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UT (Tax & Chancery) Reference Number: **UT-2021-000178**

Upper Tribunal (Tax and Chancery Chamber)

Hearing venue: The Rolls Building, London EC4A 1NL

Sitting in public on 8-10 February 2023

Judgment given on 21 June 2023

Before

JUDGE TIMOTHY HERRINGTON

JUDGE RUPERT JONES

Between

BLUECREST CAPITAL MANAGEMENT (UK) LLP

The Applicant

and

THE FINANCIAL CONDUCT AUTHORITY

The Authority

Representation:

Javan Herberg KC, Daniel Burgess and Marlena Valles, Counsel, instructed by Akin Gump LLP, for the Applicant

Andrew George KC, Ajay Ratan and Ava Mayer, Counsel, instructed by the Financial Conduct Authority

DECISION

Introduction

1. This is our decision in respect of two case management applications which we heard as preliminary issues on 8-10 February 2023, namely:

   (1) an application by the Financial Conduct Authority ('the Authority') dated 29 July 2022 for permission:
   - (i) to amend its Statement of Case ('SoC') pursuant to rule 5(3)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the 'UT Rules') ('the amendment application');
   - (ii) to rely upon a draft Rejoinder to the Applicant's Case on Redress ('the Draft Redress Rejoinder') ('the rejoinder application'); and

   (2) an application by BlueCrest Capital Management (UK) LLP ('BCMUK') dated 13 September 2022 to strike out or bar parts of the Authority's SoC, namely its case on redress pursuant to UT Rules 5 and/or 8 ('the strike out application').

2. The preliminary issues form part of the substantive proceedings before the Tribunal concerning references by BCMUK against two decisions of the Authority:

   (1) the First Supervisory Notice dated 30 September 2021 (the 'FSN') pursuant to which the Authority notified BCMUK of its decision to impose upon it a requirement to pay redress under section 55L of the Financial Services and Markets Act 2000 ('FSMA'); and

   (2) the Decision Notice dated 4 November 2021 (the 'DN'), pursuant to which the Authority notified the Applicant of its decision to impose upon it a financial penalty of £40,806,700 for breaches of Principle 8 of the Authority's Principles for Business ('Principle 8') under section 206 FSMA.

3. Judge Herrington made directions dated 14 November 2022 for the applications to be decided at a case management hearing. In broad terms:

   (1) the Authority's amendment application concerns:
   - (i) the Tribunal's jurisdiction to entertain a new case; and
   - (ii) if the Tribunal has such a jurisdiction, whether it should exercise its discretion to permit that new case to be added.

   (2) BCMUK's strike out application and the Authority's rejoinder application raise issues which substantially overlap. They concern:
   - (i) whether the Authority has pleaded a case (either as originally pleaded or as proposed in the Draft Redress Rejoinder) capable, as a matter of law, of supporting the redress requirement which it seeks to impose on BCMUK, having regard to the

requirements for the imposition of a redress scheme set out in FSMA. Specifically, the Tribunal must decide whether the Authority may impose a redress requirement on a single firm pursuant to a freestanding power under 55L FSMA read with s.55N(5) or whether it may only do so under s.404F(7) FSMA; and

(ii) if so, whether the Authority has pleaded a case which is capable of meeting the requirements under the relevant provisions.

Background

4. In summary, the Authority's case, as set out in the FSN and DN, is that between 1 October 2011 and 31 December 2015 (the 'Relevant Period'), the Applicant failed to manage fairly a conflict of interest arising in the context, in particular, of the allocation of portfolio managers working on an external fund, open to investors outside the BlueCrest group (the 'External Fund'), to an internal fund, which was open only to BlueCrest partners and employees (the 'Internal Fund').

5. The External Fund was first established in 2000 and, in 2008, was restructured into a typical master-feeder structure. During the Relevant Period, the External Fund had a master fund incorporated in the Cayman Islands and two feeder funds incorporated in the Cayman Islands and Delaware respectively. The Internal Fund was set up in 2011, also with a master-feeder structure. It had a master fund and one feeder fund (both incorporated in the Cayman Islands).

6. At the start of the Relevant Period, BlueCrest Capital Management LLP, an English LLP with place of business in Guernsey, was appointed pursuant to a series of investment management agreements (the 'IMAs') to act as the investment manager for the master and feeder funds of both the External and Internal Funds, being replaced as from 1 July 2014 by BlueCrest Capital Management Limited, a Jersey limited company. References to the "Investment Manager" below are to the investment manager at the relevant time.

7. Pursuant to a series of sub-investment management agreements (the 'Sub-IMAs'), the Investment Manager appointed BCMUK to act as one of the sub-investment managers for the master and feeder funds of both the External and Internal Funds.

8. The investment decisions on behalf of both the Internal and External Funds were made by portfolio managers ('the Portfolio Managers'). During the Relevant Period the Investment Manager transferred certain Portfolio Managers from the External Fund to the Internal Fund. The Investment Manager also allocated some capital within both funds to a proprietary quantitative trading programme called 'Rates Management Trading' ('RMT') which used inputs from Portfolio Managers and then algorithms in order to recommend an optimum trade list to be overseen and, as appropriate, executed by BlueCrest's investment professionals.

9. On 8 December 2020, the US Securities and Exchange Commission ('SEC') announced that BCMUK's parent company (BlueCrest Capital Management Limited) had agreed to settle charges arising from inadequate disclosures, misstatements, and

misleading omissions concerning its transfer of traders between the two funds. On 2 November 2021, the SEC issued its proposed plan of distribution to compensate US investors for management fees paid in connection with the affected investments.

10. By the FSN the Authority set out its redress requirement, which requires BCMUK to make redress to Non-US Investors. The requirement was that BCMUK pay redress to Non-US investors in the External Fund during the Relevant Period equivalent to:

    (1) The management fees paid by the Non-US Investors net of related operating expenses, reduced by an amount that reflects the industry average management fees paid by institutional investors (such as pension funds) that would have been paid had they invested in an alternative investment, together with:

    (2) The performance fees paid by the Non-US Investors comprised of:

        (a) Where the External Fund achieved a lower return or the same return as an industry average, all performance fees; and

        (b) In circumstances where the External Fund achieved a higher return than an industry average, the proportion of performance fees which related to the attainment of that industry average; plus

    (3) Simple interest, applied at a rate equal to the average annual returns of the External Fund over the Relevant Period, from the date when the Non-US Investors first paid the management and performance fees.

11. The basis for the redress requirement was stated to be that BCMUK's failure to appropriately manage the conflict resulted in a sub-standard investment management service being provided to the External Fund and its investors in that the service provided involved both the inadequate conflict management arrangements and inadequate disclosure. The Authority contends that the failings by BCMUK were such that the level of service received by the investors was therefore below that which could reasonably be expected to be commensurate with the fees paid by those investors.

12. By the DN the Authority imposed a financial penalty upon BCMUK of £40,806,700 for breaches of Principle 8 under section 206 FSMA.

13. BCMUK (now becoming 'the Applicant') exercised its right to use the expedited reference procedure, i.e. not to engage with the Authority before the Regulatory Decisions Committee ('RDC'), but instead to refer the matter directly to the Tribunal.

14. The part of the reference to the Tribunal pertaining to the DN is a disciplinary reference within the meaning of s.133(7A)(k) FSMA, whereas the part of the reference pertaining to the redress requirement within the FSN is not a disciplinary reference.

15. The Authority filed its SoC on 7 January 2022.

16. On 18 March 2022, having been granted an extension of time, the Applicant provided its substantial Reply to the SoC ('the Reply'). On 27 May 2022, the Authority provided

the Applicant with draft amendments to the SoC and draft further particulars on its case on redress, and enquired whether the Applicant would consent to the Authority relying on such documents. The Applicant did not consent.

17. Accordingly, on 29 July 2022, the Authority applied to the Tribunal for permission to rely on (i) the Amended Statement of Case ('ASoC'); and (ii) the Draft Redress Rejoinder.

18. The proposed amendments to the SoC are summarised below. The purpose of the Draft Redress Rejoinder was to respond to the particular arguments raised in the Applicant's Reply at [26a] and [57]-[75] concerning the Redress Requirement.

19. On 13 September 2022, the Applicant applied to this Tribunal to direct a hearing of preliminary issues, alternatively to bar the Authority from taking further part in the proceedings, in respect of the decision of the Authority to issue the FSN. The Applicant's objection to the Draft Redress Rejoinder is premised on the Authority's case being liable to be struck out; the question of whether the Authority ought to be permitted to rely on the Draft Redress Rejoinder will therefore in practice be determined by the Tribunal's resolution of that question.

20. On 14 November 2022, following a hearing the Tribunal directed the present hearing to determine:

    (1) Whether the Tribunal should exercise its powers under Rule 8(3) and (7) of the UT Rules to bar the Authority from taking further part in the proceedings relating to the reference of the Applicant in respect of the decision of the Authority to issue the FSN, on the ground that (the Applicant contends) the Authority's case on redress has no reasonable prospect of succeeding.

    (2) Whether the Authority should be permitted to amend its SoC pursuant to Rule 5(3)(c) of the Rules as proposed by the Authority in its application dated 29 July 2022 (the ASoC on which the Authority seeks to rely).

    (3) Whether the Authority should be permitted to rely upon the Draft Redress Rejoinder.

21. We address the amendment application before the strike out application because that is the order in which the parties made their arguments. Furthermore, the extent of the Authority's case that is permitted to proceed may also determine whether all or any part of it holds reasonable prospect of success.

The Regulatory Proceedings

22. Before turning to the pleadings in these proceedings it is important to set out the reasons that the Authority gave in the regulatory proceedings for imposing the financial penalty and the redress requirement.

23. This is because, as discussed in more detail below, the Tribunal's jurisdiction on a reference is confined to considering the "matter" referred, a term which has been the

subject of interpretation in case law. It is therefore important to establish at the outset what allegations were made in the statutory notices issued during the regulatory proceedings and the reasons given for the regulatory action decided upon by the Authority.

24. As we have mentioned at [13] above, the Applicant decided not to engage with the RDC process following the issue of the Warning Notice on 30 September 2021 ('WN'). Accordingly, no representations were made to the RDC on the WN with the result that the DN was issued in identical terms to the WN following the expiry of the period for the making of representations. For convenience, we refer only to the relevant provisions of the DN but comments are equally applicable to the terms of the WN.

25. The DN is not an impressive document. It demonstrates a considerable amount of muddled thinking on the part of the Authority and a lack of clarity as to the reasons it gives for its conclusion that there has been a breach of Principle 8 by the Applicant.

26. The summary of the Authority's reasons for giving the DN are set out in Section 2 of the DN. In particular:

    (1) At 2.11 the Authority contends that the Applicant's systems and controls did not manage the risk that the Portfolio Managers could be allocated in a way that favoured investors in the Internal Fund over those of the External Fund. As a result, the Applicant's approach to how it managed the conflict arising from the allocation of Portfolio Managers was inappropriate, resulting in a sub-standard investment management service being "provided to the External Fund and its investors." This passage creates uncertainty in that it fails to appreciate that the investment management service was provided not directly to investors, but to the External Fund itself. The External Fund was the only recipient of the investment management services provided by the Applicant, but the impression is therefore given that the duties owed to manage the conflict fairly were owed to the investors as well as to the External Fund.

    (2) At 2.12 it is said that the Applicant's "disclosures to its investors" regarding the existence of the Internal Fund and the conflicts arising, were insufficient. Therefore, there was a focus here solely on the investors in the External Fund and no mention is made of any duty of disclosure owed to the External Fund itself.

    (3) At 2.13 it is said that the Applicant "did not give its customers adequate disclosure of the conflict… or how it was being managed" and that "investors in the External Fund" accordingly did not have sufficient information to scrutinise the conflict or how it was being managed. Again, there is no express reference to any duty owed to the External Fund. The use of the word "customers" in a provision which is describing the effect on the investors in the External Fund gives rise to the implication that the term "customers" was intended as a reference to the investors in the External Fund and not the External Fund itself.

27. As regards the detailed provisions of the DN, there is a section headed "Facts and Matters" which must therefore be regarded as the facts and matters on which the Authority relies in taking the proposed regulatory action. In summary:

    (1) At 4.5 there is a reference to the Applicant being remunerated for its services as Sub-Investment Manager to the Funds, thus giving rise to the clear implication that the customers under the relevant services agreements were the Internal Fund and the External Fund. No reference is made to the investors in the Funds being customers of the Applicant for the purposes of these agreements and the services provided under them. Although we have not seen the terms of the relevant agreements, we are proceeding on the assumption that the actual terms of the agreements are consistent with what is said in 4.5.

    (2) At 4.20 to 4.24 there is a description of the responsibilities of the Applicant as Sub-Investment Manager. At 4.20 it is stated that the duties of the Applicant "in relation to the External Fund and Internal Fund" were formalised in separate investment management agreements, thus again giving the clear implication that the relevant investment services were provided to the Funds alone and not to the investors. However, at 4.24, a provision much relied on by the Authority, it is stated that in respect of the services provided under the agreements "the Funds and their underlying investors have professional client status." This raises the question as to whether the Authority considered that the investors were the customers of the Applicant for the purposes of the investment management agreements, but nowhere in the DN is it explicitly stated to be the case.

    (3) At 4.61 under the heading "disclosures regarding the Internal Fund to External Fund investors" there is a statement that pursuant to a master sales agent agreement ('MSA') the Applicant was appointed to market and sell subscriptions for investment in the External Fund, which included the making of presentations and issuing marketing materials to prospective investors in the External Fund. It was common ground during the hearing, but not stated in the DN, that in relation to such activities the Applicant was carrying out activities which would have made those prospective investors "clients" or "customers" of the Applicant. There then followed at 4.64 a statement that no specific conflicts of interest were described, nor how they were being managed, in the presentations.

    (4) At 4.68 under the heading "Prospectus" reference is made to the prospectus being the main marketing document issued by the Applicant to investors and prospective investors. Although it was stated that the prospectus was authored by the Applicant, we assume that it was issued as the prospectus of the External Fund and accordingly that was the entity which had legal responsibility for what is stated in it. At 4.69 it was stated that the External Fund prospectus contained limited information about conflicts of interest.

28. The implication to be drawn from these statements of the facts is that insofar as there was an obligation of disclosure so as to manage the conflict identified, it arose under the terms of the MSA and the obligation was to make disclosure to the investors during the course of the presentations made and in the prospectus. No reference is made to any disclosure made by the Applicant to the directors of the External Fund. The impression is therefore given

that no allegation is made as to any deficiency of disclosure to the External Fund, which might, for example, have been made in the investment management agreement entered into with the External Fund.

29. Section 5 of the DN is headed “Failings”. It is a section that must be regarded as setting out the reasons why the Authority had decided to take the action set out in the DN. This section, which is quite short, can be summarised as follows:

    (1) At 5.2 it is stated:

    > “Based on the facts and matters set out above, the Authority considers that BCMUK breached Principle 8 in that it failed to manage conflicts of interest fairly, between the investors in the External and Internal Funds.”

    The clear implication from that statement when read in isolation is that the Authority considers that the duty to manage the conflict under Principle 8 in this case was owed to the investors in the Funds and not also to the Funds themselves.

    (2) However, at 5.3 there is a further muddying of the waters where it is stated that the Applicant had a duty to ensure that the interests of “both the Funds and sets of investors” were taken into account and that the Applicant’s systems and controls were not sufficient to mitigate the risk of Portfolio Manager allocation decisions “favouring the interests of the Internal Fund and its investors over the External Fund,” which clearly refers to a possible conflict of interest between the Funds themselves as well as the underlying investors.

    (3) Then at 5.6 there is an allegation that the Applicant “also failed to provide sufficient disclosure to investors in the External Fund” regarding the conflict of interest and how it was being managed and that such disclosure which was provided, was inadequate, thus referring back to the limited amount of disclosure made by the Applicant when acting under the MSA in the facts and matters section. Again, there is no allegation of inadequate disclosure to the External Fund itself.

    (4) However, when it comes to the outcome of the failings identified, it is stated that the Applicant’s “failure appropriately to manage this conflict resulted in a sub-standard investment management service being provided to the External Fund and its investors.” Again, this passage fails to appreciate that the investment service of managing the fund was provided only to the External Fund.

30. Because of the lack of clarity in the Authority’s reasoning in the DN we have found it difficult to identify the essence of the Authority’s reasoning. However, reading the DN as a whole we conclude as follows.

31. First, we accept that when applying Principle 8 a distinction can be drawn between to whom the duty to manage the conflict was owed and what steps were necessary to ensure that the

conflict was appropriately managed. We consider that if the DN is read as a whole, it can, not without difficulty, be ascertained that the Authority draws that distinction in the notice.

32. The starting point is 5.2 which states that the regulatory breach alleged is that the Applicant breached Principle 8 by failing to manage conflicts of interest fairly, between the investors in the External and Internal Funds. We think this short provision elides the duty owed to the Fund to manage conflicts of interest fairly and what steps the Applicant needed to take to manage the conflict fairly.

33. However, we think that the subsequent provisions in 5.5 to 5.8 do draw out that distinction. At 5.5 the allegation is that there was a failure to recognise that the Applicant's controls in relation to the management of the conflict were ineffective and that its allocation of the Portfolio Managers was inappropriate. Clearly, on the basis of our analysis as to whom the Applicant owed its duties under the investment management agreement, this allegation can only sensibly be construed as an allegation that there was a failure to manage the conflict in the course of the Applicant's management of the assets of the External Fund.

34. This interpretation is reinforced by what is said at 5.6 where reference is made to the Applicant "also" failing to provide sufficient disclosure to the investors in the External Fund regarding the conflict of interest. It is clear that this is a reference back to the factual findings identified in section 4 of the DN which it is apparent from the context are stated to have arisen in the course of the Applicant performing its duties under the MSA.

35. Accordingly, we consider that the allegation made against the Applicant in the DN is that it breached Principle 8 for two reasons:

    (1) It failed in its duty to the External Fund to manage fairly the conflict which arose because of the manner in which it allocated Portfolio Managers in the course of its activity of managing the assets of the External Fund pursuant to its investment management agreement with the External Fund; and

    (2) It failed to make adequate disclosure of the conflict to the investors and potential investors when carrying out marketing activities under the terms of the MSA.

36. It is those reasons, which in our view are the reasons given by the Authority as to why it considers a financial penalty is justified. The facts and matters set out in Section 4 of the DN can be taken as being the facts and matters on which the Authority relies in support of its allegations. Having considered the relevant authorities, we set out below the extent to which these allegations and matters alone comprise the subject matter of the reference, or whether there is a wider interpretation to be given to that term on the facts of this case.

37. As regards the FSN, the reasons given by the Authority for the regulatory action proposed do, somewhat more clearly than the DN, draw a distinction between the failure of the systems and controls and the failure to make adequate disclosure.

38. At paragraph 27(b) the FSN states that the Applicant failed to make adequate arrangements to manage all aspects of the conflict fairly. At 27(c) it is stated that the Applicant failed to provide adequate disclosure to investors. Thus, the two failings identified were failure of the duty owed to the External Fund to manage the conflict fairly and the failure to make adequate disclosure to the investors.

The Law

Relevant conduct and obligations: Authority's Principles and Rules

39. The Authority's Principles for Businesses provide a general statement of the fundamental obligations of firms under the regulatory system as set out in the Authority's Handbook. The Principles derive their authority from the Authority's rule-making powers set out in s.138 of FSMA (as originally enacted).

40. Principle 7 provides: *"A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading"*.

41. Principle 8 provides: *"A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client"*.

42. The Authority also relies upon the Conduct of Business Rules ('COBS')**.** COBS 4.2.1(1)R provides: "*A firm must ensure that a communication or a financial promotion is fair, clear and not misleading"*.

43. Senior Management Arrangements, Systems and Controls ('SYSC') sets out rules and guidance for firms in relation to systems and controls. During the Relevant Period SYSC 10.1.3R, 10.1.7R and 10.1.8R provided:

> "10.1.3 R Identifying conflicts
>
> A firm must take all reasonable steps to identify conflicts of interest between:
>
> (1) the firm, including its managers, employees and appointed representatives (or where applicable, tied agents), or any person directly or indirectly linked to them by control, and a client of the firm; or
>
> (2) one client of the firm and another client;
>
> that arise or may arise in the course of the firm providing any service referred to in SYSC 10.1.1R
>
> 10.1.7R Managing conflicts
>
> A firm must maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps to prevent conflicts of interest as defined in SYSC 10.1.3R from constituting or giving rise to a material risk of damage to the interests of its clients.
>
> 10.1.8R Disclosure of Conflicts
>
> (1) If arrangements made by a firm under SYSC 10.1.7 R to manage conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to the interests of a client will be prevented, the firm must clearly disclose the general nature and/or sources of conflicts of interest to the client before undertaking business for the client.
>
> (2) The disclosure must:
>
> (a) be made in a durable medium; and

(b) include sufficient detail, taking into account the nature of the client, to enable that client to take an informed decision with respect to the service in the context of which the conflict of interest arises."

The Tribunal's jurisdiction to amend the Statement of Case – subject matter of the reference

44. Section 207(1) FSMA provides that when the Authority proposes to impose a penalty for misconduct on an authorised pursuant to s.206 (*"Disciplinary measures"*) the Authority *"must"* give a warning notice. If the Authority decides to impose such a penalty, under s.208(1) it *"must"* give a decision notice. Sections 387 and 388 provide that warning notices and decision notices *"must" "give reasons"* for the proposed action and decision respectively. Similar requirements exist in relation to the reference from the FSN: see s.55Y(4) and (5)(b) FSMA in respect of action under s.55L.

45. These sections confer (as we discuss below) fundamentally important procedural protections for applicants, enabling them to know the case that they must meet, to make effective representations, and to understand the reasons for the Authority's decisions, and thus whether and on what basis to refer them to the Tribunal.

46. Section 208(4)(b) provides that, *"If a regulator decides to impose a penalty on an authorised person under section 206… the authorised person may refer the matter to the Tribunal."*

47. The operative provision for the Tribunal's jurisdiction is s.133 FSMA (*"Proceedings before Tribunal: general provision"*). It provides, in relevant part:

"133(1) This section applies in the case of a reference or appeal to the Tribunal (whether made under this or any other Act) in respect of—
(a) a decision of the FCA or the PRA
[…]
(4) The Tribunal may consider any evidence relating to the subject-matter of the reference or appeal, whether or not it was available to the decision-maker at the material time.
(5) In the case of a disciplinary reference or a reference under section 393(11), the Tribunal –
(a) must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter; and
(b) on determining the reference, must remit the matter to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination. […]
(6) In any other case, the Tribunal must determine the reference or appeal by either—
(a) dismissing it; or
(b) remitting the matter to the decision-maker with a direction to reconsider and reach a decision in accordance with the findings of the Tribunal.

