically require a hearing which would be disproportionate in all the circumstances.

85. As an alternative, the Authority suggests that the Tribunal could stay the references pending the determination of the proposed applications for compensation (including determination of any subsequent references to the Tribunal) to protect the consumers from any conceivable prejudice, whilst avoiding a disproportionate hearing to consider whether remission should occur which might well result in the references being dismissed instead.

86. BPF says that the references are academic and should be dismissed. It says that in remediating customers, it has confirmed that it is not seeking to rely on the Validation Order and is treating the relevant loans as unenforceable. BPF has confirmed that it will consider claims for additional losses and would not take the dismissal of the references into account as a relevant factor when determining compensation claims.

87. BPF does not support the Authority's alternative option and does not consider that it would be appropriate to stay the references pending the outcome of a separate issue that may arise in references that are yet to be made. The references are now academic and as a result, staying them does not confer any protection or advantage on the applicants.

88. Mr Williams supports the alternative option of staying the proceedings on the basis that the Williams Support Group have no confidence that dismissing the current references would not prejudice claims for additional compensation. Ms Stoyanova also supports the alternative option.

89. I have carefully considered these representations and have concluded that there will be no prejudice to the rights of consumers to claim compensation in respect of any additional losses that they have suffered if I bring the current proceedings to an end in respect of the Validation Order. My reasons for that conclusion are as follows.

90. First, in my view it is clear from the way the legislation is constructed that the fact that a validation order is made does not prevent the other party to the agreement pursuing a claim for compensation. This follows from the fact that s 28A (3) FSMA, as set out at [22] above, which sets out the powers of the Authority on an application for a validation order, only permits the Authority to make an order

permitting the agreement to be enforced and/or permitting money paid or property transferred under the agreement to be retained. This provision says nothing about the effect of a validation order on a claim for compensation. Consequently, in my view the provisions of s 27 (2) (b) FSMA which gives the other party to the agreement an entitlement to recover compensation for any losses suffered in making payments under the agreement, will continue even if an order is made to allow monies which a party has paid under the agreement to be retained or for the agreement to be enforced.

91. Secondly, both BPF and the Authority have undertaken to consider claims for compensation regardless of whether the current proceedings are dismissed or not. There would be no proper basis for either of those parties resiling from that position. It is also consistent with my analysis at [26] above that the processes for obtaining a validation order and those for compensation, although linked to a degree in that they relate to the same agreements and circumstances are separate rights and each has to be independently invoked.

92. Thirdly, as BPF pointed out, the remediation process has been carried out on the basis that the Regulated Agreements remain unenforceable. In my view, it is clear that the agreements are, insofar as they remain in place, unenforceable. That is because the Validation Order was made subject to conditions. According to the terms of those conditions, an agreement could only be enforced if the Skilled Person concluded in relation to the customer concerned that the affordability assessment carried out by BPF was adequate. Those conditions have in effect been superseded by BPF carrying out the remediation process. As a result of that process, BPF has cancelled the relevant agreements, refunded all remaining payments together with interest and removed any adverse credit entries.

93. Consequently, BPF has performed exactly what would have been required of it had the Skilled Person found that the affordability assessments carried out by BPF were inadequate. In effect, by carrying out the remediation process BPF has accepted that the conditions laid down in the Validation Order were not satisfied in relation to any of the Regulated Agreements with the result that none of the Regulated Agreements were enforceable.

94. Fourthly, in any event as a result of the implementation of the remediation process, the Regulated Agreements have all been cancelled and are therefore no longer in force. Consequently, the subject matter of the references has entirely disappeared. The Validation Order has effectively fallen away because there are no agreements in place to which it relates. Therefore, if I were to remit the matter to the Authority for it to consider whether the Validation Order should be revoked, there are no relevant agreements in respect of which such a decision could be made. Therefore, as both the Authority and BPF have said, the references have been rendered academic as a result of the implementation of the remediation process.