(6A) The findings mentioned in subsection (6)(b) are limited to findings as to—

(a) issues of fact or law;

(b) the matters to be, or not to be, taken into account in making the decision; and

(c) the procedural or other steps to be taken in connection with the making of the decision.

(7A) A reference is a "disciplinary reference" for the purposes of this section if it is in respect of any of the following decisions—

[...]

(k) a decision to publish a statement under section 205, impose a penalty under section 206 or suspend a permission or impose a restriction under section 206A."

48. The words *"subject-matter of the reference"* and *"matter"* in respect of which the Tribunal must determine the appropriate action are not defined. The provision is (as the title indicates) a general provision, which caters for appeals as well as references to the Tribunal, from decisions of a variety of regulatory bodies in relation to financial services as well as the Authority. In its broadest terms, reading s. 208(5) and s. 133 (4) together, the subject matter of the reference in this case in relation to the DN is the decision of the Authority to impose a financial penalty on the Applicant. However, as we shall see, the authorities give a narrower interpretation.

49. Section 133A(1) provides insofar as relevant as follows: *"In determining in accordance with section 133(5) a reference made ... as a result of a decision notice ..., the Tribunal may not direct the body to take action which it would not, as a result of section 388(2), have had power to take when giving the notice."*

50. The question of what is within the subject matter of a reference to the Tribunal has been considered in a number of authorities. The starting point is the decision of this Tribunal's predecessor, the Financial Services and Market Tribunal, in *Jabre v Financial Services Authority (Decision on Jurisdiction)* [2002] UKFSM FSM035 (10 July 2006*).*

51. In that particular case the Warning Notice issued to Mr Jabre proposed to impose a penalty on him for market abuse and also to withdraw the approval given to him by the Authority under s.59 FSMA that allowed him to perform certain functions for his employer, a firm regulated by the Authority, on the basis that his actions meant that he was not fit and proper to perform those functions.

52. Having considered Mr Jabre's representations the RDC decided to maintain the financial penalty but declined to withdraw Mr Jabre's approval and issued a Decision Notice accordingly.

53. When Mr Jabre referred the decision to impose the financial penalty to the Tribunal, the Authority in its statement of case argued for Mr Jabre's approval to be withdrawn in addition to the imposition of the financial penalty. Mr Jabre argued that it was not open to the Tribunal to take that course because it did not form part of the "matter"

referred to the Tribunal as it was not provided for in the RDC's decision notice. The Tribunal decided that the "matter" referred was not the decision as expressed in the decision notice, but it was the circumstances on which the decision is based that fall to be considered and evaluated; it was for the Tribunal to decide what was the appropriate action to take in the light of those matters and any further relevant evidence presented to it.

54. The Tribunal stated at [28]-[29]:

> "28. The meaning of the expressions "the matter referred", or "the subject-matter of the reference" in section 133 has to be derived from their context. The first point relevant to this is the Tribunal's function. It provides a stage in the regulatory process to "determine" what is the appropriate action for the Authority to take having considered any evidence relating to the subject-matter of the reference. As the Tribunal's role is not to adjudicate on the rightness or otherwise of the decision as expressed in the decision notice, the decision itself is not strictly a relevant consideration for the Tribunal to take into account. Instead it is the allegations made in the decision notice and the circumstances on which these are based that fall to be considered and evaluated. They comprise the matter referred. It is in relation to those circumstances and any further relevant evidence that was not available to the Regulatory Decisions Committee that the Tribunal's function is to determine the appropriate action for the Authority to take. The indications, so far, are that the circumstances, the evidence and the allegations before the Regulatory Decisions Committee, and not the decision, are "the subject-matter of the reference".
>
> 29. The second point is that in the present case the facts and circumstances on which the Authority relies in its statement of case were before the Regulatory Decisions Committee. They are either set out within the decision notice or are recorded in the decision notice as matters on which the Regulatory Decisions Committee did not reach a concluded factual finding. In this respect it can be said that the facts and matters before the Regulatory Decisions Committee are the facts and matters relied upon by the Authority for the purposes of the present reference. This is not a case such as that considered in *Parker v FSA* (an unreported decision on a preliminary issue) where a new allegation unconnected with the factual context that gave rise to the original decision was sought to be raised. Nor is the present situation comparable to that found in *Ryder (No.2)* (2006), a Pensions Regulator Tribunal reference. There the matter that Mr Ryder had sought to raise related to factual issues that had not been in front of the Determinations Panel of the Pensions Regulator and therefore formed no part of the body of facts to which the determination notice related. [Emphasis Added]"

55. It is clear that [28] and [29] of *Jabre* circumscribe the subject matter of the reference, the foundations for which must be contained in the Decision Notice. Per [28]: the circumstances, the evidence and the allegations before the Regulatory Decisions Committee ('RDC'), and not the decision, are "the subject-matter of the reference"'. The Tribunal explains at [29] that even if findings are not made in the Decision Notice the subject matter may include the allegations which were before the RDC - the facts and circumstances on which the findings were sought by the Authority may form the subject matter of the reference i.e. allegations which were in the statutory notices and made to the RDC may be revived before the Tribunal.

56. The Tribunal in *Jabre* distinguished the facts of *James Parker v FSA* (FSMT, 13 October 2004) where a new allegation unconnected with the factual context that gave rise to the original decision was found to be outside the subject matter. The *"matter"* referred extends beyond the decision notice to the *"circumstances, the evidence and the allegations before the [RDC]"*, as the Tribunal put it – and hence included allegations (lack of fitness justifying withdrawal of approvals and prohibition order) which the Authority had included in the warning notice as to fitness and which were therefore before the RDC (and able to be addressed by Mr Jabre), even though the RDC had chosen not to rely on them in the decision notice (albeit included as matters on which it chose not to rely). This was why, as the Tribunal reasoned, its decision was consistent with *Parker v FSA*, where the new allegation of market abuse sought to be added had not been ventilated before the RDC nor included in the decision notice, and was therefore not part of the matter referred.

57. It is clear from the passages in *Jabre* quoted above that the Tribunal placed some emphasis on the fact that the matters on which the Authority relied in its Statement of Case before the Tribunal were "the facts and matters before the RDC" and therefore those facts and matters were capable of being pleaded before the Tribunal in the Authority's Statement of Case. That is so even if findings on those facts and matters are not made in the Decision Notice. Consequently, allegations which were in the statutory notices and made to the RDC may be pursued before the Tribunal even if the RDC rejected them.

58. The reference to the "statutory notices" is important. The Authority's decision-making procedure which must be followed before it can decide to impose a financial penalty requires regulatory proceedings to be commenced by the issue of a Warning Notice. Section 387 FSMA states that a warning notice "must" state, among other things "the action which the [Authority] proposes to take" and "give reasons for the proposed action." In this case, therefore, it was incumbent on the Authority to issue a Warning Notice to the Applicant stating that the Authority was proposing to impose a financial penalty. It must then set out the reasons why the Authority is seeking to take that action. We consider later what is meant by the "reasons" in this context.

59. The purpose of the Warning Notice is clear. It enables the subject of it to make effective representations to the RDC as to why the Authority should not proceed with the proposed action. It is therefore important that the subject of the notice knows the reasons for the proposed actions so they can consider whether to contest the proceedings at the administrative decision making phase. The approach taken in *Jabre* accords with procedural fairness and the statutory regime by which a party is first given a Warning Notice of the proposed action by the Authority and may make representations on the facts and issues raised before the RDC makes its decisions and gives its reasons as contained within the Decision Notice. At each stage, the regulated person makes an informed decision whether to contest the matter contained in the warning notice before the RDC or to contest the matter contained in the Decision Notice in a reference to the Tribunal knowing clearly what the allegation is.

60. Nonetheless, and non-controversially, the Tribunal may consider any *"evidence"* relating to the subject matter of the reference, whether available to the Authority at the RDC stage or not: this is expressly provided for in s.133(4) FSMA.

61. This therefore raises the question as to the circumstances in which it may be possible for the Tribunal to have jurisdiction in respect of allegations or facts and circumstances not forming part of the reasons set out in the relevant warning notice or decision notice.

62. In the recent case of *Seiler, Whitestone and Raitzen v FCA* [2023] UKUT 133 (TCC) ('*Whitestone*') the Tribunal referred to a number of cases where it has been held that the Tribunal has jurisdiction to consider an allegation that was not made in the relevant warning notice or decision notice..

63. At [969] of that decision, the Tribunal referred to the decision of the Tribunal in *Allen v Financial Services Authority* (2012) FS/2012/0019 ('*Allen*') which the Tribunal said showed that the Tribunal may, exercising its case management powers, permit the respondent in a financial services case to amend its statement of case to enable account to be taken of facts and matters not relied on in the warning notice.

64. *Allen* was a case where the Authority was seeking a prohibition order under s.56 FSMA against Mr Allen on the basis that he was not fit and proper to perform any function in relation to regulated activities because he lacked honesty and integrity. The Authority sought to rely in the proceedings before the Tribunal on new allegations which demonstrated that Mr Allen was not a fit and proper person by reason of him lacking honesty and integrity. The Tribunal allowed the new allegations to be pleaded because the allegation in the Decision Notice was that Mr Allen was not a fit and proper person to perform any function in relation to regulated activities generally because he lacked honesty and integrity. Consequently, the Tribunal held that any evidence that related to Mr Allen's honesty and integrity, whether or not it was available to the Authority at the time of the Decision Notice, may be considered by the Upper Tribunal: see [19] of the decision in *Allen.*

65. At [976] of *Whitestone* the Tribunal commented on this decision as follows:

> "The key point to take from *Allen* is that the allegation of not being fit and proper did not change but other evidence in support of it was introduced on the Reference. Consequently, the allegation did not fall outside the subject matter of the Reference and the Tribunal had jurisdiction to consider it. The position that the Tribunal may consider any "evidence" relating to the subject matter of the reference, whether available to the Authority at the RDC stage or not is expressly provided for in s 133(4) FSMA."

66. Similarly, as discussed at [977] to [982] of *Whitestone,* the Court of Appeal in *Financial Conduct Authority v Hobbs* [2013] EWCA Civ 918 ('*Hobbs*'), had to consider circumstances where new allegations of the applicant acting dishonestly arose after the issue of the relevant warning notice. In that case the Authority proposed to make a prohibition order against Mr Hobbs on the basis that he had engaged in market abuse. The Authority had also contended, in the warning notice issued to Mr Hobbs,

that he had lied to his employer and the Authority during the course of the investigation into his conduct and these allegations also formed part of the basis of the RDC's decision to prohibit Mr Hobbs. Mr Hobbs referred the matter to the Tribunal which allowed his reference as it decided that Mr Hobbs' trading did not amount to market abuse. The Tribunal found that Mr Hobbs had lied to the Tribunal about why he had undertaken the trades in question but decided that since the Authority's case had rested on a consideration of Mr Hobbs' alleged conduct in committing market abuse and then lying about it, it was not satisfied that the Authority had made its case that Mr Hobbs was not a fit and proper person.

67. The Authority appealed against the Tribunal's decision upholding a reference concerning a prohibition order, in part on the basis that the Tribunal had not considered its alternative case that the prohibition order was justified in light of the applicant's lies during the course of the investigation. The Court of Appeal recognised that it was necessary for the allegations as to the applicant's lies to be part of the *"matter referred"*. The Court of Appeal noted (at [32]) counsels' agreement as to the broad meaning of *"the matter"*: *"The matter' includes the facts and evidence referred to in the decision notice on the basis of which the Authority concluded that the person in question was not fit and proper and that a prohibition order was appropriate"*.

68. The Court of Appeal was satisfied that the allegation as to Mr Hobbs' honesty was a basis for the decision (at [34]), and thus that it was incumbent on the Tribunal to consider it as part of the "*matter referred*". Consequently, in the Court of Appeal's view as Mr Hobbs' lying was part of the case before the RDC and Mr Hobbs' lying was one of the bases for the Authority's conclusion that Mr Hobbs was not fit and proper, it was incumbent on the Upper Tribunal to address the issue.

69. Furthermore, as the Tribunal observed at [981] of *Whitestone,* at [38] of *Hobbs* the Court of Appeal, recognised that there is a wider public interest in regulatory proceedings than is the case with ordinary civil litigation, and was of the view that the Tribunal should avoid any narrowing of the inquiry and any potential prejudice to the applicant could be addressed by giving him a fair opportunity to address the case.

70. As the Tribunal observed at [982] of *Whitestone,* it is important to note that in both *Allen* and *Hobbs*, the Authority sought to rely on facts and circumstances which arose after the regulatory process had been completed and therefore were not capable of being included in the original warning notice.

71. As discussed at [983] to [984] of *Whitestone* the position where the new allegation could have been included in the warning notice but was not, as is the case in these proceedings, may lead to a different outcome. In that regard, the Tribunal referred to *Khan v Financial Conduct Authority* [2014] UKUT 186 (TCC) ('*Khan*') which the Tribunal said demonstrates that where the Authority seeks to make an allegation in its Statement of Case before the Tribunal which was not pursued before the RDC (but could have been) it is necessary that the allegation was raised during the RDC process.

72. The Tribunal approved a passage at [87] of *Khan* to the effect that the subject matter of a reference did not embrace matters which did not relate to a change in circumstances after a warning notice had been issued without those circumstances having been the subject of a full investigation and the warning notice procedure.

73. In our view, the authorities demonstrate that where the allegations sought to be introduced by the Authority in its Statement of Case relate to matters which arose after the issue of the warning notice then provided those allegations fall within the scope of the "matter referred" then the Tribunal has jurisdiction to consider those allegations, subject to exercising its case management powers so as to permit the Authority to rely on a matter which was not relied on in the warning notice. In both *Allen* and *Hobbs,* for instance, the subject matter of the relevant reference was whether the applicant was not fit and proper by reason of a lack of honesty and integrity. Thus, the Tribunal had, as a matter of jurisdiction, the power to consider allegations which post-dated the warning notice. Whether it chose to do so, would be a matter for the exercise of its case management powers, taking into account any potential prejudice to the applicant.

74. Therefore, when the Tribunal is faced with the situation where the Authority seeks to rely on allegations which were not made in the warning notice but could have been the starting point is to consider whether those allegations and the facts relied on in support of the allegations form part of the subject matter of the reference.

75. We are satisfied that the passages from *Jabre* and the later authorities are to be read as follows. In order for such allegations to form part of the subject matter of the reference and be considered or determined by the Tribunal, they must be of the same nature and based upon the same factual background as the allegations made to the RDC and contained in the warning and decision notices, even if no findings are made upon them therein.

76. If the Tribunal is of the view that the new matters on which the Authority seeks to rely do fall within the scope of the subject matter of the reference, even though not contained in the warning notice, then the Tribunal has a discretion as to whether to allow matters concerned to be pleaded, exercised through its case management powers. In that regard, see the discussion at [988] to [1012] of *Whitestone,* which we refer to in more detail below. In those circumstances, as that discussion indicates, the burden on the Authority to satisfy the Tribunal that the new allegations should be pleaded will be a heavy one.

77. Clearly, if the Tribunal takes the view that the matters concerned do fall within the scope of the allegations made in the warning notice as well as the facts and matters on which the Authority relied in support of those allegations, then it will simply be a case of the Tribunal considering whether, exercising its case management powers in accordance with principles referred to below, it should permit the matters concerned to be pleaded.

78. In relation to the FSN, which as we have said, is the subject of a non-disciplinary reference, Parliament, in introducing the distinction between disciplinary and non-

disciplinary references by way of the Financial Services Act 2012, considered that *"matter"* was limited to allegations which had been properly ventilated before the RDC, such that there could be an intelligible and meaningful review of their lawfulness and reasonableness on a non-disciplinary reference. Parliament, in other words, cannot have intended or considered *"matter"* (in either subsection) to have a wider meaning than it was given in the *Jabre* case back in 2006, requiring the allegation to have been ventilated before the RDC.

79. This in no way prevents the Authority, on a reference to the Tribunal, from relying on fresh evidence that was not capable of being contained within the Decision Notice in relation to allegations or findings that are contained in the Decision Notice. Section 133(4) of the Act specifically contemplates this and empowers the Tribunal to make findings on a reference based upon evidence that was not available to the decision-maker (in this case the RDC of the Authority) at the time of the decision so long as the evidence relates to the subject matter of the reference.

The Tribunal's power to amend the Statement of Case – case management discretion

80. Pursuant to Rule 5(3)(c) of the UT Rules, the Tribunal has power to "*permit or require a party to amend a document*", including a party's statement of case.

81. The Tribunal must exercise that power: (1) in accordance with the overriding objective (as set out in Rule 2 which includes consideration of what is just and fair); and (2) with regard to the well-established principles that apply to amendments to statements of case under the Civil Procedure Rules. These principles include those explained in *Bittar v Financial Conduct Authority* [2017] UKUT 0082 (TCC) ('*Bittar*') at [53]-[55]:

    (1) that the proposed amendments have real (as opposed to "fanciful") prospects of success;

    (2) "the timing and circumstances in which the proposed amendments are advanced";

    (3) "whether there is a good reason why the relevant allegations were not advanced sooner"; and

    (4) "whether the proposed amendments have been formulated with sufficient clarity and particularity".

The Authority's amendment application

The Authority's original unamended SoC and the Applicant's reply

82. The Authority's original SoC dated 7 January 2022 began with a very short summary of its case in support of the DN and FSN:

> "15. For the reasons outlined below, the Authority contends that the Applicant has breached Principle 8 during the Relevant Period (between 1 October 2011 and 31 December 2015 inclusive).

16. In respect of this misconduct, the Authority considers that it is appropriate to impose a financial penalty of £40,806,700.
17. The Authority also contends that the Applicant should be required to pay redress to the Non-US Investors equivalent to a proportion of management and performance fees (plus interest) as detailed at paragraph 4 above. The Authority contends that this is desirable in order to advance its operational objective of securing an appropriate degree of protection for consumers."

83. "Principle 8" referred to is contained within 'The Principles for Businesses': a general statement of the fundamental obligations of firms under the regulatory system as set out in the Authority's Handbook. The Principles derive their authority from the Authority's rule-making powers set out in FSMA. Principle 8 provides:

> "A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client."

84. In summary, the original and unamended allegations of breach of Principle 8 (as set out in [154] to [170] of the SoC) were as follows:

(1) The transfer of Portfolio Managers between the External Fund and Internal Fund *"could have had a positive impact on one fund and a corresponding detrimental impact on the other"* ([162]) and thus gave rise to a potential conflict of interest. It was pleaded that the Applicant had a duty to ensure that the interests of the Funds and sets of investors were taken into account as part of that decision-making process.

(2) In the course of carrying out the regulated activity of managing investments pursuant to the terms of the IMAs and Sub-IMAs, BCMUK *"was aware of, and ratified"* ([159]) the movement of Portfolio Managers and thus owed obligations pursuant to Principle 8 to manage that conflict of interest fairly.

(3) The *"importance of managing the risk"* arising from this conflict was *"heightened"* by the use of RMT because it *"exacerbated the impact of traders being reallocated from the External Fund to the Internal Fund in that those traders' performance was sought to be replicated (but necessarily only within the limitations of the RMT system) by the disproportionately greater use of the RMT system in the External Fund"* ([166]).

(4) BCMUK failed to put in place adequate arrangements to manage the conflict of interest. Given that those arrangements were inadequate, BCMUK was obliged to provide sufficient disclosure of the nature of the conflict to the External Fund investors and failed to do so. The disclosure provided was allegedly *"entirely insufficient and, at times misleading"* ([168] to [170]).

85. The conclusion on breach of Principle 8 was explained at [172] and [174] of the SoC:

> "172. As outlined in the preceding paragraphs, at all material times Group ExCo, the Applicant's ExCo and certain individuals who were members of both those committees had responsibilities in respect of managing the Internal and External Funds, including the allocation of capital and portfolio managers, and of monitoring and mitigating the resulting conflict of interest. Members of the Applicant's senior management plainly

recognised that there was an inherent and overarching conflict of interest, but its response was inadequate, in that:

172.1. no steps were taken to consider whether the collective exposure of its senior staff to the Internal Fund (including those given certain specific responsibilities for managing any relevant conflicts) presented its own conflict;
172.2. there is no evidence of any consideration by the Applicant as to whether the Applicant's ExCo, which made or otherwise approved all strategic decisions in relation to the Internal Fund, and which had a financial interest in the performance of the Internal Fund, was sufficiently independent from these conflicts to manage them properly; and
172.3. no steps were taken to manage the conflict by providing sufficient disclosure to investors, either before or after queries were raised, by investors and Due Diligence Consultants.
…
174. Based on the facts and matters set out above, the Authority contends that the Applicant breached Principle 8 in that it failed to manage conflicts of interest fairly, between the investors in the External and Internal Funds. The Authority considers that the misconduct was committed recklessly."

86. The Authority's case as to the consequences of the Applicant's breach was brief and set out at [173] of the SoC as follows:

> "173. The Applicant's failure to appropriately manage this conflict resulted in a substandard investment management service being provided to the External Fund and its investors in that the service provided involved both the inadequate arrangements and the inadequate disclosure described above. The Authority contends that the failings by the Applicant were such that the level of service received by the investors was therefore below that which could reasonably be expected to be commensurate with the fees paid by those investors."

87. BCMUK denied any breach of Principle 8 as set out in its Reply. Its response to the unamended allegations of breach was in short summary as follows:

(1) The Internal Fund was an important and effective talent retention vehicle which benefitted all BlueCrest funds, including the External Fund (Reply, paras 10 to 14).

(2) BCMUK properly identified the potential conflict of interest arising from the allocation of Portfolio Managers (Reply, paras 15 to 21) and put in place effective and sufficient organisational and administrative arrangements to manage it – involving oversight by the BlueCrest Group ExCo, BCMUK ExCo and the risk function of BlueCrest (Reply, paras 22 to 31).

(3) If it was necessary to do so (on the (denied) basis that the management of the conflict was insufficient) BCMUK fully disclosed the conflict to its client, which was the External Fund and not (as the Authority had wrongly pleaded) the investors in the External Fund (Reply, paras 32 to 44). This disclosure primarily took the form of board packs provided to the boards of the External Fund which was amply sufficient, in particular given the fact that, throughout the Relevant Period, all of the professional directors on the External Fund boards were also members of at least one of the Internal Fund boards (being the board of the 'master' or the 'feeder').

88. As to RMT, BCMUK submitted that the Authority had fundamentally misunderstood the nature of the programme, how it was used, and its performance; and had drawn unjustified inferences from the fact that the allocation of RMT was temporarily removed from the Internal Fund as a result of the 'taper tantrum' within the market (when this was due simply to the differing leverage and thus cash stress parameters within the funds) before being again employed in the Internal Fund (Reply, paras 102 to 123).

89. It appears to us that the pleadings made in the original SoC are consistent with the reasons given by the Authority for the regulatory action decided on in the DN and accordingly raised no concerns as to whether any of the matters pleaded went beyond the scope of the subject matter of the reference.

The Authority's amendment application

90. The Authority applied, pursuant to Rule 5(3)(c) of the UT Rules, to amend its Statement of Case on 29 July 2022. The Authority's draft amended Statement of Case (the ASoC) contains a number of amendments, a large proportion of which are contested by the Applicant.

91. Some amendments were not in dispute. For example, at the hearing the Applicant confirmed that, while disputing the allegation, it no longer objected to an amendment to the case pleaded by the Authority that: even if the only "*client*" of the Applicant was the External Fund, and the relevant conflict of interest was capable of remedy and/or mitigation by disclosure to the External Fund's directors, the Applicant breached Principle 8 by failing adequately to disclose the relevant conflict of interest to the External Fund's directors.

92. Mr Herberg KC, for the Applicant, accepted that the amendment was no more than an elaboration of the existing case on behalf of the Authority. He accepted it proceeded on the correct basis that the client was the board of the relevant fund and it alleged that that conflict was not adequately disclosed to the directors, i.e. to the client. While the Applicant denied the factual allegations therein, it did not oppose the amendment and accepted that it is a matter for trial and that it is not some new or different case in principle which is sought to be advanced by the Authority.

93. Therefore, the amendment sought at ASoC [170B] reads as follows:

> "170B. Further or alternatively, the Applicant failed to "*clearly disclose the general nature and/or sources of conflicts of interest*" to the Board of the External Fund. The Applicant failed to clearly and/or expressly draw to the attention of the Board of the External Fund either (1) the nature of the conflict between the Internal Fund and the External Fund; or (2) the absence of adequate arrangements to manage that conflict fairly as set out in paragraphs 157 – 167 above. Alternatively, the Applicant failed to ensure that such facts and matters were disclosed to the Board of the External Fund. Further or alternatively, the Applicant also failed to disclose material facts about RMT to the Board of the External Fund (alternatively failed to ensure such facts were disclosed to the Board of the External Fund) and/or misled the Board of the External Fund in material regards and/or failed to ensure that the Board of the External Fund were not misled in such regards. As late as 11 July 2012, the Board of the External Fund were informed that RMT was a *"project"* that was *"in the early stages of*

> *development"* whereas RMT had in fact been used in the External Fund since January 2012. Similarly, in July 2013, the Board of the External Fund were told that RMT was a *"discrete rates trading strategy"* when, in that month, RMT's allocated capital in the External Fund was approximately US$3.8bn. Further or alternatively, the Applicant failed to disclose to the Board of the External Fund the facts and matters set out at paragraph 72 above."

The four contested amendments

94. The Authority pleaded a number of amendments within the ASoC to which the Applicant objected on the basis that they raised four new cases not previously pleaded: therefore (i) they were outside the Tribunal's jurisdiction because they were not matters pursued by the Authority before the RDC or in its statutory Warning and Decision Notices; and (ii) the Tribunal should not exercise its case management powers to permit them.

95. The first two contested amendments rely on breaches of Principle 8 (the same Principle already alleged in the original SoC).

The first contested amendment – breach of Principle 8

96. The first contested amendment alleges that even if the only "*client"* of the Applicant was the External Fund, the Applicant breached Principle 8 in circumstances where the relevant conflict of interest was only disclosed to the External Fund's directors. Such disclosure was not capable of managing the conflict of interest fairly in circumstances where the External Fund directors were themselves subject to the same conflict. This proposed and contested amendment is to be found at ASoC [42A(c)]:

> "42A In relation to the External Fund....
> (c) As to disclosure, if, which is denied, the breach of Principle 8 was capable of remedy and/or mitigation by any form of disclosure, <u>such disclosure, in order to manage the conflict fairly, required to be provided to the External Fund's investors</u> rather than merely the directors of the External Fund. This is because (1) each of the directors of the External Fund was also a member of at least one of the Internal Fund boards and were themselves therefore subject to, or potentially subject to, the same conflict between the Internal Fund and the External Fund which the Applicant was failing fairly to manage; and/or (2) the Applicant was itself responsible for communicating with External Fund investors. [emphasis added]."

The second contested amendment – breach of Principle 8

97. The second contested amendment alleges that the Applicant's role under the MSA, (mentioned only once in passing in the original SoC at [81]) involved the provision of services to the External Fund's investors in the course of carrying out the regulated activities of "*making arrangements with a view to transactions in investments*" and/or "*arranging (bringing about) deals in investments*". This meant that the investors in the External Fund were indeed "*clients*" of the Applicant for the purposes of Principle 8. It was alleged that in breach of that Principle, disclosure of the relevant conflicts of interest to those underlying investors was inadequate. The contested amending paragraphs are at ASoC [21], [41A], [42], [42A(f) & (g)], [81], [158A], [170A] and [170B].

98. Most relevantly, 42A(f) & (g) of the ASoC alleges that the investors in the External Fund were clients of the Applicant:

> "42A…In relation to the External Fund's investors:
>
> (f)As a result of its duties under the MSA as summarised at paragraph 41A above, and set out in more detail at paragraphs 81 – 102 below, and by reason of the fact that it completed Regulatory Details Forms for each potential investor, the Applicant (1) provided services to the External Fund's investors and/or prospective investors in the course of carrying out the regulated activities of "*making arrangements with a view to transactions in investments*" and/or "*arranging (bringing about) deals in investments*"; further or alternatively (2) communicated or was likely to communicate financial promotions to the firm's clients (the recipients and/or likely recipients of those communications being, for these purposes, the firm's clients).
>
> - (g) The External Fund's investors and/or prospective investors were therefore clients of the Applicant for the purposes of the obligations in Principle 8 and, in order to ensure the relevant conflicts of interest were fairly managed and/or (in respect of (1) in the preceding sub paragraph) in order to comply with the specific requirements of SYSC 10.1.8R, the Applicant was required (but failed) to "*clearly disclose the general nature and/or sources of conflicts of interest".*

99. Paragraph 170A of the ASoC alleges a further breach of Principle 8 based on the Applicant's alleged duty to the investors as clients:

> "170A. Further or alternatively, the Applicant failed to communicate information to investors and/or prospective investors in the External Fund in a way that was fair, clear and nor misleading in that it failed, when communicating information to investors and/or prospective investors to whom it was making financial promotions, as set out at paragraphs 81 – 102 above, to inform those investors of either (1) the nature of the conflict between the Internal Fund and the External Fund; or (2) the absence of adequate arrangements to manage that conflict fairly as set out in paragraphs 157 –167 above."

The third and fourth contested amendments – breach of Principle 7 and COBS 4.2.1 R (1)

100. The third contested amendment relies on a breach of Principle 7 which provides:

> "A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading".

101. The fourth contested amendment relies upon the Conduct of Business Rules ("COBS"). COBS 4.2.1(1)R provides:

> "A firm must ensure that a communication or a financial promotion is fair, clear and not misleading".

102. The third amendment alleges that the Applicant's role under the MSA for the reasons set out in paragraph 42A(f) & (g) of the ASoC, meant that the External Fund's investors were clients of the Applicant for the purposes also of Principle 7.

103. The Authority seeks to contend that, in breach of Principle 7, the Applicant failed to communicate relevant information to the underlying investors in a way that was clear, fair and not misleading. The disputed paragraphs are at ASoC [15], [42B], [174 (second sentence)] and Appendix 2 (excluding paragraph 20) read with ASoC [21], [41A] [42], [42A(f)], [81], [158A] and [170A].

104. The fourth amendment is that by virtue of the same matters set out in the paragraph above, the Applicant breached COBS 4.2.1R (1).

105. For example, paragraph 42B of the ASoC alleges as to the Applicant's duty to the investors in the External Fund:

> "42B. Further or alternatively, as a result of the matters set out in paragraph 42A(f) above, the External Fund's investors and/or prospective investors were clients and/or customers of the Applicant for the purposes of the obligations in Principle 7 and/or COBS 4.2.1(1)R and the Applicant was required to ensure that it communicated information to them in a way that was clear, fair and not misleading and/or that its communications and/or financial promotions were fair, clear and not misleading."

106. The conclusion at [172] ASoC remained as set out in the original SoC (bar for an immaterial deletion in respect of ExCo's strategic decision-making powers in relation to the Internal Fund).

107. However, [174] of the ASoC contained an amendment as underlined as regards the Applicant's alleged breach of duty to the External Fund investors as clients:

> "174. Based on the facts and matters set out above, the Authority contends that the Applicant breached Principle 8 in that it failed to manage conflicts of interest fairly, between the investors in the External and Internal Funds. <u>Further or alternatively, the Authority contends that the Applicant breached Principle 7 and/or COBS 4.2.1(1)R in that it failed to communicate information to its clients in a way which was fair, clear and not misleading as set out in paragraph 170A above</u>. The Authority considers that the misconduct was committed recklessly. <u>In this regard, the Authority relies upon and avers that each of Messrs. Paul Dehadray, Peter Cox and/or Matt Weir acted recklessly in that they were aware of (1) the relevant conflicts of interests (as set out above) and the risks to which they gave rise; and (2) the (it is averred) insufficient and/or unreasonable steps taken by the Applicant to manage and/or disclose those risks. To the extent necessary, the Authority shall seek to rely upon such awareness for the purposes of its case against the Applicant as a matter of vicarious liability and/or attribution."</u>

The parties' arguments

The Applicant's objection in outline

108. The Applicant objected to the Authority's amendment application on the basis of two grounds. First, as a matter of law and on the basis of a consistent line of Tribunal decisions, the Tribunal does not have jurisdiction to entertain or determine the four amendments which raise new cases. Second and alternatively, the Tribunal should not

in its discretion permit the Authority in all the circumstances to introduce the amendments and new cases at this stage in the proceedings.

109. In summary, Mr Herberg KC for the Applicant submitted that the four amendments raised new cases to which the Applicant objected. The first two proposed amendments constitute new cases of fact in relation to breach of Principle 8 that were not contained within the Authority's Warning Notice, nor the FSN / DN nor the original SoC.

110. He submitted that the second two proposed amendments constitute a new case in fact and in law (new legal foundations are relied upon) to those relied upon in the statutory Warning and Decision Notices. It matters not that the Applicant chose to expedite the RDC process as this does not affect the Authority's obligation to set out its position in the statutory notices to be issued. He submitted that the Authority could not realistically submit that it did not have the opportunity to change or correct its case at that stage given the history of draft annotated notices being issued and representations being made earlier in the process.

111. He objected to the four amendments for the following reasons.

112. First, the proposed amendment at para 42A(c) of the ASoC raises a new allegation that BCMUK breached Principle 8 by failing to conclude that its client (the External Fund, acting through its board) was conflicted and that it was therefore necessary to 'bypass' its client and make disclosures directly to the investors in the External Fund ("New Para 42A(c) Case"). Mr Herberg KC contended that there was a different alleged conflict in issue from that originally pleaded. He submitted: (i) that the new Para 42A(c) Case is bad in law and has no real prospects of success such that the Tribunal should not exercise its discretion to permit the amendment; and (ii) in any event that it was a new factual case which the Tribunal had no jurisdiction to hear.

113. Second, the proposed amendment of breach of Principle 8 relating to the MSA introduced an entirely new case on the facts when the Authority had previously only relied upon breaches relating to the Sub-IMAs in its statutory notices and in its SoC. Mr Herberg KC argued that it was based on a different conflict of interest. The existing case in the SoC concerned conflicts in managing the Internal and External Funds and transferring Portfolio Managers between the two and allegations that BCMUK did not control or supervise or disclose this. The new case is about conflict in failures of communication to investors and financial promotions to potential clients and that is not a regulated activity – there is a distinction to be drawn between financial promotion and arranging deals.

114. The third and fourth proposed amendments raised new cases of fact and new allegations of law – breaches of Principle 7 and COBS - that were not contained within the Authority's Warning Notice, nor the FSN / DN nor the original SoC.

115. In relation to the factual case, Mr Herberg KC contended that it was not the subject of the original case that BCMUK failed to communicate relevant information to the investors in a way that was clear, fair and not misleading. In relation to the legal case, he argued that a substantial purpose of the third and fourth amendments was to add two entirely new cases to the effect that BCMUK breached obligations pursuant

to Principle 7 of the Principles for Businesses and COBS 4.2.1R(1) (the "New Principle 7/COBS Case").

116. Mr Herberg KC submitted that these new cases are a response to BCMUK's Reply pointing out fundamental legal defects in the Authority's original case which was framed entirely on the basis of an alleged breach of Principle 8. The last three amendments all arise out of new obligations and related activities and none of the Authority's original case was based on a breach of the MSA or investors as clients. The new cases were based on how activities were performed and different facts and circumstances as well as different legal principles.

The Authority's reply in outline

117. Mr George KC submitted that two remaining categories of amendments are in dispute. Both are responsive to the Applicant's case, advanced for the first time in its Reply to the Statement of Case, that the investors in the External Fund were not "*clients*" of the Applicant:

118. The first category, the first and second disputed amendments are "Principle 8 Amendments". For the purposes of the Principle 8 case already pleaded in the SoC, the Authority seeks to advance the cases identified as set out above.

119. The second category, the third and fourth disputed amendments, are "Principle 7 / COBS Amendments". The Authority seeks to plead that the Applicant was required under Principle 7 and/or COBS 4.2.1 R (1) to ensure that it communicated information to the External Fund's investors and/or prospective investors in a way that was clear, fair and not misleading by way of the cases identified above.

120. Mr George KC argued that the Authority has consistently pleaded at all stages that the relevant "*clients*" of the Applicant included both the underlying investors and the External Fund. He relied on four further matters.

121. First, the Authority's amendment application arises in circumstances where the Applicant, in its pleaded Reply to the SoC, departed for the first time from a position which previously appeared to be common ground, namely (1) that the relevant "*clients*" of the Applicant included the underlying investors in the External Fund; and (2) that those clients received regulated services from the Applicant by virtue of the MSA.

122. Second, the disputed amendments arise substantially out of the same underlying facts and matters that are already set out in the SoC. The focus of the Authority's case was and remains the Applicant's failure over the Relevant Period (1 October 2011 – 31 December 2015) appropriately to manage the conflict of interest that arose between the Internal Fund and the External Fund. More specifically, the Authority's case was and remains that the failure to manage the conflict arose from inadequate arrangements for managing the conflict and a failure appropriately to disclose the existence of the conflict. The disputed amendments provide further particularisation of the same essential failure.

123. Third, in light of the fact that the amendments arise out of substantially the same underlying facts and matters, the Applicant has failed to identify any concrete prejudice that it would suffer by virtue of these amendments: there is no suggestion that the amendments (i) would add to the length of the final hearing of the reference (nor indeed has the final hearing yet been listed); (ii) expand the scope of the evidence and factual investigations required in order for the Applicant to pursue its references; or (iii) raise any issue in respect of which there may be difficulties obtaining evidence (e.g. due to the degradation of witness memory over time or for any other reason).

124. The absence of any concrete prejudice to the Applicant is a significant factor to be taken into account when assessing the Authority's application for permission to amend.

125. Fourth, in connection with the FSN reference, the proposed amendments must be seen against the backdrop of the Authority's case on loss as already pleaded in the SoC. In particular, the investors and/or the External Fund itself have suffered a real loss in respect of the defective services that the Applicant provided in breach of its regulatory obligations. One central question arising on the FSN reference is whether section 55L FSMA provides a lawful route for the Authority to require the Applicant to provide redress for that loss.

Discussion and Analysis

The first contested amendment: New Principle 8 Case at ASoC 42A(c)

Case management discretion to amend the statement of case

126. BCMUK objects to the proposed amendment at para 42A(c) of the Authority's ASoC as it argues that it raises a new allegation that, on the assumption that the External Fund was BCMUK's client (i.e. BCMUK's case), BCMUK nevertheless breached Principle 8 by failing to conclude that its client, the External Fund acting through its board, was conflicted and that it was therefore necessary for it to 'bypass' its client and make disclosures directly to the investors in its client.

127. Mr George submits that the Authority's proposed case in this regard has a real prospect of success in the law. The case raises (at the very least) a serious issue to be tried, namely whether, in the particular circumstances of this case and on the factual findings subsequently made at trial, it would have been necessary, if the breach were capable of remedy by any form of disclosure, for the Applicant to make proper disclosure of the conflict of interest not only to the External Fund itself, but to those underlying investors who would be affected by it.

128. He contends that the purpose of this amendment is to emphasise that, in fact, little turns on whether the clients were the Funds or the investors, because there could never have been a properly managed conflict of interest on the present facts without the underlying investors to the External Fund being given sufficient detail: (i) to understand (a) the nature of the conflict of interest; (b) that there was a risk of damage to their interests by reason of the conflict of interest; and (c) the risks to the investors that arose as a result of that conflict of interest; and then (ii) in all the circumstances to

take an informed decision as to whether to invest in the circumstances of the conflict of interest.

129. He argues that in a case like the present where the firm has not prevented a conflict of interest arising, the question is whether there is adequate disclosure to manage that conflict of interest in such a way that the potential harm presented by the conflict of interest is managed. On the present facts, that risk of harm does not operate solely in respect of the Funds themselves. The risk of harm extends to the underlying investors. Accordingly, any disclosure capable of managing the conflict of interest would need to address the harm as it arises in full.

130. He contends that even if it were correct that the Applicant's only relevant "*client*" was the External Fund, the Applicant's objection elides the questions of (i) identifying and preventing a conflict of interest arising between clients on the one hand, and (ii) the disclosure required properly to manage a conflict of interest once it has arisen. That distinction is of particular significance on the present facts, where each of the directors of the External Fund was also (potentially) subject to exactly the same conflict between the Funds – no purpose is served by disclosing a conflict to someone who is part of the conflict. Further, the Applicant itself was in fact communicating with the external investors, and was doing so in the context of further regulated activities.

131. We reject Mr George's submissions on this point.

132. As our analysis of the statutory notices set out above confirms, under the terms of its Sub-IMA the Applicant agreed to manage the assets of the External Fund. In relation to these investment services, the obligation to identify and manage conflicts of interest arose. It is therefore the customer relationship created pursuant to the investment management agreement which gave rise to the Applicant's obligations under Principle 8.

133. Principle 8 is clear in its terms. The obligation under it to manage conflicts of interest fairly arises "both between itself and its customers and between a customer and another client". In this case, the term "customer" has the same meaning as "client" as used in the Authority's Handbook Glossary. By virtue of COBS 3.2.1R(1)(a), the *"client"* is the person or entity to whom a firm provides *"a service in the course of carrying on a regulated activity"*. As we have said, in this case in relation to the sub-investment management agreement, the person to whom the service was provided was the External Fund and not the underlying investors.

134. Accordingly, the conflict that has to be managed in this case is that which has arisen as a result of managing the assets of two different clients, that is the Internal Fund and the External Fund. These are the persons to whom the duty is owed. Insofar as the client is concerned, in this case the External Fund, has a conflict, for example because the members of its Board are conflicted because of their connection with the Internal Fund, then that is a matter which that client must manage.

135. Therefore, in this case insofar as the Applicant had a duty of disclosure because of the conflict which arose in the context of managing both the assets of the Internal Fund and the External Fund, the duty of disclosure will be owed to its client, the External Fund. In these circumstances, the Board of the External Fund would need to

consider what steps it should then take in the light of its own duties to its investors. That may lead to a disclosure exercise on its own part, for example through the prospectus or other marketing material which it itself used or authorised its agents to use.

136. We agree with Mr Herberg's submission that there is no basis in statute or in the Authority's rules or guidance for the proposition that an obligation under Principle 8 can be owed to persons who are not a firm's clients, and the ASoC does not seek to identify any.

137. We consider that, applying the factors to be considered as set out in *Bittar*, the Authority's proposed New Principle 8 Case set out at 42A(c) of the ASoC should be refused as a matter of discretion. That is because this case has no real prospect of success because the amendment is bad as a matter of law for the reasons set out above.

Jurisdictional objection to amending the SoC

138. In addition, Mr Herberg on behalf of the Applicant took a jurisdictional objection to this new case. He contended that it raises a new allegation of fact that does not form part of the subject matter of the reference as it was not explored or contained within the RDC proceedings nor statutory notices.

139. In view of our conclusion on the prospects of success of the proposed amendment, we do not need to consider this point further.

The second contested amendment: New Principle 8 Case at 42A(f), (g) & 170A of the ASoC.

The jurisdiction to amend the Statement of Case

140. Mr Herberg submits that this amendment concerns a different agreement between BCMUK and the Investment Manager. Instead of the Sub-IMAs referred to above under which BCMUK provided investment management services, the amendments relate to services provided under the MSA, pursuant to which BCMUK was appointed by the Investment Manager to market and sell subscriptions for investment in the External Fund (ASoC, [21]).

141. Mr Herberg submits that the amendment concerns different activities on the part of BCMUK, namely the marketing and sale of investments and/or the communication of financial promotions, and/or a different regulated activity, that of *"making arrangements with a view to transactions in investments"* and/or *"arranging (bringing about) deals in investments"* (ASoC, para 41A and 42A(f)), rather than investment management.

142. As submitted by Mr Herberg, the amendment concerns BCMUK's provision of services to different persons, namely to the External Fund's investors (as opposed to the External Fund itself) (ASoC, para 42A(f), and (g).

143. Finally, Mr Herberg submits that the amendment concerns a fundamentally different body of disclosure by BCMUK to its client. Specifically: in respect of the Principle 8 case as originally pleaded by the Authority, the relevant client to whom the

Principle 8 duties to disclose any conflict were owed could and should only have been the External Fund and not the underlying investors. With respect to the amended case, the relevant persons for the purposes of the New Principle 8 Case are the underlying investors. The relevant disclosure to be made by BCMUK for the purposes of the new cases would therefore be quite different. It would concern the disclosure made by way of the offering documents and other communications made directly to the investors, pursuant to its activities in marketing and selling subscriptions.

144. Accordingly, Mr Herberg submits that the New Principle 8 Case set out in this amendment was never (whether as a matter of substance or form) put to the RDC, considered by the RDC, nor relied on by the RDC in promulgating either the DN or the FSN therefore, on the basis of the case law summarised above, the matters covered by this amendment do not form part of the subject matter of the reference and therefore the Tribunal has no jurisdiction to consider them.

145. We disagree with Mr Herberg's submissions on this point.

146. Our analysis of the statutory notices as set out at [25] to [38] above leads inevitably to the conclusion that the matters pleaded at 42A(f) and 42A (g) of the ASoC are within the scope of the subject matter of the reference and accordingly the Tribunal has the jurisdiction to consider them.