95. In his latest representations, Mr Williams submitted that the remediation process had not yet completed because BPF had, as part of that process, undertaken to consider claims for compensation and those claims had not yet been determined. However, in the context of my decision as to whether to conclude the current proceedings is concerned, I am only concerned with that part of the remediation process that relates to the subject matter of the current references, which as I have repeatedly said, is the challenge to the Validation Order. That aspect of the remediation process has been completed with the consequences that I have described above.

96. In the light of my conclusions that none of the grounds advanced by any of the applicants in support of their contentions that these proceedings should continue have any reasonable prospect of succeeding, and in the light of my conclusion that if I were to bring these proceedings to an end no claims for compensation would be prejudiced I must make directions for the conclusion of these proceedings.

97. I have decided that the appropriate course to take is (i) to consent to the withdrawal of those references in respect of which notice of withdrawal has been made and (ii) to direct pursuant to the case management powers set out in Rule 8 (3) (c) of the Rules, that the proceedings in respect of the remaining references be struck out on the grounds that there is no reasonable prospect of the applicant's case succeeding on the grounds that are being advanced. In my view that is a better course of action to take rather than dismissing the references. The latter course suggests that the applicants have been unsuccessful in their references whereas, as I have stated above, in reality they have succeeded on the references because they have achieved everything they could reasonably have expected to have achieved through their challenge to the Validation Order. I set out at [105] below the appropriate directions.

***Next steps regarding the Compensation Issue***

98. It will be apparent from what I have said above that it is regrettable that the process for claiming compensation had not been readily explained to consumers before BPF indicated that it would consider claims for compensation.

99. As is clear from what I have said above, the separate process for determining what, if any, compensation is due to those consumers who allege that they have suffered loss is already underway. BPF has made it clear that it is prepared to consider claims for compensation and has engaged the services of BDO LLP to assist consumers who require help in that regard.

100. In a letter dated 5 May 2022 to the Tribunal, the Authority appears to give somewhat conflicting advice about whether the compensation process has already been invoked or not. Under the heading "whether the procedure in s 28A (2) (b) FSMA has been invoked" the Authority says:

> "Consumers wishing to invoke the compensation procedure should make an application directly to the Authority. To properly consider any application for recoverable compensation, the Authority would require specific information in respect of each consumer's circumstances. For instance, the Authority will require the Applicant's name, contact details, particulars of the agreement (s) with BPF and particulars of matters in respect of which compensation is said to be recoverable…"
>
> Consumers who wish to make an application should write to
>
> BPF compensation applications@fca.org.uk."

101. This wording rather suggests that the Authority is prepared itself to determine the compensation if requested by a consumer, regardless of whether a claim has been made to BPF.

102. However, later in the letter under the heading "Next steps" the Authority says:

> "The Authority is of the view that it is appropriate and proportionate that parties can agree compensation in the first instance before any application to the Authority under the compensation procedure is determined. Consequently, the Authority considers that in circumstances where BPF's process for assessing compensation is in train, it will generally be appropriate for the Authority to wait for that process to be exhausted before determining any applications for specification of compensation made by the same consumers. In this particular instance, BPF has agreed to consider claims for compensation… The Authority considers that this process should be given the opportunity to run its course before the Authority determines any applications which are made."

103. In my view it would be helpful if the Authority could clarify whether consumers who have not yet made an application to BPF for compensation should make a claim through that route first rather than filing an application with the Authority.

104.It follows from my observations set out above, that both BPF and the Authority need to rebuild confidence with the affected consumers that compensation claims will be dealt with efficiently and fairly. In the light of the time that has elapsed since this matter first came before the Tribunal I would hope that the outstanding matters can be settled without the need for further references to be made to the Tribunal.

**Directions**

105.I direct in relation to the references which are the subject of this decision as follows:

(1) Consent is given pursuant to Rule 17 (2) of the Rules to the withdrawal of the reference of any applicant who either directly or through their representative has given notice of withdrawal pursuant to Rule 17 (1) of the Rules.

(2) The proceedings of any applicant which the Tribunal has determined have no reasonable prospect of success for the reasons set out in this decision are hereby struck out.

**Signed On original**

**TIMOTHY HERRINGTON**

**UPPER TRIBUNAL JUDGE**
**RELEASE DATE: 16 June 2022**