147. As we have found, although not stated as clearly as it should have been, we consider that the facts and matters before the RDC included allegations that BCMUK breached Principle 8 by failing to make adequate disclosure of the conflict between the Internal Fund and the External Fund to investors in the External Fund when carrying out its functions under the MSA, which was a different investment service provided to the External Fund to that provided under the Sub-IMA.

148. The proposed amendment makes an allegation that there was a failure to make adequate disclosure to investors when acting under the MSA and the facts and matters on which BCMUK seeks to rely in the ASoC to support that allegation are consistent with the facts and matters relied on in the DN: see 81 to 102 of the ASoC. Those provisions correspond closely to the matters set out at 4.62 to 4.81 of the DN.

149. Since the matters which are the subject of the new amendment are consistent with the reasons set out in the statutory notices for the proposed regulatory action, no point may be taken that the Authority is seeking to plead matters that did not form part of the reasons for this regulatory action as required by s.387 and s.388 FSMA respectively.

150. For completeness, we should mention that our analysis of the statutory notices was to the effect that the Authority had not stated with any clarity that the disclosure obligation was owed to the External Fund, as opposed to the underlying investors. That proposition was the subject of the amendment at [170B] of the ASoC proposed by the Authority, which, as discussed above, the Applicant did not oppose. We have therefore considered whether, notwithstanding the fact that it was unopposed, we should take the view that an allegation that the Applicant had not made adequate disclosure to the External Fund did not form part of the facts and matters before the RDC.

151. However, as we have said, the DN does not set out the Authority's reasoning with any degree of clarity. It is certainly possible to imply, as the Applicant certainly did, that the DN could be read as including an allegation that there was a failure to make adequate disclosure to the External Fund as well as the investors. That is presumably why it did not oppose the first amendment. Mindful of the statement of the Court of Appeal in *Hobbs* to the effect that the Tribunal should not take an approach which unnecessarily narrowed the enquiry to be made in the Tribunal, we consider that we should take the view that it can be properly implied that an allegation that the Applicant failed to make adequate disclosure of the conflict to the External Fund falls within the scope of the matter referred to the Tribunal. Accordingly, in the absence of any challenge from the Applicant on the ground that we should not exercise our discretion to permit the amendment, we permit it to be made.

Discretion to amend the Statement of Case

152. Having decided that the Tribunal has jurisdiction to consider facts and matters relating to the second contested amendment, we now consider whether, in exercise of our discretion, we should permit the Authority to amend the SoC in that regard.

153. In exercising its power under Rule 5(3)(c) of the UT Rules to permit a party to amend a document, the Tribunal should have regard to the overriding objective as set out in UT Rule 2, asking whether it would be fair and just to permit the Authority to add the allegations. It should also have regard to the relevant factors set out by Judge Herrington in *Bittar v Financial Conduct Authority* [2017] UKUT 82 (TCC) at [53] to [55], set out above which for convenience we repeat as follows:

(1) that the proposed amendments have real (as opposed to "fanciful") prospects of success;
(2) the timing and circumstances in which the proposed amendments are advanced;
(3) whether there is a good reason why the relevant allegations were not advanced sooner; and
(4) whether the proposed amendments have been formulated with sufficient clarity and particularity.

154. As has been emphasised in the case law, the starting point is that the Authority should be expected to advance the same case as before the RDC, save where there is a new and unexpected change of circumstances (see *Legal & General v Financial Services Authority* [2005] UKFSM 11, at [15]; *Allen* at [19]).

155. As far as the first factor referred to in *Bittar* is concerned, the Applicant does not seek to argue that the pleading is bad in law and accordingly we are satisfied that the proposed amendments have a real prospect of success.

156. As regards the timing of the amendment, the application was made relatively early in the Tribunal proceedings, before directions have been made for the preparation of witness evidence. The amendments were proposed in response to statements in the Applicant's Reply and, as our analysis of the statutory notice demonstrates, in effect they clarify the case that was originally put before the RDC. Accordingly, we do not

consider that the amendment would result in the Authority presenting a significantly different new case before the Tribunal on Principle 8 to that which was originally pleaded.

157. We are therefore satisfied that the Applicant will not be significantly prejudiced by the introduction of the amendment at this stage in the proceedings. The underlying facts and circumstances which support the allegation made by the amendment are already pleaded in the SoC at paragraphs 81 to 102 and there is no application to amend those provisions. The Applicant is therefore already familiar with those provisions and will have adequate opportunity to address them in evidence and by submissions.

158. As to whether there was a good reason why the relevant allegations were not pleaded earlier, the reason given by the Authority was that until the Applicant filed its Reply, it had raised no objections to the Authority's clear and consistent position that the Applicant's clients included the underlying investors in the External Fund.

159. We accept that the amendments are responsive to the Reply. However, we do not consider that the Applicant is to be criticised for not having objected to the position earlier. Quite properly, it exercised its right not to exercise its right to make representations to the RDC and the Authority will have to live with the consequences of that election. There is no reason why the Authority could not have made a clearer pleading in the SoC. That it did not do so was as the result of the lack of clarity in the statutory notices. Accordingly, although the fact that the amendment is responsive to the Reply is a mitigating factor, it does not in our view give rise to a good reason in itself why the allegation could not have been pleaded earlier.

160. We also accept that the proposed amendment is set out with appropriate detail and clarity. In our view, there can be no suggestion that the Applicant is unable adequately to respond to the proposed case.

161. Consequently, our assessment of the first, second and fourth factors point strongly in favour of permitting the amendment. In our view, these factors outweigh the fact that the Authority has not advanced a particularly strong reason why the allegation was not made earlier. The strength of that factor is, in our view, diminished because the amendment is made in response to the Reply and in order to clarify what, albeit not clearly, was originally pleaded.

162. We therefore permit the second contested amendment to be made.

The third and fourth contested amendments

The jurisdiction to amend the Statement of Case

163. In respect of the third and fourth contested amendments the Authority's case relies on a duty and breach of Principle 7 / COBS as set out at paragraphs 42B and 173 of the ASoC. Mr George KC submits that the Applicant was required under Principle 7 and/or COBS 4.2.1R (1) to ensure that it communicated (or took reasonable steps to communicate) information to the External Fund's investors and/or prospective investors in a way that was clear, fair and not misleading. The proposed amendments serve to show that the same facts and matters which are relevant to the Principle 8 case

(i.e. the Applicant's role under the Master Sales Agreement which was already pleaded at SoC [81]) can also be viewed through the prism of different regulatory requirements (Principle 7 and COBS 4.2.1R(1)), such that there can be no doubt that the underlying investors in the External Fund were clients of the Applicant.

164. He argues that the Applicant is wrong to assert that the Principle 7 / COBS amendments constitute a substantial shift in the Authority's case. The proposed amendments serve to show that the same facts and matters which have already been advanced by the Authority can also be viewed through the prism of different regulatory requirements (i.e. Principle 7 and COBS 4.2.1R(1)). In particular the proposed amendments concern the same agreement between the Applicant and the investment manager as already pleaded at SoC [81], namely the MSA. As already set out in the Authority's pleaded case, pursuant to that Agreement the Applicant was appointed by the Investment Manager to market and sell subscriptions for investment in the External Fund. It has consistently formed part of the Authority's case (including as advanced before the RDC) that the underlying investors in the External Fund were "*clients*" of the Applicant by virtue of that Agreement.

165. He contends that the proposed amendments concern the provision of inadequate services to the same persons as already pleaded at SoC [173], namely the underlying investors in the External Fund. In this regard, the Authority has already pleaded that "*the failings by the Applicant were such that the level of service received by the investors was therefore below that which could reasonably be expected to be commensurate with the fees paid by those investors*".

166. He submits that the proposed amendments concern the same body of disclosure to that which is already pleaded, namely disclosure to the underlying investors in the External Fund. The inadequacy of the disclosure made to those investors by way of offering documents and other direct communications is already pleaded at SoC [78-119].

167. Whilst we accept that the New Principle 7 and COBS allegations do, to a large extent, rely on the same body of disclosure to that pleaded in relation to the Principle 8 allegations regarding disclosure to the investors, and do rely on the same regulated activity, namely the services provided by the Applicant pursuant to the MSA, there are significant differences which lead us to the conclusion that these allegations do not fall within the subject matter of the reference and accordingly the Tribunal has no jurisdiction to consider them.

168. The reason why we take a different view to our position on the second contested amendment is that notwithstanding the need not to take too narrow an approach to the question of what constitutes the *"subject-matter of the reference",* we consider that there must come a point at which a hard edge is applied to the Tribunal's jurisdiction.

169. We would seek to define that edge by reference to the question as to whether the amendment proposed embraced an allegation that was made as one of the key reasons for the regulatory action proposed in the Warning Notice. In our view the third and fourth contested amendments raise allegations which are based on different regulatory provisions to that originally pleaded so fall outside the scope of the subject matter of the reference. This is particularly the case in circumstances where these

allegations could have been, and should have been, made at the time of the issue of the relevant statutory notices.

170. As we stated at [75] above, in order for an allegation to form part of the subject matter of the reference and be considered or determined by the Tribunal, they must not only be based on the same factual background as the allegations made to the RDC but also must be of the same nature. In our view, where the allegation is in respect of a different regulatory provision then it cannot be considered to be of the same nature.

171. The reason we consider that a hard edge should be identified is because, as we observed at [58] and [59] above, Parliament has placed particular importance on the need for there to be a statutory notice which "must" state the reasons for the action the Authority proposes to take. That enables the subject to take an informed decision as to whether to contest the matter contained in the warning notice before the RDC or to contest a matter contained in a decision notice in a reference to the Tribunal knowing clearly what the allegations are being made against him.

172. We expand further on that important point in our conclusions below.

173. We should also point out that the Authority does also seek to rely on facts and matters which have not been previously pleaded in the context of the allegations of breach of Principle 8. The fourth contested amendment seeks to plead at [174] of the ASoC new facts relating to the knowledge of particular individuals to whom the Authority seeks to attribute responsibility for the alleged misconduct, as set out at [106] above. Those facts and matters clearly fall outside the scope of the subject matter of the reference.

174. The New Principle 7/COBS case was not addressed, still less advanced, by the Authority (whether by the RDC, Enforcement or otherwise) at any time prior to its introduction by way of the Authority's amendment application. Following an investigation lasting 44 months, the case which went forward to the RDC concerned Principle 8 alone and in much narrower terms. It is worth considering this in a little more detail below.

Consideration of the investigation by the Authority and procedural history of its enforcement proceedings

175. The investigation of BCMUK by the Authority never considered any breach of Principle 7 or indeed COBS.

176. On 23 February 2017 the Authority issued a Memorandum of Appointment of Investigators and a Notice of Appointment of Investigators, and then on 14 July 2017 the Authority issued a Memorandum of Appointment of Investigators (Change of Scope) and a Notice of Change of Scope of Investigation which each provided that the investigators were appointed under s.168(5) FSMA as a result of s.168(4) FSMA to conduct an investigation into BCMUK. The reasons given for the appointment were that there were circumstances suggesting potential contraventions of Principles 2, 3, 6 and 8.

177. It does not appear that the investigation ever addressed BCMUK's regulated activity of making arrangements with a view to transactions through its marketing and sales role. This was notwithstanding that the MSAs were disclosed to the Authority at a relatively early stage in the investigation, in response to a generic information request for *"Master Sales Agents Agreements"* and other "*Sales and Distribution Agreements*" relating to the funds made on 12 December 2017.

178. The Note of Substantive Communications between the RDC and the Authority Enforcement case team, dated 30 September 2021, provides (at para 3) that:

> "The decisions to give the Warning Notice and the First Supervisory Notice were reached by the RDC after consideration of:
> - the Enforcement Submissions Document dated 13 November 2020, the Annotated Warning Notice, the draft First Supervisory Notice and the bundle of supporting documents; and
> - additional substantive communications with Enforcement."

179. The Enforcement Submissions Document ('ESD'), provided to the RDC by the Authority's investigations team on 13 November 2020, includes a section entitled *"Analysis of breaches, relevant statutory and regulatory provisions, and policy*". In this section, only Principle 8 is addressed, stating *"The relevant Principle in this case is Principle 8"*.

180. The Authority has not filed any evidence offering any clarification or explanation of the proceedings before the RDC, or stated clearly that the allegations were not advanced earlier (or why). This in itself is noteworthy given the clear and express guidance to the Authority from the Tribunal in *Khan v Financial Conduct Authority* [2014] UKUT B6 (TCC) at [88] that:

> "For future reference it is important that when the Authority seeks to rely on a case which differs from that set out in the Warning Notice that the full picture is disclosed so that the jurisdictional issue can be fully considered, particularly where the Applicant is contesting the position taken by the Authority."

181. The New Principle 7/COBS Case was not raised within any of the statutory notices relevant to these proceedings. The Draft Annotated Warning Notice dated 3 March 2020 alleged in its *"Summary of Reasons"* that BCMUK breached Principle 8 by having a conflict of interest and having insufficient arrangements for managing the conflict to ensure, *"with reasonable confidence, that the interests of its customers would not be damaged"*, and also alleged that by failing to disclose this conflict, BCMUK breached SYSC 10.1.8R.

182. BCMUK responded to this in a Response dated 17 April 2020. The revised draft Annotated Warning Notice, dated 19 October 2020 (sent to the RDC on 13 November 2020), abandoned the breach of SYSC allegation, relying solely on the alleged breach of Principle 8.

183. BCMUK exercised its right to use the expedited process so as to forfeit participation in the oral representations process before the RDC, but rather refer the matter directly to the Upper Tribunal at the first opportunity. It took the view that there were fundamental issues dividing the Authority and it which would not be resolved by

oral representations, such that it was more sensible and efficient for the matter to come before the Tribunal.

184. The Authority's DN (imposing a financial penalty of £40,806,700 on BCMUK), issued on 4 November 2021, likewise relied solely on Principle 8. It did not contain any reference to, let alone a finding of, any breach of Principle 7/COBS.

185. The FSN was issued on 30 September 2021 and sets out the decision of the Authority to impose a requirement on BCMUK to pay redress to *"those customers who were non-US investors [...] in the External Fund during the Relevant Period"*. The *"Reasons for Action"* indicate that the Authority likewise relied solely upon the breach of Principle 8: see para 4.

186. Accordingly, the New Principle 7/COBS Case was never (whether as a matter of substance or form) put to the RDC, considered by the RDC (whether at its own initiative or otherwise), nor relied upon by the RDC in promulgating either of the two Notices referred to this Tribunal.

187. On 27 October 2021 BCMUK referred the FSN to the Upper Tribunal by way of a reference notice (the "FSN Reference"), and on 22 November 2021 referred the DN to the Upper Tribunal by way of a reference notice (the "DN Reference").

Conclusion on jurisdiction

188. In the light of the authorities, we are satisfied that the Tribunal does not have jurisdiction to determine the New Principle 7/COBS Case in respect of the DN Reference, because the New Principle 7/COBS Case was not part of the *"reference"* or *"matter"* referred pursuant to s.133(5) and (6) FSMA. Therefore, the Tribunal has no jurisdiction to permit the third and fourth contested amendments contained in the ASoC.

189. The *"matter referred"* and thus the ambit of the Tribunal's jurisdiction is the *"allegations made in the decision notice and the circumstances on which these are based"* (*Jabre* at [28]). It is clear that the alleged breach of Principle 7 and/or COBS was not only not advanced or referred to in the DN; they were not contained or foreshadowed in the WN nor were they raised by the RDC of its own initiative, nor otherwise discussed during the RDC process.

190. There are before the Tribunal both a disciplinary reference (the DN Reference) and a non-disciplinary reference (the FSN Reference) within the meaning of s.133 FSMA. As the New Principle 7/COBS case was not included in the DN or the FSN, it was not possible for it to be included or referred to within the DN Reference or FSN Reference.

191. The New Principle 7/COBS Case remained absent from the Authority's Statement of Case on the FSN Reference and the DN Reference (together, the 'References'), filed on 7 January 2022.

192. The freshness of the new Principle 7/COBS case means that the Authority failed to follow the mandatory statutory procedure in respect of them. It did not issue a

Warning Notice embodying any such case, as is required pursuant to s 207 FSMA. As a consequence, BCMUK was not afforded any opportunity to make any representations (and to decide whether or not to make representations) to the RDC in respect of the new allegation.

193. As emphasised in *Khan*, an important reason why the allegations of regulatory breach must have been properly before the RDC to form part of the *"matter referred"* is that this ensures satisfaction (or substantial satisfaction) of the objective of the statutory notice requirements. As is explained in [434]-[435] of *Markou v FCA* UKUT 2023 101 (TCC):

> "434.While Mr Brown points out that it is in the public interest for the Tribunal to make relevant findings on all matters under consideration, this should not usurp the Authority's function to decide, with clarity and certainty, the regulatory case that it wishes to pursue. The starting point should be that if the Authority wishes to pursue an alternative or lesser case it should plead this from the outset of enforcement proceedings before the RDC and then the Tribunal itself. Pleadings on a reference to the Tribunal are in no way akin to an indictment in criminal proceedings or particulars of claim in civil proceedings. A reference is a continuation of a regulatory process that has begun by way of a Warning Notice and enforcement proceedings before the RDC. In those proceedings the Applicant is entitled to know the full nature of the allegations, findings and decisions made against him by the Authority in order to consider whether to contest the regulatory action proposed or whether to make a reference to the Tribunal.
>
> 435.An application by the Authority to amend a Statement of Case on a reference, or even to introduce fresh factual or legal allegations without such an amendment, is therefore not akin to amending pleadings in criminal, disciplinary or civil proceedings. In those proceedings allegations are free-standing and the court may exercise its discretion to permit amendments subject to the standard principles of procedural fairness. However, if the Authority seeks to amend factual or legal allegations within a reference, the first question will always be whether they fall within the subject matter of the reference and the Tribunal's jurisdiction."

194. This passage emphasises that the proceedings in the Tribunal, although starting afresh and not an appeal, are part of the regulatory process started by the Authority. Therefore, particularly in relation to disciplinary references, the Tribunal stands in the shoes of the Authority and makes a decision as to the appropriate action to take on the basis of the case investigated by the Authority. The scheme did not envisage that the Authority could change significantly the basis of the action it wishes to take when it came to the Tribunal proceedings. Parliament intended that the subject of enforcement action should have the right to have the Authority's decision reviewed through a judicial process but that did not mean that the process in the Tribunal could become significantly divorced from the regulatory proceedings.

195. This feature of the process was emphasised recently in *Whitestone*. The Tribunal said this at [1001] to [1012]:

> "1001. We also bear in mind the importance that both Parliament has indicated in FSMA and the Authority has provided for in its administrative decision-making procedure for disputes between a subject of enforcement action and the Authority to be determined, where possible, through fair and effective administrative decision-making

procedures. In that regard, the Warning Notice and Decision Notice procedure goes beyond what might be the minimum under general administrative law principles, providing as it does for a decision-maker separate from those responsible for conducting the relevant investigation.

1002. In deciding the constitution of the decision-maker, the Authority has decided that the RDC should be chaired by an employee separate from the Authority's Executive, the RDC being a committee of the Board of the Authority which does not report to the Authority's Executive and, aside from the Chairman, its members are entirely independent of the Authority, containing a mixture of financial services practitioners and other lay members. All that is clearly designed to ensure that those who are regulated by the Authority or otherwise might be subject to its enforcement procedures have confidence in the fairness and effectiveness of the Authority's procedures, bearing in mind the important role of the financial services industry in the country's economy.

1003. Furthermore, it is well known that judicial proceedings are expensive. It is clear from what we have said above that the intention of Parliament was that in so far as is possible, Tribunal proceedings should be the last resort and if the Authority's administrative proceedings are fair and robust then most subjects will be satisfied that the matters are been fairly dealt with through a process that is designed to be less formal, less expensive and swifter in their resolution.

1004. Those objectives will be compromised if the Authority does not use its best endeavours to ensure that all relevant matters are placed on the table at the Warning Notice stage.

1005. At each stage of the regulatory process, the subject of the action needs to have all relevant material pursuant to which they can make an informed decision whether to contest the matter contained in the Warning Notice before the RDC or to contest the matter contained in the Decision Notice in a reference to the Tribunal knowing clearly what the allegations are that they are going to be faced with.

1006. It is also the case that a draft Warning Notice is a key document presented to the subject of enforcement proceedings setting out the Authority's preliminary findings following the completion of its investigation and at that point the subject can decide whether to contest the proceedings or endeavour to reach a settlement. Again, reaching a settlement rather than contesting the proceedings is to be encouraged where possible to avoid the length, delay and expense of both regulatory and possible judicial proceedings.

1007. For all these reasons the integrity of the Warning Notice is important. The Authority should not be tempted into thinking that if there are deficiencies in its case at the Warning Notice stage then these can be remedied later in the proceedings, either by raising new issues during the representations phase before the RDC, as happened in this case, or later in the Tribunal.

1008. The fact that the proceedings before the Tribunal start afresh and the Authority has to prove its case on the basis of the allegations set out in the Statement of Case do not mean that the Authority should not in principle be constrained by what was said in the Warning Notice.

1009. While it was made clear in *Hobbs* that it is in the public interest for the Tribunal to make relevant findings on all matters under consideration, this should not detract from the Authority's duty to articulate clearly and with certainty, the regulatory case that it wishes to pursue.

1010. As was made clear many years ago in the extract from the *Legal and General* case set out at [973] above, it is generally to be expected that the Authority will have

> completed its investigation before the commencement of the regulatory proceedings and carry forward the same case both through the regulatory proceedings and in the Tribunal. The judicial proceedings in the Tribunal, whilst of a different character, are, as was made clear in *Jabre,* part of the regulatory process and part of the same continuum that commences with the Warning Notice.
>
> 1011. Consequently, pleadings on a reference to the Tribunal are in no way akin to particulars of claim in civil proceedings. The Court of Appeal in *Hobbs* also made reference to the difference between regulatory proceedings and civil proceedings. In those proceedings the Applicant is entitled to know the full nature of the allegations, findings and decisions made against him by the Authority in order to consider whether to contest the regulatory action proposed or whether to make a reference to the Tribunal.
>
> 1012. An application by the Authority to amend a Statement of Case on a reference, or even to introduce fresh factual or legal allegations without such an amendment, is therefore not akin to amending pleadings in disciplinary or civil proceedings. In those proceedings allegations are free-standing and the court may exercise its discretion to permit amendments subject to the standard principles of procedural fairness. However, in relation to prohibition proceedings if the Authority seeks to bring in fresh allegations the first question will always be whether they formed part of the reasons in the Warning Notice. If they did not, the Authority will need to make an application to the Tribunal for permission to rely on the allegations concerned."

196. Although at that point in its decision the Tribunal was addressing the question as to whether it should exercise its discretion to amend a Statement of Case where it had held that the amendment proposed was within the scope of the matter referred, the reasoning is equally applicable when considering the question of jurisdiction and what comes within the scope of the subject matter of a reference.

197. In our view it is not necessary to enquire into the extent to which the facts and evidence included in the warning notice and/or canvassed by the RDC *could* have supported a breach of Principle 7 or COBS. The consistent line of case law requires that the allegations of regulatory breach be at the very least canvassed before the RDC and potentially must be (a) at least referred to if not relied on in the decision notice (*Jabre*) and (b) fall within the scope of the allegations made in the warning notice for them to form part of the *"matter referred"*. We agree with the Applicant that the failure to present the Principle 7 and/or COBS case at any point prior to the current application goes beyond a failure to attach legal *"labels"* to the Authority's case. It involves a new and different allegation.

198. We should also address a further argument that Mr George relied upon. He suggested that the Principle 7 allegation regarding BCMUK failing to make sufficient disclosure was in effect subsumed as a matter of law within the existing Principle 8 allegations regarding failure to manage the conflict. He relied by analogy on the case of *Carrimjee v Financial Conduct Authority* [2015] UKUT 0079 (TCC) at [58]-[61] where the Tribunal, with the consent of both parties, went on to consider an allegation of a breach of Statement of Principle 2 (acting without due skill, care and diligence) as an alternative to Statement of Principle 1 (a lack of integrity) despite it not being pleaded or pursued before the RDC.

199. We are not satisfied that this authority is sufficient to confer jurisdiction in relation to the Principle 7 amendment in this case. First, the question of jurisdiction was never fully argued in *Carrimjee* and the alternative case proceeded on an agreed

basis (where it is keenly contested in this case). Second, in any event, we do not accept that allegations of failures to communicate or disclose for the purposes of Principle 7 automatically form a subset of the non-disclosure of conflicts for the purposes of Principle 8. There is no sense in which a Principle 7 allegation can be automatically deemed to be subsumed within a Principle 8 allegation as an alternative or lesser allegation. Third, in any event, the nature of the factual allegation upon which the Principle 7 amendment relies is to an extent different to that contained within the original Principle 8 allegation as pleaded.

200. Accordingly, we refuse permission to make the third and fourth amendments to the SoC. We have concluded that we do not have jurisdiction to permit these amendments, therefore we do not need to consider the question as to whether we should do so as a matter of discretion.

The strike out application

201. BCMUK's strike out application proceeds on the basis that the Authority should be barred from participating in the reference in respect of the FSN. The application involves a determination of two questions.

202. The first is: what statutory conditions must the Authority satisfy before imposing a redress requirement upon it as a single firm (a single firm consumer redress scheme)?

203. The second question is: does the Authority have a reasonable prospect of satisfying the statutory conditions for the imposition of a single firm consumer redress scheme on the basis of its pleaded case (taking into account the permitted amendments and its rejoinder to BCMUK's reply)?

204. The first question involves considering BCMUK's argument that there is no freestanding power under section 55L FSMA alone to impose the redress requirement upon it. BCMUK submits the Authority only has the power to impose a single firm consumer redress scheme upon it by virtue of sections 55L FSMA and 404F(7) FSMA which requires the scheme to correspond or be similar to a multi-firm consumer redress scheme imposed by virtue of section 404.

205. Thus, BCMUK submits that, on the proper construction of s.55L and s.404F(7) FSMA, and reading in the requirements contained in section 404A(1)(c) and (3) FSMA, the Authority may only impose a redress scheme on individual firms if the Authority is able to establish four statutory conditions that:

(1) persons have suffered loss or damage ("Loss");

(2) that loss or damage has been caused by a wrong on the part of the firm ("Causation");

(3) the loss or damage was suffered by a person or persons to whom the relevant regulatory duty was owed ("Duty"); and

(4) that wrong which caused the loss or damage was an *actionable* wrong (being a wrong in respect of which a remedy or relief would be available in legal proceedings, including a breach of a regulatory requirement actionable by virtue of FSMA) ("Actionability");

206. The Authority's case is that it does not need to satisfy the requirements of s.404F(7) FSMA (or the rules under section 404A) in order to impose a single firm consumer redress scheme. It submits that the conditions for the exercise of the operative statutory power in section 55L FSMA are clearly and expressly stated within section 55L itself. The only relevant condition in the present case is simply that "*it appears to the FCA that… it is desirable to exercise the power in order to advance one or more of the FCA's operational objectives*" (see section 55L(2)(c)).

207. The Authority relies in this regard on its consumer protection objective, which is to secure an "*appropriate*" degree of protection for consumers (see section 1C(1) FSMA). Accordingly, it submits that the question to be asked in assessing whether the Authority had power to impose the Redress Requirement under s.55L is a short and simple one: was there a rational basis for the Authority to conclude that it was desirable to impose the requirement in order to advance its operational objective of providing an appropriate degree of protection to consumers? The statute requires no more and no less than this.

208. The second question involves determining BCMUK's argument that the Authority's case as pleaded (including the permitted amendments within the ASoC and pleadings in the Draft Redress Rejoinder) holds no reasonable prospect of satisfying the four statutory conditions set out above (or all of those conditions which the Tribunal finds are required).

209. The Authority submits that its case as proposed to be pleaded, in the ASoC and Draft Redress Rejoinder, satisfies any required conditions in any event.

Approach to the strike out application

210. The Tribunal is empowered to strike out part or all of a party's case. This power is set out in UT Rule 8 which provides relevantly as follows:

> "8(3) The Upper Tribunal may strike out the whole or a part of the proceedings if—
>
> …
>
> (c) … the Upper Tribunal considers there is no reasonable prospect of the appellant's or the applicant's case, or part of it, succeeding.
> …
>
> (7) This rule applies to a respondent or an interested party as it applies to an appellant or applicant except that—
> (a) a reference to the striking out of the proceedings is to be read as a reference to the barring of the respondent or interested party from taking further part in the proceedings; and
> ...
>
> (8) If a respondent or an interested party has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Upper Tribunal need

> not consider any response or other submission made by that respondent or interested party, and may summarily determine any or all issues against that respondent or interested party."

211. The strike out power under 8(3)(c) may thus be exercised to bar the Authority (as respondent) from taking further part in the proceedings on the FSN Reference by virtue of rule 8(7)(a) and summarily determine proceedings against it by virtue of rule 8(8). The power may be exercised if the Tribunal is satisfied that there is no reasonable prospect of the Authority's case succeeding.

212. The test for strike out under the above UT Rules is the same as that applied under Part 24 of the Civil Procedure Rules. The relevant principles were set out by Lewison J (as he then was) in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]; (as cited in *The First De Sales Partnership and others v HMRC* [2018] UKUT 396 (TCC) at [33]). One of the principles set out in *Easyair* concerned the proper approach of the Court when considering strike out based on a point of law. Lewison J found as follows (at [15(vii)]):

> "…it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be."

213. The first stage in BCMUK's strike out application is a pure question of law and the Tribunal has already decided that it should *"grasp the nettle"* and finally determine it – as Judge Herrington indicated in his Reasons for the Directions, at paragraph 27. This stage requires the Tribunal to take the Authority's pleaded case at its highest and determine whether that case has a *"reasonable prospect"* of establishing the matters deemed legally necessary by the first question.

The first question: The source of the Authority's power to impose a redress requirement upon a single-firm and the statutory conditions which must be fulfilled

214. We begin by recording the relevant statutory provisions within FSMA that apply to the FSN in this reference and as are currently in force.

Current law - the applicable powers by which the Authority may impose a single-firm redress scheme

215. The redress requirement, for BCMUK to pay redress to customers who were non-US investors in the External Fund was imposed by the Authority under the FSN dated 30 September 2021. The FSN stated that it was imposed "pursuant to section 55L of the Act" which provides:

> "55L Imposition of requirements by FCA

(1) Where a person has applied (whether to the FCA or the PRA) for a Part 4A permission or the variation of a Part 4A permission, the FCA may impose on that person such requirements, taking effect on or after the giving or variation of the permission, as the FCA considers appropriate.

(2) The FCA may exercise its power under subsection (3) in relation to an authorised person with a Part 4A permission (whether given by it or by the PRA) ("A") if it appears to the FCA that—

...

(c) it is desirable to exercise the power in order to advance one or more of the FCA's operational objectives.

(3) The FCA's power under this subsection is a power—

(a) to impose a new requirement,

(b) to vary a requirement imposed by the FCA under this section, or

(c) to cancel such a requirement.

(4) The FCA's power under subsection (3) is referred to in this Part as its own-initiative requirement power.

…."

216. The Authority relies upon ss.55L(2)(c) and (3)(a) as the source of its power.

217. There are further provisions in FSMA which are potentially relevant to the statutory construction arguments.

218. The first is section 55N FSMA:

"55N Requirements under section 55L or 55M: further provisions

(1) A requirement may, in particular, be imposed—

(a)so as to require the person concerned to take specified action, or

(b)so as to require the person concerned to refrain from taking specified action.

…

(5) A requirement may refer to the past conduct of the person concerned (for example, by requiring the person concerned to review or take remedial action in respect of past conduct).

(6) In this section "requirement" means a requirement imposed under section 55L or 55M."

219. Section 138D FSMA limits the basis on which a contravention of a rule is actionable:

"138D Actions for damages

…

(2) A contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.

(3) If rules made by the FCA so provide, subsection (2) does not apply to a contravention of a specified provision of the rules.

…"

220. Section 404 FSMA provides for the Authority to impose multi-firm consumer redress schemes, applying the steps required by virtue of subsections (4)-(7), if certain conditions are satisfied under subsection (1):

"404 Consumer redress schemes

(1) This section applies if—

(a) it appears to the FCA that there may have been a widespread or regular failure by relevant firms to comply with requirements applicable to the carrying on by them of any activity;

(b) it appears to it that, as a result, consumers have suffered (or may suffer) loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available in the proceedings; and

(c) it considers that it is desirable to make rules for the purpose of securing that redress is made to the consumers in respect of the failure (having regard to other ways in which consumers may obtain redress).

…

(3) The FCA may make rules requiring each relevant firm (or each relevant firm of a specified description) which has carried on the activity on or after the specified date to establish and operate a consumer redress scheme.

(4) A "consumer redress scheme" is a scheme under which the firm is required to take one or more of the following steps in relation to the activity.

(5) The firm must first investigate whether, on or after the specified date, it has failed to comply with the requirements mentioned in subsection (1)(a) that are applicable to the carrying on by it of the activity.

(6) The next step is for the firm to determine whether the failure has caused (or may cause) loss or damage to consumers.

(7) If the firm determines that the failure has caused (or may cause) loss or damage to consumers, it must then—

(a) determine what the redress should be in respect of the failure; and

(b) make the redress to the consumers.

…"

221. Section 404A provides for the scope of the rules which the Authority may make under section 404(3):

"404A Rules under s.404: supplementary

(1) Rules under section 404 may make provision—

…

(c) setting out, in relation to any specified description of case, matters to be taken into account, or steps to be taken, by relevant firms for the purpose of—

(i) assessing evidence as to a failure to comply with a requirement; or

(ii) determining whether such a failure has caused (or may cause) loss or damage to consumers;

…

(3)Matters may not be set out in the rules as a result of subsection (1)(c) if they have not been, or would not be, taken into account by a court or tribunal for the purpose mentioned there."

222. Section 404F sets out various definitions that are used in the foregoing provisions, including the following:

"404F Other definitions etc

(1) For the purposes of sections 404 to 404B—

"redress" includes—

(a) interest; and

(b) a remedy or relief which could not be awarded in legal proceedings;

"specified" means specified in rules made under section 404.

…."

223. Section 404F(7) provides for the possibility of the Authority imposing a single firm consumer redress scheme, with requirements on the firm corresponding to a multi-firm consumer redress scheme. The Applicant argues that this subsection is the only source of the power to impose redress requirements on a single firm:

"(7) If the FCA varies a permission or authorisation of a person so as to impose requirements on the person to establish and operate a scheme which corresponds to, or is similar to, a consumer redress scheme, the provision that may be included in the permission or authorisation as varied includes—

(a) provision imposing requirements on the person corresponding to those that could be included in rules made under section 404; and

(b) provision corresponding to section 404B.

(8) In subsection (7) the reference to the variation of a permission or authorisation by the FCA is a reference to—

…

(aa)the imposition or variation of a requirement under section 55L,

…"

224. Section 404B provides for Complaints to the Ombudsman Scheme and subsection (4) provides that a relevant complaint is to be determined by reference to what, in the opinion of the ombudsman, the determination under the consumer redress scheme should be or should have been (subject to subsection 5).

225. The Authority also relies on section 415A of the Act which states that *"Any power which the FCA…has under any provision of this Act is not limited in any way by any other power which it has under any other provision of this Act."*

FSMA as originally enacted

226. It is necessary to consider the history and development of FSMA in order to construe its current scope and the powers that might be available to impose a consumer redress requirement on a single firm.

227. As originally enacted, FSMA provided four means by which clients or customers of authorised firms could obtain redress where breaches of certain regulatory rules in or made under FSMA were established. Notwithstanding the subsequent amendments set out below, these remain the four means of redress provided by FSMA.

228. The first means of redress was that, pursuant to s.150 FSMA as originally enacted, a private person could seek damages by way of a civil claim where that person could establish that they had *"suffer[ed] loss as a result of the contravention"* by an authorised person *"of a rule"*.

229. Section 150(2) FSMA provided that the Authority could provide in its rules that contravention of certain rules did not give rise to an action under section 150(1) (pursuant to the Financial Services Act 2012 ('FSA 2012', addressed below), s.150(1) was replaced by s.138D(2) FSMA in materially the same form. Thus s.150(2) is now replaced in similar terms by section 138D(2) FSMA as set out above).

230. PRIN 3.4.4R duly provided pursuant to that provision (and still provides) that a contravention of the Authority's Statement of Principles (such as Principle 8) does not give rise to a right of action by a private person under section 150(1) (now section 138D(3)). The rationale for breaches of the Principles not being actionable, is contained in the Authority's Consultation Paper (*CP 13, The FSA Principles for Businesses*) published in September 1998 made available to Parliament during the passing of the Bill that became FSMA:

> "23. We propose that it should not be possible for private persons to found an action for damages on the Principles alone. We have designed the proposed Principles as a statement of regulatory expectations, not as a set of legal rights at large. The high level at which they are expressed makes it important that their interpretation and application should be in harmony with the overall body of FSA rules and guidance and declared authorisation, supervisory and enforcement policy. This might be put at risk if civil litigation between private parties were to become the engine driving the interpretation of the Principles. The investor protection need can be amply met (as it is at present) by providing for civil actionability below the level of Principles in more specific rules."

231. The second means of redress was that, pursuant to ss.382 and 384 FSMA, the court and the Authority respectively could require an authorised firm to pay restitution where a person *"has contravened a relevant requirement, or been knowingly concerned in the contravention of such a requirement, and ... (b) ... one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention."* As to the quantum of the redress, pursuant to ss.382(2) and 384(5) the court and Authority respectively were empowered to order payment of a sum as

appeared *"to be just having regard ... to the extent of the loss or other adverse effect"*. Sections 382 and 384 have remained in materially the same form since.

232. The third means of redress was that, pursuant to section 404 FSMA, the Treasury (not the Authority) had the power to impose a consumer redress scheme. Such a scheme could be imposed where the Treasury was satisfied that there was "*evidence suggesting—(a) that there has been a widespread or regular failure on the part of authorised persons to comply with rules relating to a particular kind of activity; and (b) that, as a result, private persons have suffered (or will suffer) loss in respect of which authorised persons are (or will be) liable to make payments ('compensation payments')"* (s.404(1), as originally enacted).

233. The Authority was required to produce a report setting out the details of the alleged failure and of the scheme proposed (s.404(4)). The Treasury would then obtain Parliamentary approval for the scheme and, if obtained, would authorise the Authority to establish and operate a scheme for *"(a) determining the nature and extent of the failure; (b) establishing the liability of authorised persons to make compensation payments; and (c) determining the amounts payable by way of compensation payments"* (s.404(2)). This provision was substantially amended by the Financial Services Act 2010 ('FSA 2010'), as set out in more detail below.

234. The fourth means of redress was that, pursuant to Part XVI FSMA, the Financial Ombudsman Service ("FOS") was empowered to resolve complaints which *"relate[d] to an act or omission of a person ... in carrying on an activity*" (s.226(1) as originally enacted). Complaints were determined on the basis of what, in the opinion of the ombudsman, was *"fair and reasonable in all the circumstances of the case"* (s.228(2)).

235. As to financial redress, the FOS was empowered to make *"an award against the respondent of such amount as the ombudsman considers fair compensation for loss or damage ... suffered by the complainant"* (s.229(2)(a)). The loss and damage for which such an award could be made was limited to *"(a) financial loss, or (b) any other loss, or any other damage, of a specified kind"* (s.229(3)). Where compensation was for *"other loss, or any other damage, of a specified kind"* it must only be up to a limit prescribed by the rules (s.229(4)). All compensation that could be awarded is subject to a *"the monetary limit"* as specified from time to time (s.229(6)). Originally this limit was £100,000. It was increased to £150,000 from 1 January 2012 and from 2019 to £350,000.

236. As set out above, each of the four powers of redress as originally set out in FSMA required the Authority (or the FOS) to establish (at a minimum) that (a) a person had suffered loss (Loss); (b) that loss or damage has been caused by a wrong on the part of an authorised firm (Causation); and (c) that the loss or damage was suffered by a person or persons in respect of whom the wrong was committed (Duty). Additionally, both the consumer redress power and action for damages power required that the relevant wrong be actionable (Actionability).

237. Also pursuant to FSMA (as originally enacted), where the Authority granted permission to a firm to carry on regulated activities it could do so on the condition that the firm complied with certain specified *"requirements"*. Thus s.43 FSMA provided that when granting a permission, the Authority *"may include such requirements as the*

Authority considers appropriate" (s.43(1)) and those requirements may include a requirement to *"take specified action"* (s.43(2)(a)). Section 43(3) further provided that *"A requirement may extend to activities which are not regulated activities"*.[1]

238. Sections 44 and 45 FSMA as originally enacted further provided the Authority with the power to vary thereafter a permission or to cancel it, either on the application of the authorised person (s.44) or on the Authority's own initiative (s.45). The latter power was referred to as the Authority's *"own-initiative power"* and the Authority could employ it, *inter alia*, where it considered it *"desirable to exercise that power in order to protect the interests of consumers or potential consumers"* (s.45(1)(c)). The Authority's power to vary a permission included a power to include any provision that could have been included if a fresh permission were being sought (s.45(4)).

Amendments introduced by Financial Services Act 2010

239. The main relevant amendment to FSMA made by the FSA 2010 was to the power to impose multi-firm consumer redress schemes under s. 404. The primary purpose of the amendment was to provide the Authority itself with the power to impose consumer redress schemes without the need for that scheme to be approved by Parliament via the Treasury.[2]

240. This required both the amendment of s.404 and the inclusion of a number of new provisions (at ss.404A to G) which together gave the Authority a new rule-making power to impose rules on certain firms for the purposes of establishing a consumer redress scheme, and also placed significant restrictions on the Authority's use of that power.

241. Four provisions introduced by the amendments are worth highlighting.

242. First, section 404(3) provided that the Authority *"may make rules requiring each relevant firm (or each relevant firm of a specified description) which has carried*

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[1] The Explanatory Notes to s.43 (as originally enacted) indicate that the purpose of the power to impose requirements on permissions was to place forward looking restrictions on a firm's permissions:

"104. … Such requirements might include requirements on the authorised person to act, or refrain from acting, in a certain way. Subsection (5) allows the Authority to specify a period during which such requirements have effect. Thus the Authority might impose a limit on the amount of a certain type of business the person may conduct during the first five years after receiving the permission…

105. Under subsection (3), such requirements may also be imposed in respect of unregulated activities. For instance, the Authority might have misgivings about the way in which a regulated activity might be carried on in conjunction with an unregulated activity that the person already carries on, or which he proposes to carry on. …"

[2] See the evidence of Andrew Whittaker, the FSA's general counsel, to the Financial Services Public Bill Committee on 8 December 2009: "*there are provisions in section 404 of FSMA on this subject, but those powers have never been exercised. They involve quite a complex process of an assessment by the FSA, a report to the Treasury, and then a parliamentary process. This is a more direct process involving standard rule-making by the FSA. We think that it will be speedier and more flexible than the process that is currently in the legislation."* Official Report, Financial Services Public Bill Committee, 8 December 2009; c. 35, Q85.

on the activity on or after the specified date to establish and operate a consumer redress scheme". Further restrictions on the scope of the rules were imposed pursuant to s.404A (as referred to further below).

243. Second, pursuant to s.404(1) the Authority could make those rules and impose the redress scheme only if the Authority considered that: (a) there had been *"widespread or regular failure by relevant firms"* (plural) to comply with requirements; (b) *"it appears to it that, as a result, consumers have suffered (or may suffer) loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available in the proceedings";* and (c) it considers that it is *"desirable"* to impose the scheme to secure redress for consumers. Thus, the Authority was permitted to impose the scheme only if all four elements of Loss, Causation, Duty and Actionability were established. Breaches of the Principles are not actionable for this purpose (see above and also CONRED 1.3.16G and 1.3.17G).

244. Third, section 404B provided for rules as to how the FOS should approach complaints that fell within the scope of an existing consumer redress scheme which had been established by the Authority. Specifically, by s.404B(4), in such a case the FOS was required to determine the complaint in line with the rules of the redress scheme (and, pursuant to s.404B, could make a monetary award in accordance with those rules subject to the usual monetary limit).

245. Fourth, a further new provision that was added as part of these amendments was s.404F(7). This provision is significant and is addressed in more detail below. On enactment of FSA 2010, s.404F(7) provided as follows:

> "If the Authority varies a permission or authorisation of a person so as to impose requirements on the person to establish and operate a scheme which corresponds to, or is similar to, a consumer redress scheme, the provision that may be included in the permission or authorisation as varied includes—
>
> (a) provision imposing requirements on the person corresponding to those that could be included in rules made under section 404; and
>
> (b) provision corresponding to section 404B".

246. By virtue of s.404F(8) the variation of permission referred to in s.404F(7) was, *inter alia*, a variation under s.44 or s.45 FSMA. Save that *"Authority"* is now *"FCA"*, section 404F(7) has remained in the same terms since enactment.

Amendments introduced by the Financial Services Act 2012

247. The material amendment to FSMA introduced pursuant to the FSA 2012 was to the Authority's power to impose requirements on a firm's permission.

248. The existing power of the Authority to impose a requirement on a firm when determining an application for permission (under s.43) was retained in materially the same terms by the introduction of s.55L(1). The Authority's existing *"own initiative power"* (under s.45) was retained in materially the same terms by way of s.55L(2) and (3). Section 404F(8) was amended by FSA 2012 to refer to s.55L.

249. Section 55N introduced *"further provisions"* relevant to the powers under s.55L. These included the pre-existing provisions that a *"requirement may extend to activities which are not regulated activities"* (s.55N(2), previously s.43(3)) and that a requirement *"may, in particular, be imposed—(a) so as to require the person concerned to take specified action"* (s.55N(1)(a), previously s.43(2)(a)).

250. Section 55N also included a new provision that a requirement *"may refer to the past conduct of the person concerned (for example, by requiring the person concerned to review or take remedial action in respect of past conduct)"* (s.55N(5). The Explanatory Notes to FSA 2012, at [206], state in respect of that new provision as follows:

> "Subsection (5) enables a requirement to refer to the past conduct of the person concerned. This could be used by either regulator to require an authorised person to carry out a review of its past conduct (for example, to identify customers who have been treated unfairly)."

Outline of the Authority's case on the first question: free standing power under s.55L to impose a single firm consumer redress scheme

251. The Authority's argument was extensive and is summarised as follows.

252. Mr George KC argues that there is a freestanding power under s55L to impose the redress requirement on BCMUK. He submits that the requirements of section 404F(7) for a single firm consumer redress scheme and the Applicant's four proposed conditions by virtue of sections 404 and 404A (causation, loss, actionability and duty) do not need to be satisfied by the Authority in order to impose a redress requirement.

253. Mr George KC contends that the operative statutory power is set out in section 55L(3)(a) FSMA: "*(3) The FCA's power under this subsection is a power—(a) to impose a new requirement"* and the only conditions to be satisfied before which this power may be exercised are set out in section 55L(2) FSMA which provides as follows:

> "(2) The FCA may exercise its power under subsection (3) in relation to an authorised person with a Part 4A permission (whether given by it or by the PRA) ("A") if it appears to the FCA that—
> (a) A is failing, or is likely to fail, to satisfy the threshold conditions for which the FCA is responsible,
> (b) A has failed, during a period of at least 12 months, to carry on a regulated activity to which the Part 4A permission relates, or
> (c) it is desirable to exercise the power in order to advance one or more of the FCA's operational objectives."

254. He submits that the relevant operational objective under s.55L(2)(c) in the present case is the Authority's consumer protection objective: see sections 1B(3)(a) and 1C FSMA. This objective is defined in section 1C(1) FSMA as securing an "*appropriate"* degree of protection for consumers. Section 1C(2) FSMA then provides a list of matters to which the FCA must have regard "*in considering what degree of protection for consumers may be appropriate"*.

255. He also relies on the fact that section 55L is supplemented by section 55N (entitled "*Requirements under section 55L or 55M: further provisions*") which makes clear in subsection (1) that the Authority may impose a requirement that the person in question take any specified action: *"(1) A requirement may, in particular, be imposed— (a) so as to require the person concerned to take specified action, ..."*

256. Drawing these provisions together, he emphasises that section 55L(2)-(3) relevantly provides the Authority with a broad and flexible statutory power to impose a new requirement (section 55L(3)(a)) requiring the person in question to take any specified action (section 55N(1)(a)) provided only that "*it appears to the FCA*" that it is " *desirable to exercise the power"* in order to advance one or more of the FCA's operational objectives (section 55L(2)(c)) including the objective of providing an "*appropriate"* degree of protection to consumers (section 1C(1)).

257. He contends therefore that the statutory scheme thereby explicitly confers a wide discretion on the Authority to ascertain whether it "*appears"* to be "*desirable"* to exercise the section 55L power in order to obtain an "*appropriate"* degree of protection for consumers. The assessment of these matters is a matter for the Authority subject only to the ordinary public law constraints such as rationality and proper purpose.

258. Moreover, he argues that in circumstances where section 55L expressly defines the conditions under which the power may be exercised, it would be wrong to imply or interpolate further restrictions (as the Applicant seeks to do). He relies on the judgment of the Court of Appeal in *R (Rudewicz) v Secretary of State for Justice* [2012] EWCA Civ 499, [2013] QB 410 at [30]:

> "it is, at least in the absence of special circumstances, inappropriate for the court to treat a statutorily conferred discretion with no express limitations or fetters as being somehow implicitly limited or fettered".

259. He submits that there are no special circumstances in this case that would support the implication of further limits; indeed, the position is quite the contrary because s.415A FSMA expressly provides that each of the Authority's powers under FSMA "*is not limited in any way by any other power which it has under any other provision of this Act"*. Accordingly, he submits that the exercise on which the Applicant is seeking to embark (i.e. seeking to imply or interpolate limits into the general power in s.55L(3) based on specific examples provided in other statutory provisions) is fundamentally misconceived.

260. Mr George KC argues that the Applicant is seeking to transplant alleged limitations in other sections of FSMA into the broad and flexible power under section 55L. That is a fundamentally misconceived exercise because it is clearly and explicitly excluded by s.415A FSMA, which provides that each of the Authority's powers under FSMA "*is not limited in any way by any other power which it has under any other provision of this Act."*

261. In summary the Authority's position is as follows. The question to be asked in assessing whether the Authority had power to impose the Redress Requirement under s.55L(3) FSMA is a short and simple one: was there a rational basis for the Authority to conclude that it was desirable to impose the requirement in order to advance its

operational objective of providing an appropriate degree of protection to consumers? The statute requires no more and no less than this.

262. Where (as here) the Authority imposes a requirement to provide redress, establishing a rational connection with its consumer protection objective may of course require the Authority to adopt a rational approach to the identification and assessment of the "loss" to be redressed.

263. However, Mr George KC submits that it would be quite wrong to elevate the requirement of "loss" to the status of a statutory precondition or to assume that the definition of "loss" used in a claim for civil damages must necessarily be applied by the Authority in the exercise of its statutory power.

264. In the event, he argues that the Redress Requirement imposed by the Authority in this case is consistent with (and supported by) the primary measure of civil damages recognised in the authorities in respect of common law claims for the defective provision of services. Nonetheless, he contends that there is no basis under the statutory scheme for concluding that the Authority would be obliged to adopt this particular approach to the identification and assessment of loss in all cases in which it exercises its section 55L(3) power to require the provision of redress.

265. Mr George KC also raises a further contextual point which he submits provides further support for the Authority's analysis of section 55L. It concerns the express power to make "restitution orders" under ss.382 and 384 FSMA.

266. The Authority has a separate power under section 384 FSMA to order restitution where (among other scenarios) a person has contravened a relevant requirement and "*one or more persons have suffered loss* <u>*or been otherwise adversely affected*</u> *as a result of the contravention*" (emphasis added). As the plain terms of section 384 make clear, this power is not limited to loss but also extends to other adverse effects.

267. Mr George KC argues that the High Court has observed in relation to the analogous provision allowing the court to order restitution under s.382 FSMA, the power is not circumscribed by the common law principles governing claims to civil damages. See *Financial Conduct Authority v Avacade Ltd* [2020] EWHC 2175 (Ch) at [46] emphasising that "*it is clear from the face of s.382 FSMA itself that this remedial jurisdiction is intended to operate flexibly and not as a facsimile of common law principles governing damages calculated by reference to loss or profit*" and "*the quantum of any restitution order is a matter of discretion*". He contends that these observations are equally accurate in relation to the Authority's power to order restitution under section 384.

268. He submits that these points provide further support for the analysis and conclusions set out above: in particular, the section 55L power does not require the establishment of loss as a statutory precondition and is not necessarily circumscribed by the common law principles governing claims to civil damages. There would otherwise be the anomalous consequence that the Authority's power to order restitution under section 384 is not bounded by these limitations, and yet the broad and flexible power to impose a requirement under section 55L is so bounded.

269. He further argues that there is neither room nor need to interpolate further statutory preconditions into section 55L as the Applicant seeks to do through section 404F(7). Section 404F(7) is a permissive and empowering provision in circumstances where a requirement is to operate a scheme "*similar*" to a consumer redress scheme; its significance is in enabling the Authority to impose requirements under section 55L which bind the ombudsman scheme. But the Authority does not seek to bind the ombudsman in this case and therefore has not relied, and does not need to rely, on section 404F(7) as the basis for the redress requirement.

270. He also submits that the allegedly limiting provisions relied upon by the Applicant are not in fact limitations at all. Section 55N(5) identifies that a requirement may refer to "*past conduct*", and "*for example*" may require "*remedial action in respect of past conduct*"; that is only one example of the many scenarios in which the section 55L power may be exercised (and even that illustrative example is not limited in the way the Applicant alleges).

271. Finally he contends that, the consequence of section 404F(7) cannot be to transplant the criteria for an industry-wide consumer redress scheme under section 404(1) into the power to impose a requirement on a particular firm under section 55L, as the Applicant alleges. The criteria in section 404(1) are expressly and necessarily directed towards wider industry failures that might justify the imposition of a consumer redress scheme on a plurality of relevant firms, and they cannot logically or justifiably be carried across into the power to impose a particular requirement on a particular firm based on its particular failings and circumstances under section 55L.

BCMUK's submissions

272. We have accepted much of the submissions made by Mr Herberg KC on behalf of the Applicant so do not repeat them here but incorporate them within our discussion below.

Discussion and Analysis

273. The Authority's case as to its power to impose a consumer redress scheme on a single firm, (originally set out in paras 10 to 17 of its Draft Redress Rejoinder) is that section 55L(3) provides a power to impose on a single firm a requirement to operate a consumer redress scheme subject only to the Authority considering it *"desirable"* to do so in order to further any of the Authority's operational objectives (55L(2)(c) - here, its consumer protection objective).

274. The Authority submits that its power to impose a redress scheme under s.55L is not constrained by the need to establish any of the four elements of Loss, Causation, Duty or Actionability which BCMUK submits that sections 404F(7) and 404A(1) and (3) import. It argues that ss.55N(1)(a) and (5) are only clarificatory provisions confirming certain types of requirement which may be imposed by the Authority and do not restrict the power in s. 55L.

275. It contends that section 404F(7) also does not give the Authority the original source of the power to impose a single firm consumer redress scheme (which already

exists under s.55L(3)) but does permit the Authority to "include certain conditions some of which: (1) affect the operation of third parties, including the Financial Ombudsman Service; and/or (2) would not be available to the Authority absent the provisions of section 404F(7)" (see para 13 of the Draft Redress Rejoinder). The Authority further argues that it does not seek to impose any of the conditions for which it would be necessary to invoke section 404F(7).

276. The Authority's case is thus that the power to impose a redress scheme on a single firm is constrained only by the need to consider that the scheme is desirable to advance its objectives and that there is a rational exercise of its discretion in so doing.

277. The task of statutory interpretation in this case is not straightforward. We bear in mind Lord Bingham's words in *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687, [8]:

> "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

278. Lord Hodge, giving the leading judgment for the Supreme Court in the case of *R (on the application of O) v Secretary of State for the Home Department* [2022] UKSC 3, [2022] 2 WLR 343 said at [29]-[31]:

> "29.The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:
>
> > "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context." (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396).
>
> Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397: *"Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."*
>
> 30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the

background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below…

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme*, 396, in an important passage stated:

> "The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. … Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning."'

279. In construing the relevant statutory provisions within FSMA we must therefore ascertain the meaning of the words in the light of their context and the purpose of the provision. There is a presumption that Parliament intends to act reasonably and so should not be taken to "*intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless"*: R *(Edison First Power) v Central Valuation Officer* [2003] UKHL 20, at [116].The more unreasonable the result produced, the less likely it is that Parliament intended it: *Edison* at [117].

280. Before embarking on any construction of the relevant provisions it is worth noting that the Authority's interpretation of FSMA would create a surprising result in this case (and in others). It would mean that the Authority could require a firm to pay something which the Authority refers to as *"redress"* to its customers (in this case in the sum estimated by the Authority to be over US$700 million) without there being any statutory requirement on the Authority to establish in respect of those customers any of the four elements referred to above (loss suffered by the customers, breach by the firm causing loss to customers, duty owed by the firm to customers or actionability of breach by customers). It would also mean that the Authority could do so without needing to show that the firm had breached a regulatory requirement at all *or* that the redress proposed even related to regulated activities.

281. Further, in conducting this exercise, we have not found it necessary nor determinative to consider the arguments we heard from both parties as to whether the Authority's interpretation of section 55L would violate BCMUK's rights under Article 1 of Protocol 1 to the European Convention on Human Rights such that section 3 of the Human Rights Act 1998 requires us to adopt a compatible interpretation. Nonetheless, we are satisfied that our interpretation, applying the restrictions of section 404F(7) and 404A to section 55L, is so compatible.

282. Likewise, we do not find it necessary to consider BCMUK's arguments that common law has similar effect on our interpretation and requires these restrictions. We would observe however that any interpretation of s.55L read with s.404F(7) which permitted the imposition of a requirement on BCMUK to pay substantial *"redress"* (purportedly pursuant to a consumer protection objective) without the Authority being required to be satisfied that any consumer actually suffered any loss, or that the firm caused any loss that was suffered as a result of any wrong which it had committed, may well not to be "*in the public interest"*.

283. When considering the proper construction of the relevant provisions, we have taken into account whether the Authority's interpretation of its powers is consistent with Parliament acting reasonably: we consider that the power to impose a consumer redress scheme on a single firm by virtue of s.55L(2)(c) and (3)(a) must be constrained beyond that asserted by the Authority so as to avoid unreasonable or absurd results.

284. We are satisfied that the power in section 55L is in fact constrained as set out below by the terms of s.404F(7) and the rules under section 404, namely section 404A. These provisions require the Authority to establish the four conditions BCMUK contends, namely causation, loss, duty and actionability, before a redress requirement may be imposed upon a single firm.

285. We have set out above the history and development of the relevant provisions of FSMA from inception and as amended in 2010 and 2012. We consider that Parliament originally provided for the four carefully tailored means of redress set out in FSMA, summarised above (action for damages, restitution, consumer redress schemes and the FOS scheme) each of which require specific statutory hurdles to be satisfied (such as a failure to comply with a duty – a breach, together with causation and loss).

286. Thereafter, it is unlikely that Parliament also intended to provide the Authority with a further general power under section 55L, or previously under s.45 to impose a *"redress"* scheme on a single firm by way of a *"requirement"* without any restriction or statutory hurdles beyond the Authority considering it *"desirable"* to do so for its operational objectives. Such a largely unrestricted power might render both the Authority's restitution power and consumer redress power otiose.

287. It would also give rise to a striking anomaly in giving the Authority the power to require redress be paid by single firms to consumers without significant restriction

when a multi-firm consumer redress scheme cannot be imposed without establishing the conditions of causation, loss, actionability and duty under section 404 FSMA.

288. Moreover, the development and amendments to the legislation point strongly away from the Authority's interpretation.

289. A necessary implication of the Authority's case is that its power to impose a redress scheme on a firm if desirable for operational objectives has always been available to the Authority, ever since FSMA was first enacted. This is so by virtue of the fact that s.55L(2)(c) merely replicates s.45(1)(c), which existed in the original FSMA.

290. We are satisfied that this cannot be correct for the following reasons.

291. First, as originally enacted, the Authority was required to seek specific permission of the Treasury before implementing a (multi-firm or collective) consumer redress scheme under s.404. It cannot reasonably have been the intention of Parliament that, notwithstanding such onerous oversight, the Authority could of its own initiative simply have imposed consumer redress schemes on a firm-by-firm basis (and thus on as many firms as it liked), bypassing all restrictions beyond considering it to be desirable to do so for operational objectives.

292. Second, after s.404 was amended by FSA 2010 to permit the *Authority* to impose consumer redress schemes (without reference to the Treasury), it again cannot reasonably have been the intention of Parliament (on the one hand) to impose restrictions on the use of that power by, for example, restricting how a firm subject to a collective consumer redress scheme is required to determine loss to consumers (by adopting the approach that would be taken by the courts), while (on the other hand) at the same time to have allowed the Authority to implement (single firm) consumer redress schemes on a firm-by-firm basis without any of those restrictions.

293. Third, section 404F(7)(a) introduced the power for the Authority to include in a firm's permission provision imposing requirements on the person corresponding to those that could be included in rules made under section 404 (multi-firm consumer redress schemes). If it were the case that the Authority already had an unfettered power to impose a consumer redress scheme on individual firms absent s.404F(7), there would be no need for subsection 404F(7)(a) of that provision at all; it would be redundant. The Authority could simply make requirements that corresponded to those set out in the s.404 rules if it wished under the unfettered variation power (under s.55L or previously s. 45).

294. Section 404F(7)(a) provides: "*If the FCA varies a permission or authorisation of a person so as to impose requirements on the person to establish and operate a scheme which corresponds to, or is similar to, a consumer redress scheme, the provision that may be included in the permission or authorisation as varied includes*:…".

295. On its proper construction, s.404F(7) enables the Authority to impose on a single firm a requirement under s.55L(3) which corresponds to or is similar to a consumer redress scheme, and provides that if the Authority does so the requirements that the Authority is permitted to impose on that firm are those corresponding to the rules for consumer redress schemes against multiple firms (as set out in s.404 and s.404A).

296. Section 404F(7) ensures, in essence, that the statutory criteria are aligned whichever statutory route is chosen: the single or multiple firm route.

297. The Authority asserts that the purpose of s.404F(7)(a) is to "*include certain conditions ... which ... would not be available to the Authority absent the provisions of section 404F(7)"* (Draft Redress Rejoinder, para 13). It is hard to see why (on the Authority's construction) the Authority would require such statutory authorisation to include those conditions if the power under s.55L(3) is as wide and unconstrained as the Authority contends.

298. We consider that the use of the word *"may"* in section 404F(7)(a) (as in "*the provision that may be included"* in the varied permission) is not intended to be merely "clarificatory", permissive or intended only to provide an example of the type of requirement that the Authority is entitled to impose. Rather, it is to permit the Authority to impose requirements that, but for s.404F(7), it would not otherwise have the power to impose. In this regard it reflects the wording of s.404(3) (*"The FCA may make rules requiring each relevant firm ... to establish and operate a consumer redress scheme"*) which in turn reflects the use of that word in the general rule making power at s.137A(1) ("*The FCA may make such rules applying to authorised persons" ... "*), both of which provisions undoubtedly grant statutory powers to the Authority.

299. The Authority's case is that the purpose of s.404F(7) is to *"permit the Authority ... to include certain conditions"* which (but for that provision) it would otherwise not have the power under s.55L to impose (Draft Redress Rejoinder, para 13). The dispute is thus as to the extent of what s.404F(7) permits in this way.

300. The construction set out above is consistent with how the provision came to be introduced. As set out above, the amendments to s.404 were introduced in order to permit the Authority to impose consumer redress schemes itself, without the need to seek the permission of the Treasury. It thus must follow that the Authority did not have that power (with respect to individual firms) prior to the enactment of FSA 2010, otherwise there would have been no need for the amendment to add s.404F(7). Further, as noted above, it would have been inconsistent for FSMA (as originally enacted) to have required the Authority to seek the consent of the Treasury to impose consumer redress schemes on multiple firms but to also have a completely unfettered ability to impose such scheme on individual firms (and thus multiple individual firms).

301. We take into account the White Paper for the bill that would become the FSA 2010[3] stated relevantly as follows: *"The FSA has existing powers to impose redress schemes on a firm-by-firm basis where a large number of consumers are affected. The power of the Treasury to initiate a collective redress scheme on a wider basis is set out in section 404 of FSMA. The Government believes there should be new powers for the FSA to require a firm or firms to make redress either on an industry wide or firm-by-firm basis as appropriate."*

302. Thus, the intention was that the amendments to s.404 would introduce a new power to impose a redress scheme on a single firm. That new power did not come from s.404 and s.404A alone: it is clear that s.404 and 404A only apply where redress is sought from multiple firms (see for example *"widespread failure by relevant firms"*, thereafter referring to either *"relevant firms"* or *"each relevant firm"*). Rather, that new power to impose a redress scheme on a single firm only arose by virtue of s.404F(7), which conferred a new broader power to vary permissions or authorisation under (*inter alia*) s.55L.

303. The amendments made by FSA 2010 allowing the Authority to impose such schemes imposed a number of statutory requirements which restrained how the Authority could use that power. Again, as noted above, those constraints would have been unnecessary (and could be circumvented) if the Authority also had a largely unfettered power (subject to rational exercise) to impose consumer redress schemes on single firms (and thus multiple single firms) in the interests of consumer protection.

304. Furthermore, this construction is also consistent with subsequent legislation which has referred to s.404F(7) as providing a separate power under which a s.55L requirement (specifically, a requirement for a consumer redress scheme) may be imposed.

305. For example, Article 58(6) of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2013/1881 provides as follows:

> "Where P's interim permission ceases to have effect in accordance with paragraph (1) or (1B)—
>
> (a) paragraph (7) applies in respect of an act or omission by P which occurred at a time when P had an interim permission;
>
> (b) any requirement—
>
> (i) imposed on P under section 55L, 55M or 404F(7) of the Act at a time when P had an interim permission, and
>
> (ii) which is in effect immediately before that interim permission ceases to have effect, continues to have effect and paragraph (7) applies in respect of any contravention of that requirement."

306. Article 82(12) of the Financial Services and Markets Act 2000 (Claims Management Activity) Order 2018/1253, provides as follows:

[3] "*Reforming Financial Markets"* HM Treasury, July 2009, page 146

> "(12) Paragraph 13 applies in relation to—
> (a) any act or omission by A which occurred before the cessation date; or
> (b) the contravention by A of any requirement imposed on A under section 55L (imposition of requirements by FCA) or 404F(7) (other definitions) which—
> (i) is in effect immediately before the cessation date; and
> (ii) which continues to have effect in accordance with paragraph (14)."

307. The construction is also consistent with how (prior to this case) the Authority has itself considered the power, and how it has explained its potential use of that power to authorised firms by way of its published guidance.

308. Soon after FSA 2010 came into force, the Authority released guidance on s.404F(7) in a document called *"Use of s404F(7) power on single firms"*. The guidance made it clear that the Authority considered s.404F(7)(a) to be a new power; and s.404F(7)(b) to allow the Authority to implement rules contained in ss.404 and 404A which it otherwise not be permitted to do. Specifically, the guidance stated relevantly as follows:

> "Under s404 of the Financial Services and Markets Act 2000 (FSMA), the FSA can make rules to require firms to establish and operate 'industry-wide' consumer redress schemes … Under s.404F(7) however, the FSA can impose on a single firm, a scheme which 'corresponds to or is similar to a consumer redress scheme' and enables such a scheme to include specific provisions that an 'industry-wide' consumer redress scheme may include. …
>
> The use of s404F(7) is subject to different triggers from the 'industry-wide' s404, namely the triggers that attach to the imposition of a VVOP (voluntary variation of permission under s.44 of FSMA) or OIVOP (own initiated variation of permission under s.45 of FSMA), and the FSA is not obliged to consult before its use because it affects a single firm rather than the whole industry or sector of the industry.
>
> The FSA has used this power for the first time in February 2011 and recognises that it is desirable to clarify, for firms and consumers, how it intends to use s404F(7). Therefore, it is appropriate for the FSA to consult on and publish guidance on its policy for the use of s404F(7). This is expected to happen in the summer of 2011, when the FSA reviews its guidance on the use of s404.
>
> In advance of this publication, the FSA can and will use its powers under s404F(7), where appropriate, in respect of individual firms where there is potential for mass claims from consumers on a single issue. As the FSA plans to consult on this matter, our policy on the use of s.404F(7) will be subject to change. In any event, any use of s404F(7) will depend on the particular facts of each case and will not set any precedent about the future use of this power."

309. The Authority's guidance on the use of s.404F(7) came to be set out in CONRED (which remains the current guidance). This guidance, again, expressly provides (contrary to the Authority's case) that it is s.404F(7) which provides the power to impose a redress scheme on a single firm by way of a requirement under

s.55L. CONRED 1.8 is entitled *"Imposing a consumer redress scheme on a firm under section 404F(7) of the Act"*. It provides, relevantly, as follows:

> "Section 404F(7) of the Act empowers the FCA to require a firm 'to establish and operate a scheme which corresponds to, or is similar to, a consumer redress scheme' established under section 404 of the Act" (CONRED 1.8.1G) …
>
> "The decision to require a firm to establish and operate a scheme pursuant to section 404F(7) affects a firm, or a small number of firms, each individually rather than the whole industry or sector of the industry" (1.8.9G and see similar references at 1.1.5G, 1.8.10G) …
>
> "It is likely that many section 404F(7) schemes will be set up because…" (1.8.13G)."

310. It is apparent that the Authority did not mention in its guidance that it also had a separate, parallel power (under s.55L alone) to impose a consumer redress scheme on a firm without any of the statutory safeguards and requirements attendant on the power described in CONRED. Further, this description of the s.404F(7) power is also reflected elsewhere in the Authority's guidance. In the context of describing forms of redress that the Authority can require firms to pay for loss suffered as a result of unfair terms, for example, UNFCOG 1.6.1G(3) states:

> "The FCA can use its powers under section 404 of the Act to make rules requiring authorised persons, electronic money issuers and payment service providers to establish and operate consumer redress schemes. The FCA can also impose a requirement on an authorised person, electronic money issuer and payment service provider under section 404F(7) of the Act to establish and operate a scheme that corresponds to, or is similar to, a consumer redress scheme under section 404 of the Act."

311. Even if, as the Authority asserts, it is s.55L(3) *"alone"* (without s.404F(7)) that provides the Authority with power to impose a consumer redress scheme on a single firm, the extent of that power must be construed in light of the restrictions placed on consumer redress schemes by s.404 and s.404A. It cannot reasonably have been the intention of Parliament that the Authority should have wider scope to impose a consumer redress scheme on a single firm than it had on multiple firms (not least because, as noted above, there would be nothing to prevent the Authority from imposing such a scheme on multiple firms by way of s.55L(2) alone).

312. The construction is also supported by the later introduction of section 55N(5) which provides the Authority with a further power to impose a requirement which requires a relevant firm to *"take remedial action"* with regard to past conduct. As set out above, s.55N(5) was added to FSMA pursuant to FSA 2012: thus after s.404F(7) had been added pursuant to FSA 2010. Thus, by the time s.55N(5) was added the Authority already had the power to impose a requirement which corresponded to or was similar to a consumer redress scheme.

313. If s.55L(3) were really as unlimited a power as is contended, there would be little purpose whatsoever to be served by s.55N(5). In reality, as the Explanatory Notes to FSA 2012 (referred to above) make clear, s.55N(5) was intended to afford the Authority a new and additional power.

314. We therefore consider that s.55N was not intended to provide the Authority with an independent power to impose a requirement to pay redress (which would have been unnecessary in light of s.404F(7)). Rather, as explained below, the *"remedial action"* referred to was intended to denote such activities as a review of past business. But even if this were too limited an interpretation of what was intended, the extent to which *"remedial action"* can entail payment of redress is limited by the requirements of s.404F(7) as addressed above.

315. There is a distinction between *"remedial action"* and *"redress"*, which is drawn in the Authority's own guidance. DISP, for example, repeatedly refers to "*remedial action or redress (or both)*": see DISP 1.1A.20R(3); DISP 1.4.1R(2)(c); and DISP 1.3.6G(2) ("*redress or remediation exercise*"). In DISP 1.3.3 R , the Authority sets out examples of how a firm might "*remed[y] any recurring or systemic problems*", none of which resemble an action akin to setting up a consumer redress scheme, namely: *"analysing the causes of individual complaints so as to identify root causes common to types of complaint"*; *"considering whether such root causes may also affect other processes or products, including those not directly complained of"*; and *"correcting, where reasonable to do so, such root causes".*

316. But even if s.55N(5) does provide a power to require payment of redress, or, on the Authority's case, 'clarify' the extent of the power under s.55L(2) (see Draft Redress Rejoinder at para 11) then the reference to *"remedial action"* equally requires that the Authority establish the four elements of Loss, Causation, Duty and Actionability. These are integral to the concept of remedying a wrong done by the firm to an affected consumer.

317. We reject the Authority's arguments as to the implications of section 415A. Section 415A merely provides that one power under FSMA does not limit any other. The provision has no other relevant effect – it is not seeking to imply restrictions or limitations otherwise as to how relevant provisions are to be interpreted. The Applicant is not seeking to argue, against the legislative framework that, s. 404F(7) has a narrow ambit because of a broader power.

Conclusion on the source of the power to impose redress upon the Applicant

318. Thus, on the proper construction of FSMA, the source of the power to impose a redress requirement on a single firm is by virtue of section 55L, read together with and restricted by, the terms of s.404F(7). There is no free-standing power under section 55L(2)(c) and (3) for the Authority to impose a redress requirement simply by being satisfied for rational reasons that the consumer protection objective is met.

The first question: the statutory conditions that are imported by virtue of ss.404F(7) and 404A – loss, causation, duty and actionability

319. The requirements that the Authority is permitted to impose when requiring a single firm to conduct a consumer redress scheme under s.55L and section 404F(7)(a) (*inter alia*) are those that may be imposed by way of rules made under section 404, which are provided for in s.404A.

320. The four conditions of loss, causation, breach of duty (failure to comply) and actionability are required by a multi-firm consumer redress scheme as imposed under section 404 FSMA. Section 404(1)(b) addresses actionability, subsection (5) addresses breach of duty, subsection (6) addresses causation and loss, and subsection (7) addresses the payment or enforcement of redress in the following terms:

> "404(1) This section applies if—
> …
> (b) it appears to it that, as a result, consumers have suffered (or may suffer) loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available in the proceedings; and
> …
> …
> (4) A "consumer redress scheme" is a scheme under which the firm is required to take one or more of the following steps in relation to the activity.
> (5) The firm must first investigate whether, on or after the specified date, it has failed to comply with the requirements mentioned in subsection (1)(a) that are applicable to the carrying on by it of the activity.
> (6) The next step is for the firm to determine whether the failure has caused (or may cause) loss or damage to consumers.
> (7) If the firm determines that the failure has caused (or may cause) loss or damage to consumers, it must then—
> (a)determine what the redress should be in respect of the failure; and
> (b)make the redress to the consumers.
> …"

321. We consider that corresponding statutory conditions must be satisfied in order to impose a single firm redress scheme under s. 404F(7)(a) through provisions which correspond to those that could be provided in rules made under section 404. These are those contained in section 404A.

322. The s.404A requirements correspond to the same four conditions required by a multi-firm consumer redress scheme as imposed under section 404(1)(b) & (5)-(7) such that there is no anomaly between the two.

323. Section 404A (1) provides that:

> "Rules under section 404 may make provision…
> (c) setting out, in relation to any specified description of case, matters to be taken into account, or steps to be taken, by relevant firms for the purpose of—
> (i) assessing evidence as to a failure to comply with a requirement; or

(ii) determining whether such a failure has caused (or may cause) loss or damage to consumers".

324. Subsection 404A(1)(c) therefore addresses the three corresponding conditions of breach of duty (failure to comply with a condition), causation and loss.

325. For similar reasons to those set out above in relation to s.404F(7), the effect of the word "may" in s. 404A is to permit the Authority to impose requirements under the rules rather than to leave the decision to impose the requirements to the Authority's complete discretion. Section 404F(7) makes clear that the requirements to be imposed are those that could be included in the rules made under section 404. Section 404A is to be read in light of section 404F(7) and as applicable to a single firm redress scheme (for example reference to "firms" in section 404A must be read as applying to a single firm). That does not require consideration of all the rules that may be available for a multi-firm redress scheme enabled under section 404A. The single firm and multi firm redress schemes must correspond but are not required to be identical (for example a multi-firm redress scheme requires a widespread or regular failure by relevant firms by virtue of s. 404(1)(a)).

326. Nonetheless we reject the submission of Mr George KC that there is anything inconsistent with this interpretation with the other subsections of s.404A. For example, s.404A(1)(m) provides for rules as to the enforcement of any redress and payment by a relevant firm. He submits that this is not something that would be empowered by a variation of permission pursuant to section 55L so the introduction of s. 404F(7) is expanding the existing powers available under section 55L rather than introducing them but s. 404A(1)(m) may still be applicable to a single firm redress requirement imposed upon the firm by the Authority as part of granting it permission.

327. Even if there were any inconsistency between the provisions of s. 404A and s. 404F(7), any such provision of s. 404A would simply be disapplied. Section 404A should be read compatibly with s. 404F(7) so as to achieve the corresponding purpose that it is seeking to achieve – effective redress under a single firm scheme is to be provided to customers who have suffered damage as a consequence of a firm's actionable failure to comply with requirements. This is made clear by s. 404F(7) where the single firm scheme is required to "correspond to, or [be] similar to a [multi-firm] consumer redress scheme." This provision, contrary to Mr George's submission, does not import only a loose correspondence such that the four statutory conditions found in s. 404 and mirrored in s.404A do not require to be imported. Any single-firm scheme which did not import such fundamental conditions would no longer correspond to or be similar to a multi-firm scheme.

328. Accordingly, s.404F(7) imports into a single firm redress scheme the requirement to prescribe conditions which correspond to rules that could be made under s.404A(1)(c) which necessitate that the Authority may only impose a requirement on the firm to pay redress where the customers of the firm have suffered loss which has been caused by a breach of a duty (a failure to comply with a requirement).

329. The fourth necessary condition is contained in s.404A(3) which provides that: *"Matters may not be set out in the rules as a result of subsection (1)(c) if they have not been, or would not be, taken into account by a court or tribunal for the purpose mentioned there."*

330. We are satisfied that this subsection (s. 404F(7) read with s.404A(3)) imports a requirement of actionability upon a single firm redress scheme.

331. The wording on actionability for a multi-firm scheme contained in s.404(1)(b) is not in identical terms to that of s. 404A(3). However, we are satisfied that the same limitation is imposed by s.404A(3). Matters such as a failure to comply with a Principle which caused loss or damage to consumers would not be taken into account by a court or tribunal because they are not actionable before it. This is because section 138D(3) and PRIN 3.4.4R provide that a contravention of the Authority's Principles for Businesses (such as Principle 8) does not give rise to a right of action by a private person. Therefore, any failure to comply with a Principle causing loss to a consumer cannot be taken into account for the purposes of a single firm redress scheme imposed under ss.55L, 404F(7) and 404A FSMA.

332. Thus, Mr George's submission - that the statutory language of s.404F(7), even if it were the source of the power, is only that a single firm scheme be "similar to" or "corresponding to" a multi-firm scheme and not be identical – does not assist the Authority. Single firm schemes imposed by virtue of s.404F(7) with rules corresponding to those in s.404A do not mirror the identical requirement of s.404(1)(a) but that is for the obvious reason that they do not require the widespread or collective failures by multiple firms. Nonetheless the purpose of the provision is clear that – in so far as is relevant – the single firm scheme should mirror the multi-firm scheme. Thus, the fact that neither s.404F(7) nor s.404A expressly states that the four conditions are imported into single-firm schemes does not mean that they are not imported. The conditions are expressly within s. 404 and mirrored, although not identically in s. 404A – a provision originally drafted to have application to multi-firm schemes. Single firm schemes are to correspond to these conditions by virtue of section 404F(7).

Conclusion on the statutory conditions that are imported: the first question

333. For the same reasons as set out above, we are satisfied that the proper construction of the variation power is that it is being subject to the same principles for single firm redress under section 55L and 404F(7) that are applicable to the corresponding/similar multi-firm consumer redress power under s.404 (accepting that there are additional conditions that must be satisfied, for example under s.404(1)(a), before a multi-firm consumer redress scheme can be imposed). This ensures consistency of approach and alignment of the requirements as section 404F(7) makes clear that they should correspond or be similar to each other.

334. Our conclusion is that the four statutory conditions are required to be satisfied by virtue of ss.55L, 407F(7) and 404A before a single firm consumer redress requirement can be imposed, namely: loss, causation, duty and actionability must therefore be established. These correspond to and are similar to the four necessary conditions that are required to be satisfied before multi-firm consumer redress schemes can be imposed by virtue of s.404.

335. The failure to comply with a requirement (breach of duty), causation and loss must each be matters that would be actionable in a court or tribunal. Breach of duty, causation and loss are to be determined in accordance with the approach of the civil courts. All the four conditions of loss, causation, duty and actionability must therefore be established.

336. This leads to the second question as to whether the Authority's remaining case (including the permitted amendments to the SoC and its Draft Redress Rejoinder) which relies only upon an allegation of a breach of Principle 8 has a reasonable prospect of satisfying the four statutory conditions (including actionability by a consumer - a right of action by a private person).

Second question: has the Authority arguably satisfied the four statutory conditions for the imposition of a single firm consumer redress scheme on the basis of its pleaded case (taking into account the permitted amendments and its rejoinder to BCMUK's reply)?

337. We address each of the four statutory conditions in turn. We note that at the strike out stage the question is whether the Authority has pleaded a case that has a reasonable prospect of success in respect of each.

First and second conditions: Causation and Loss

338. The sole paragraph of the ASoC (in both its original and amended form) which sets out the Authority's case as to loss and causation is paragraph 173. This is confirmed by the reference to that paragraph in para 17 of the Redress Rejoinder. Paragraph 173 of the SoC / ASoC states as follows:

> "173. The Applicant's failure to appropriately manage this conflict resulted in a substandard investment management service being provided to the External Fund and its investors in that the service provided involved both the inadequate arrangements and the inadequate disclosure described above. The Authority contends that the failings by the Applicant were such that the level of service received by the investors was therefore below that which could reasonably be expected to be commensurate with the fees paid by those investors."

339. Paragraph 17 of the Authority's Rejoinder to the Applicant's case on Redress provides as follows:

> "17. As to paragraph 64, it is denied that *"actionable loss or damage"* is required in order for a redress requirement to be imposed under section 55L of the Act. Paragraph

16 above is repeated. In any event, it is averred, as clearly set out in paragraph 173 of the Statement of Case and as further set out below, that the External Fund and/or its investors suffered loss and damage in a sense which (were a breach of the Principles to be actionable in private law) an English Court would recognise and seek (as the Authority has sought) appropriately to quantify. In this regard:

17.1. The Authority accepts and avers that it is impracticable to seek to identify a counter-factual scenario reflecting what would have occurred if the Applicant had complied with Principle 8 given the number of variables, each of which are applicable over a four and a half-year period, including: (1) what Portfolio Managers would have traded for the External Fund; (2) how those Portfolio Managers would have performed; (3) which External Fund investors would have withdrawn from the External Fund earlier than they in fact did (and when); and (4) which External Fund investors would not have invested in the External Fund at all.

17.2. In such circumstances, it is entirely permissible to seek, as the Authority has done, a proxy measure to value the difference between the service which was contracted for by the investors in the External Fund, and the service which was received.

17.3. Indeed, (without prejudice to the averred irrelevance of the comparison) English Courts in private law actions routinely seek to quantify loss and damage in such a manner including (1) in sale of goods cases by evaluating the difference between the value of the acquired chattel with the value of the chattel contracted for; (2) in *Wrotham Park* cases (also referred to as 'negotiating damages' or 'licence fee damages') seeking to identify the value of (and thereby a notional price for) the right which has been unlawfully exploited; (3) in a wide variety of cases, disgorgement damages seeking to deprive a contract-breaker of his profits through the remedy of an account; (4) the Courts' upholding of non-penal liquidated damages; (5) damages measured by the cost to rectify the breach rather than to remedy the consequences to the claimant (*McGregor on Damages*, 21st ed., 2-008); (6) damages in addition to or in substitution for granting either an injunction or specific performance under section 50 of the Senior Courts Act 1981; (7) cases where there is no deduction from damages for betterment, as per *Harbutt's Plasticine v Wayne Tank & Pump Co* [1970] 1 QB 447 (CA); (8) damages for loss of chance; and (9) the presumption of damage for the general pecuniary loss by injury to credit and reputation caused by the defendant's failure to pay the claimant's cheques or honour their drafts (e.g. *Wilson v United Counties Bank* [1920] AC 102 at 112). Indeed, it is a foundational rule of English contract law that all breaches of contract sound in damages, even where these are nominal (see *McGregor on Damages*, 21sted., 12-002).

17.4. In the instant case, the Authority has sought to impose a fair and reasonable redress scheme taking into account both the breaches committed by the Applicant and the management services and performance which were provided to the External Fund and its investors.

17.5. The Authority avers that the redress scheme imposed, which broadly compensates investors only in respect of (1) management fees which exceeded both (a) operating expenses; and (b) industry average management fees; and (2) performance fees which did not relate to a performance in excess of the industry average, is an entirely reasonable, legitimate and proportionate approach (and well within the range of regulatory responses open to it)."

BCMUK's objection

340. Mr Herberg KC argues that in assessing whether the Authority's case discloses an arguable case that consumers have suffered loss, both loss and causation are to be assessed in a manner consistent with how those concepts would be assessed in the civil courts. Based on the way in which the Authority puts its case in the Draft Redress Rejoinder (notably at para 17.3) this is understood to be common ground. In any event, this is the implication of s.404F(7) and s.404A(3) further specifies that the rules that the Authority can impose for the purpose of determining causation and loss must be consistent with the approach of the civil courts. Specifically, *"Matters may not be set out in the rules as a result of subsection (1)(c) if they have not been, or would not be, taken into account by a court or tribunal for the purpose mentioned there"* (s.404A(3).

341. He contends that the extent of the Authority's case on loss is thus that the *"level of service"* was affected by the alleged conflict of interest and/or the alleged failure to disclose it. The Authority does not allege that the External Fund suffered any loss of return by reason of the alleged breaches. He submits that properly understood, the allegation at para 173 of the ASoC is not an allegation of loss at all. Rather it is merely a restatement of the alleged breach: that the service which the customers received was the service subject to an unremedied conflict of interest (which is labelled *"substandard"*).

342. He notes that the Authority denies it has failed to plead loss and relies on para 17 of the Redress Rejoinder but submits that this is limited to an explanation as to why it was permissible and appropriate for the Authority to employ a *"proxy measure"* in order to determine the *quantum* of difference between the service "*contracted for"* and the service received. That, of course, merely presupposes that a loss has been suffered.

343. Mr Herberg KC submits that each of the examples provided at para 17.3 of the Authority's Draft Redress Rejoinder are instances where the courts, having determined that financial loss has been suffered, deem it necessary to employ a proxy measure of some kind in order to determine the quantum of that loss but that is not the position in this case because no financial loss has been pleaded at all. The point is that the Authority's pleading is consistent with the proposition that all investors were, financially, in exactly the same position as they would have been had there been no breach.

344. Mr Herberg KC submits that the upshot of the Authority's case at para 173 of the ASoC appears to be, as a matter of principle, that any breach by an authorised firm of its regulatory obligations when providing a service must inherently cause financial loss because a client would have "paid less" for that (compromised) service, even though those services did not result in any financial loss to that client.

345. Mr Herberg KC submits that notwithstanding that that is not pleaded anywhere in the SoC (in original or amended form), that appears to be the implication of both para 173 ASoC and the metrics proposed for calculating redress (at para 4) which proceeds on the basis that the investors should have paid a reduced management fee (the industry average) and reduced performance fee (based on the industry average performance).

346. He submits there is no legal basis for that assertion. There is no way in which a lower *"value"* can be placed on a service compromised by failures to comply with a firm's regulatory obligations (and it is obvious that that is not a service which can be offered or accepted); no value (different or otherwise to that paid for) can be placed upon services provided in breach of a Principle for Businesses or any regulatory requirement. Therefore, the only measure of loss can be whether the breach of regulatory obligations has caused a loss to the beneficiaries of the service.

347. As set out in para 64 of the Reply, the service provided by BCMUK was to manage investments in a manner which achieved risk-appropriate returns. As set out above, the Authority does not allege that the External Fund obtained a lower return by reason of the alleged breach. There self-evidently cannot have been any overpayment of performance fees (given that they reflected the level of return, which is not challenged). Equally, in circumstances where the level of return is not challenged there is no basis on which it could be said that BCMUK should have charged lower management fees.

Discussion and analysis

348. As set out above, the Redress Requirement imposed by the Authority seeks to compensate Non-US Investors in respect of the alleged excessive fees they paid for a substandard service, namely: (1) management fees which exceeded both: (i) operating expenses, and (ii) industry average management fees; and (2) performance fees that did not relate to a performance in excess of the industry average.

349. The alleged breach by the Applicant and the substandard nature of the service that it is alleged to have been provided are matters which (as the Tribunal has already ruled) are to be assumed in the Authority's favour for the purpose of this hearing: as set out in the Tribunal's reasons for its directions dated 14 November 2022 at [32].

350. We reject the submissions on causation and loss on behalf of BCMUK. We are satisfied that the Authority has pleaded a case (taking into account paragraph 17 of the Draft Redress Rejoinder) which holds a real prospect of successfully establishing that the alleged breaches of Principle 8 (which are permitted to proceed) have caused loss to consumers.

351. As set out in its Draft Redress Rejoinder, such payment of redress is an arguable proxy measure for the alleged loss suffered by the underlying investors and/or the External Fund by reason of the sub-standard service that they received. The fact that the nature of the sub-standard service, as alleged, also gives rise to a breach of Principle, does not mean that this measure of loss cannot be adopted (e.g. there is no need to examine the authorities on whether a criminal or unlawful service has any monetary value).

352. We agree with Mr George KC that the common law recognises the availability of loss as pleaded at paragraph 17 of the redress rejoinder. In the case of defective provision of services, a primary measure of loss is the difference in value between (on the one hand) the service that ought to have been provided and (on the other) the service

that was in fact provided. The point is stated in *Chitty on Contracts* (34th ed) at para 29-062 by reference to a number of the leading cases (as addressed below):

> "Sir Thomas Bingham MR [in *White Arrow*] said that if there is a clear difference between the market value of what was contracted for and what was supplied, the difference will be the measure of damages; and this has been confirmed by dicta in the Supreme Court [in *One-Step*]. If there is no market price, it may still be possible to quantify the loss by reference to the cost of providing the lacking services, or indeed to use the contract price as best evidence of the value of them. Thus the value of a performance has sometimes been calculated by assuming that it was worth at least what the buyer had agreed to pay for it. Subsequently it has been held [in *Force India*] that if the services provided are incomplete or of less than the contracted quality, the buyer is prima facie entitled to the difference in value between the service promised and the service delivered, whether or not he has suffered any further loss and whether or not he has obtained substitute services from another supplier."

353. This extract relies upon three authorities.

354. The first is Sir Thomas Bingham MR sitting in the Court of Appeal in *White Arrow Express Limited v Lamey's Distribution Limited* [1995] CLC 1251 ('*White Arrow*') where he emphasised that if there is a difference between the market value of what was contracted for and what was supplied, this difference could properly form the subject of a damages claim (at p.1256):

> "It is not the law that an innocent party who contracts for a deluxe service and receives a sub-standard service is in principle denied a claim to more than nominal damages. If such were the law it would be defective. But it is the law that an innocent party in such a position must quantify, or at least provide evidence from which the court can draw an inference as to, the difference between the value (usually the market value) of what was contracted and the value (again usually the market value) of what was provided"

355. He illustrated the point by giving a number of examples (at pp.1254-1255):

> "It is… obvious that in the ordinary way a party who contracts and pays for a superior service or superior goods and receives a substantially inferior service or inferior goods has suffered loss. If A hires and pays in advance for a 4-door saloon at £200 per day and receives delivery of a 2-door saloon available for £100 per day, he has suffered loss. If B orders and pays in advance for a 5-course meal costing £50 and is served a 3-course meal costing £30, he has suffered loss. If C agrees and pays in advance to be taught the violin by a world famous celebrity at £500 per hour, and is in the event taught by a musical nonentity whose charging rate is £25 per hour, he has suffered loss. It is irrelevant whether A, B or C might have been entitled to reject the goods or services tendered if they in fact accept them. It would defy common sense to suggest that A, B and C have suffered no loss, and are not financially disadvantaged by the breach. The measure of damage in each of these cases is the difference between the price paid (or, if it is lower, the market value of what was contracted for) and the market value of what was obtained."

356. The second authority is *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) ("*Force India*") in which the High Court held, following the Court of Appeal in *White Arrow,* that the claimant was indeed entitled to

bring a freestanding claim for the difference in market value between the service promised and that provided ([435]):

> "It does not in my view follow that the ordinary measure of compensatory damages identified and approved by Lord Nicholls in the House of Lords is inadequate in all cases of skimped performance. Where the skimped performance consists of the supply of inferior and cheaper goods than those ordered and paid for the shopkeeper has to refund the difference in price as damages for breach of contract. Where the defendant provides inferior and cheaper services then those contracted for the approach prescribed by Lord Nicholls presumably involves refunding the difference in price between the inferior and cheaper services supplied and those which the defendant agreed to supply."

357. Mr Justice Stadlen further made clear that, in order to refute a damages claim based on the difference in value between the services promised and those provided, the burden would lie on the defendant to prove that the inferior services had in fact been just as effective in securing the intended objective of the services. The mere fact that the claimant faced "*evidential difficulty in establishing substantial consequential loss*" was not enough to deprive them of a claim based on the difference in value of the services. Thus, he held ([436]):

> "Since in every case the loss for which the claimant is entitled to be compensated by damages is the difference between the value of what the defendant agreed to supply and what he did supply one can see that if the inferior (or insufficient) services actually supplied can be proved to have been no less effective in securing the objective which the superior (or larger number of) services contracted for were intended to achieve, a court might readily accept that the breach of contract did not result in any diminution in the value of the services contracted for."

358. The third authority is the decision of the Supreme Court in *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, [2019] AC 649 ('*One-Step*'). Lord Reed (giving the majority judgment) carried out a careful analysis of the principles governing the assessment of compensatory damages and specifically confirmed the availability of a damages award based on "*the difference between the value of the goods or services contracted for and those actually provided*", which he regarded as supported by authority([80]):

> "For the avoidance of doubt, the award of damages for skimped performance, based on the difference between the value of the goods or services contracted for and those actually provided, is not excluded by the principle in *Robinson v Harman* 1 Exch 850 but is an example of its application. That was recognised by Lord Nicholls in *Attorney General v Blake* [2001] 1 AC 268, 286."

359. The Authority's case on loss is that: (i) the Applicant's failings "*resulted in a substandard investment management service being provided to the External Fund and its investors*"; and (ii) these failings "*were such that the level of service received by the investors was therefore below that which could reasonably be expected to be commensurate with the fees paid by those investors"* (see ASoC [173]). The Redress Requirement imposed by the Authority is designed to compensate for this loss.

360. We accept that the Authority does not contend that it can quantify the relevant loss by reference to a counterfactual comparison with what precise sums would have

been earned by the External Fund and its investors but for the breach. Nonetheless, we consider that the Authority has pleaded and may be able to evidence at trial specific deleterious consequences of the Applicant's failure properly to manage the conflict of interest on the (supposedly *"deluxe"*) services provided to investors in the External Fund and the External Fund itself. The allegations may be made by reference to evidence as to:

(1) the disproportionate and effectively immediate re-allocation of such a substantial amount of the External Fund traders to the Internal Fund;
(2) the performance of the automated RMT system on the External Fund (in circumstances where the Internal Fund was actively traded in real time by – in many cases re-allocated - human traders); and
(3) the misleading and inadequate disclosures regarding the existence of the Internal Fund, and the conflicts arising, which meant that investors were denied the opportunity to make informed decisions regarding their continued investment in the External Fund.

361. The Authority's approach to causation and loss is consistent with a primary measure of damages in cases of defective provision of services in the authorities set out above: namely, the difference in value between the services that ought to have been provided and those which were in fact provided (such as loss from skimped performance). Once the above-mentioned authorities on loss are properly taken into account, the first two of the statutory conditions hold a real prospect of being satisfied, namely that the pleadings disclose an arguable case that "*persons have suffered loss or damage*" and "*that loss or damage has been caused by a wrong on the part of the firm*".

362. Some of the objections taken by BCMUK as to how loss can be measured are matters for trial. The preliminary hearing assumes that the Authority will be able to evidence its assertions of loss at trial such that the Authority does not need expert evidence at this stage as to the value of the sub-standard service compared to that paid for. The strike out application proceeds on assumed facts and takes the Authority's case at its highest. Disputes as to the facts and evidence and how one can value the diminution in the substandard service are matters for trial so long as there is an arguable basis for the allegations in law. The allegation of sub-standard service is taken to be assumed – once this is accepted for the purpose of the application then the measure of the loss, if it can be permissibly pursued as a matter of law, would be for trial.

363. We are therefore satisfied that the Authority's pleadings at [173] of the ASoC and [17] of the Draft Redress Rejoinder give rise to a reasonable prospect of success that causation and loss can be made out.

Third condition: Duty

BCMUK's objection

364. Mr Herberg KC submits that, for the reasons set out above, a consumer redress scheme can only be imposed pursuant to s.404 (and thus s.404F(7)) if consumers have suffered actionable loss as a result of the failure of the relevant firm to comply with regulatory duties. No actionable loss could have been suffered by consumers to whom the relevant regulatory duty was not owed.

365. He argues that, as set out in paras 34 and 35 of BCMUK's Reply, and as we have accepted, the relevant client of BCMUK, for the purposes of Principle 8, was the External Fund. This is so given that the *"client"* to whom the Principle 8 duty is owed is the person or entity to whom a firm provides *"a service in the course of carrying on a regulated activity"* (by virtue of COBS 3.2.1R(1)).

366. He contends that the *"service"* provided by BCMUK as sub-investment manager (by reason of the relevant contracts, being the IMA and Sub-IMA as defined in the Reply) was provided to the External Fund only.

367. By reason of COBS 3.2.1R(1) and COBS 3.3.1R(2), BCMUK was required to specifically identify the External Fund as its client in advance of commencing the provision of investment management services to the External Fund, and did so by way of clause 3.1 of the Sub-IMA.

368. Notwithstanding this, Mr Herberg KC points out that the Authority's unamended Statement of Case is pleaded entirely on the basis that the underlying investors were the clients of BCMUK and on the basis that it was those investors that have thus suffered loss as a result of the breach.

369. By way of example, from the section of the ASoC (in original or amended form) entitled "The Authority's Case" "*in conflict with the duties they owed to investors in the External Fund*" (para 164) "*the Applicant's systems and controls did not manage the risk that Portfolio Managers could be allocated in a way that favoured investors in the Internal Fund over those of the External Fund*" (para 166) "*the Applicant's disclosures to its investors regarding the existence of the Internal Fund, and the conflicts arising, were entirely insufficient and, at times, misleading. External Fund investors were not told ... the Applicant also failed to provide sufficient disclosure to investors in the External Fund regarding ...*" (para 169) and by way of conclusion "*Based on the facts and matters set out above, the Authority contends that the Applicant breached Principle 8 in that it failed to manage conflicts of interest fairly, between the investors in the External and Internal Funds*" (para 174).

370. In his witness statement on behalf of the Authority, Mr Duncan disputes this and asserts that *"the Authority has always maintained that the Applicant's clients, for the purposes of the alleged breaches of Principle 8, included the External Fund itself"* (para 19). There is however no basis for this assertion. The only paragraph in the Statement of Case that Mr Duncan is able to refer to in this regard is para 42 which states that *"the Funds and their underlying investors had professional client status"* (para 18 of Duncan 1). This plainly does not support Mr Duncan's assertion, which elides two quite distinct concepts.

371. As stated above, Mr Duncan states expressly (at para 15) that the *"purpose"* for the late amendments which the Authority seeks to make is precisely to remedy this flaw in its pleading and to advance a case by which the underlying investors are the clients. If permission to make those amendments is refused by the Tribunal then the

Authority would have no pleaded case that any actionable duty was owed to the underlying investors.

372. Mr Herberg KC submits that even if the amendments are permitted, the amendments relate only to the DN Reference (as set out above). Consistent with this, no loss is pleaded as arising from the breach of Principle 7/COBS 4.2.1R(1). As discussed above, he argues that the only loss pleaded is that in para 173 of the ASoC. Even if it did amount to a case on loss, it is not a loss which arises from the new case set out in the ASoC. Specifically, it is not loss arising from a breach of Principle 7/COBS 4.2.1R(1) or the operation of the MSA or the communication of financial promotions or the regulated activities of *"making arrangements with a view to transactions in investments"* or *"arranging (bringing about) deals in investments"*. Rather it refers only to the *"failure to appropriately manage [the] conflict"* as giving rise to a *"sub-standard investment management service"* which relates only to the unamended case. Specifically, it relates only to Principle 8, the investment management service provided pursuant to the IMAs and Sub-IMAs and the regulated activity of managing investments.

Discussion and analysis

373. We are satisfied that there is a reasonable prospect of the Authority establishing that a duty was owed to the External Fund and its investors. This is for the reasons set out above as to the scope of the DN and the facts and matters (see [27]-[35]) and in accepting the second amendment at [145]-[147] that the Authority may allege the Applicant breached Principle 8 by failing to make adequate disclosure of the conflict between the Internal Fund and the External Fund to investors in the External Fund when carrying out its functions under the MSA, which was a different investment service provided to the External Fund to that provided under the Sub- IMA.

374. In any event, on the Authority's existing and unamended pleaded case, the allegation of duty to the External Fund and investors is clearly pleaded.

375. The Authority pleads that the Applicant's failings "*resulted in a substandard investment management service being provided to the* ***External Fund and its investors***" (see ASoC [173], emphasis added). Further, as set out above, the relevant loss consists of the difference in value of the services that ought to have been provided and those which were in fact provided. Accordingly, there is no difficulty in characterising this as a loss suffered by *both* the External Fund and the investors as the recipients of the defective services.

376. Moreover, it was money from the underlying investors' investments *in the External Fund* (i.e. money which was initially paid to and then subsequently paid out by the External Fund) which was used to pay the relevant management and performance fees (via a separate BlueCrest entity which acted as the investment manager for the fund).

377. Still further, the Draft Redress Rejoinder reiterates the Authority's case that "*the External Fund and/or its investors suffered loss and damage"* (§17) and that "*the Authority has sought to impose a fair and reasonable redress scheme taking into account both the breaches committed by the Applicant and the management services and performance which were provided to* ***the External Fund and its investors***." ([17.4], emphasis added)

378. For all of these reasons it is incorrect for the Applicant to suggest that "*the Authority does not allege any actual or applicable loss or damage to the External Fund*".

379. Accordingly, even on the Applicant's case that the only relevant duty was owed to the External Fund, there is no difficulty in concluding (on the pleaded facts that fall to be assumed for the purposes of this hearing) that the External Fund has itself suffered a loss as a result of the Applicant's breach of duty.

380. The third condition is therefore satisfied even on the Authority's existing pleaded case and as a result of the second amendment which we have permitted.

Fourth Condition: Actionability

The Authority's case

381. Mr George KC argues that actionability is not a required condition for the imposition of a single firm consumer redress scheme but in any event, the Authority's amended case (relying upon alleged breaches of 4.2.1R of COBS) is actionable.

382. He rejects a requirement of actionability in principle, submitting that the consequence of the Applicant's contentions would be to undermine the Authority's statutory consumer protection objective in a legally unnecessary and unsound fashion. He contends that the effect of the Applicant's contentions is that *even if* the Applicant has breached its duties under Principle 8 and *even if* this breach has caused loss to the underlying investors, the Authority is unable to require the Applicant to give redress in respect of this loss. To deprive the underlying investors of redress in this fashion would undermine the Authority's statutory objective of providing an appropriate degree of protection for consumers, and there is no basis in the statutory and regulatory scheme for suggesting that this unjust and implausible outcome is required.

383. He submits that the Applicant is seeking to apply the criterion of private actionability far beyond its proper territory. The statutory conditions for actionability in court proceedings (as now set out in section 138D FSMA) merely define the limits of one route of recourse (i.e. a direct action by a private person in court proceedings) and do not detract from scope of the Authority's distinct powers to take action itself.

384. He further contends that the courts have emphasised the distinct and important coverage provided by the Authority's own action, including in circumstances where an aggrieved party is unable to bring a claim for breach of statutory duty under the FSMA regime.

385. He relies upon two authorities.

386. In *Grant Estates Ltd v The Royal Bank of Scotland plc* [2012] CSOH 133 (a decision of Lord Hodge sitting in the Outer House of the Court of Session), the pursuer (a company) sought to bring a claim for breach of the COBS rules and argued that it was incompatible with EU law for actionability to be limited to private persons under (what was then) section 150 FSMA. Lord Hodge rejected this contention precisely because FSMA provides a range of regulatory remedies which are distinct and additional to any right of private recourse and are not limited to private persons (at [47]).

387. In *Flex-E-Vouchers Ltd v Royal Bank of Scotland* [2016] EWHC 2604 (QB), the claimant (who again was not a "private person" and was therefore unable to bring a claim under s.138D FSMA) sought instead to bring a contractual claim on the basis of an alleged implied term requiring compliance with the FSA's Handbook (see [5] & [18]). The High Court struck out this element of the Claimant's case. Relevantly for present purposes, the High Court emphasised that "*(t)he fact that one may not have a remedy for breach of statutory duty does not mean that a claimant affected by an alleged breach of any of those rules has no remedy at all"* and noted that action taken by the Authority may also provide a remedy (at [19]).

388. Moreover, he submits that the starting point under s.138D FSMA is that breaches of *all* of the Authority's rules (including the Principles) are actionable: see s.138D(2). The only reason why a breach of the Principles is not actionable is that s.138D(3) empowers the Authority to make rules disapplying the right to bring a damages claim under s.138D(2), and the Authority has in fact made such a rule in respect of the Principles: see the Authority's Handbook at PRIN 3.4.4R.

389. Mr George KC notes that PRIN 3.4.4R is very narrowly drafted: it specifically refers to s.138D(3) FSMA and is intended to do no more than exercise the power granted under that sub-section to disapply that statutory right of action that would otherwise attach to infringements of the Principles.

390. He argues that there is nothing within either section 138D FSMA or PRIN 3.4.4R to suggest that the Principles were to be deprived of any of the other legal incidents and effects that attached to them as rules enacted under the FCA's general rule-making powers and forming part of the regulatory system.

Discussion and analysis

391. We have rejected Mr George's submissions that actionability is not a requirement of a single firm redress scheme imposed by virtue of ss.55L, 404F(7) and 404A(3). This is for the reasons set out above.

392. The Authority's case is now only permitted to proceed based on a breach of the Principles for Businesses– Principle 8 only. This is because the Authority's amendment application to add alleged breaches of Principle 7 and COBS 4.2.1R(1) is refused.

393. There is no dispute that a breach of the Principles is not actionable under s.138D(3) FSMA (see PRIN 3.4.4R). The rationale for this is explained above. Breaches of the Authority's rules beneath the high level of Principles are actionable but we have refused the amendment for the Authority to rely upon a breach of COBS 4.2.1R(1) because it is outside the subject matter of this reference.

394. As we have explained above, it is s.404F(7) that provides the power, together with s.55L(3), for the Authority to impose requirements corresponding to or similar to a multi-firm consumer redress scheme under section 404. It follows from our analysis of the conditions required by s.404A that the Authority has no power to impose a single firm consumer redress based on breach of Principle 8 alone, or any other Principle, because they are not actionable. This would be the identical position if there were to be a multi-firm scheme redress power in relation to similar breaches by other firms. It is common ground, that *"a consumer redress scheme cannot be used to require redress in relation to breaches of the Principles"* (CONRED 1.3.16G and 1.3.17G).

395. In any event, as set out above, even if, as the Authority asserts, it is s.55L(3) alone that provides the Authority with the power to impose a consumer redress scheme on a single firm, the extent of that power must be construed in light of the restrictions placed on consumer redress schemes by s.404 and s.404A. It must follow therefore, that if a consumer redress scheme can only be imposed on multiple firms if the relevant breach is actionable, then the same must also apply to a consumer redress scheme imposed on a single firm.

396. Our conclusions do not give rise to such a surprising result as it may first appear. In the appropriate case, the Authority may be able to bring a case based on the breach of relevant rules (such as SYSC or COBS) which are actionable, but which the Authority chose not to plead in its original SoC in this case. In the appropriate case, and subject to issues such as the limitation period, the Authority may be permitted to bring a fresh case to the RDC pleading allegations which the tribunal has refused to amend a statement of case to include as being outside the subject matter of the original reference. Based even upon the Authority's current permitted case, as amended, there may be other remedies available to consumers by the various statutory avenues referred to at [231] above.

397. In conclusion, we are satisfied that the Authority's case, as permitted to proceed, has no reasonable prospect of success in establishing any actionable loss as is required by virtue of section 404F(7) in order to impose the single firm redress requirement which is imposed under the FSN.

398. We therefore bar the Authority from defending the reference and strike out the Authority's case. We summarily determine the reference in respect of the FSN in the Applicant's favour on the basis that the redress requirement cannot be lawfully imposed.

The rejoinder application

399. In light of the fact that the Draft Redress Rejoinder does not disclose a case of actionable loss with a reasonable prospect of success, the application is refused.

Conclusion and disposition

400. The Authority's amendment application in relation to those amendments which are disputed succeeds only in respect of the second disputed amendment in relation to a breach of Principle 8 ([42A(f) & (g)] and [170A] ASoC). The first disputed amendment in relation to a breach of Principle 8 ([42A(c)] ASoC) is refused as a matter of discretion as it does not raise a case with a realistic prospect of success. The third and fourth disputed amendments, alleging a breach of Principle 7 and COBS 4.2.1R(1) ([42B] and [174] ASoC), are refused as falling outside the subject matter of the reference and not being within the tribunal's jurisdiction. They introduce new allegations of fact and law which were not considered before the Regulatory Decisions Committee of the Authority nor included in the statutory notices (the Warning and Decision Notices).

401. Permission is granted for the Authority to make those amendments to the SoC which are not disputed.

402. BCMUK's strike out application succeeds. The Authority is barred from participating in the reference in respect of the FSN and it is summarily determined in BCMUK's favour with the consequence that the reference is allowed. The Authority's pleaded case at its highest and as amended (with the permitted amendments and in light of the proposed redress rejoinder) does not have a *"reasonable prospect"* of establishing one of the necessary conditions we have deemed legally necessary for the imposition of a redress requirement upon it. The Authority's case proceeds on the basis that BCMUK has breached Principle 8 but this is not an actionable cause in respect of which redress may be imposed under section 55L and 404F(7) FSMA. For the same reasons, the rejoinder application is refused.

403. As we have allowed the reference, the matter is remitted to the Authority with a direction to the Authority to reconsider and reach a decision in accordance with the findings of the Tribunal. In this case, the relevant finding is a finding of law that the Authority has no power to impose a redress requirement on BCMUK as pleaded in the SoC (and the permitted amendments).

404. An application for permission to appeal in respect of a decision in a financial services case must normally be made or delivered to the Upper Tribunal so that it is received within 14 days after the date on which the Upper Tribunal sent to the person making the application (i) written notice of the decision; (ii) notification of amended reasons for, or correction of, the decision following a review; or (iii) notification that an application for the decision to be set aside has been unsuccessful (see rule 44(3D) of the UT Rules. Given the complexity of the decision in this case, in exercise of the Tribunal's power under Rule 5(3)(a) of the UT Rules, the time for making an

application for permission to appeal is extended to 28 days after the date on which the Upper Tribunal releases this decision in final form.

JUDGE TIMOTHY HERRINGTON **JUDGE RUPERT JONES**

UPPER TRIBUNAL JUDGES

RELEASE DATE: 21 June 2023