Neutral Citation Number: [2020] EWHC 1758 (Ch)

Claim No: FS–2018-000009

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN ENGLAND AND WALES
BUSINESS LIST (ChD)
FINANCIAL SERVICES AND REGULATORY SUB-LIST (FS)

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 3 July 2020

Before:

Sarah Worthington QC(Hon) sitting as a Deputy High Court Judge

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Between :

MR CLIVE RICHARD DAVIS	**Claimant**
- and -	
LLOYDS BANK PLC	**Defendant**

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- -

David McIlroy and Lloyd Maynard (instructed by **Mayo Wynne Baxter Solicitors**) for the **Claimant**
Javan Herberg QC and Simon Pritchard (instructed by **Addleshaw Goddard LLP**) for the **Defendant**

Hearing dates: **10, 11 February 2020**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Sarah Worthington QC(Hon)

Sarah Worthington QC(Hon):

1. The issues

1. Mr Davis claims to be entitled to bring an action for breach of statutory duty against Lloyds Bank plc. The claim is said to arise out of the conduct by Lloyds Bank plc of a review process that was agreed between the Financial Services Authority and Lloyds Bank plc in June 2012, and later updated in 2013. The review process concerned the mis-selling of certain types of interest rate hedging products to unsophisticated customers on or after 1 December 2001.

2. Mr Davis was involved in two of these interest rate hedging products. Both were reviewed under this agreed review ("**the Review**"). Mr Davis accepted the outcome of the review of the first product, but not the second. It is the review of this second product which is now in dispute.

3. Mr Davis ("**C**") does not seek damages for mis-selling, which is not pleaded. Instead he seeks substantial damages (c.£30m) for breach by Lloyds Bank plc ("**D**") of its statutory duty, in particular breach of the rules contained in the FCA Handbook, which C suggests also incorporate the detailed processes and practices agreed in June 2012, and later updated in 2013, between the Financial Services Authority and D for the conduct of the Review (in its final version, "**the Review Agreement**" or simply "**the Agreement**"). This is notwithstanding that the Agreement was confidential to the two parties signing it, and expressly gave no rights to third parties.

4. Two preliminary issues arise for resolution here. The answers will determine whether a full trial of C's claim should take place. The two issues are set out in full at para [14], but at a fundamental level they concern the extent to which it is possible to build a bridge between the Review processes detailed in the Agreement and the general statutory review processes provided for under the Financial Services and Markets Act 2000 ("**FSMA 2000**"), so that the general statutory duties that are actionable by individuals such as C also incorporate within their ambit the terms of the private voluntary Review Agreement between the Financial Services Authority and D.

2. Outline of the claims leading to the preliminary issues requiring determination

5. Interest rate hedging products ("**IRHPs**") are products designed to enable borrowers to manage fluctuations in interest rates, and thus reduce the risk of changes in an otherwise variable rate of interest on their loans. These hedging products vary from the relatively simple to the very complex. The Financial Services Authority, as the statutory regulator of the banks, considered that there had been serious failings in the way banks had sold these products to unsophisticated individuals, including small and medium sized businesses.

6. Rather than entering into enforcement proceedings against the banks, the regulator entered into without prejudice settlement discussions, and, in June 2012, reached agreement with D, as well as with other High Street banks, providing that each bank would review its sales of IRHPs to "non-sophisticated customers" during the period from 1 December 2001 and provide appropriate redress where mis-selling had occurred.

7. In June 2012, the Financial Services Authority announced the existence of the Review but not its terms. Those remained confidential until February 2015, when they were made public by the Treasury Select Committee.

8. On 1 April 2013, the Financial Services Authority was renamed the Financial Conduct Authority ("**FCA**"), and for simplicity this judgment refers to the regulator throughout as the FCA.

9. C is an individual who accepted D's invitations to participate in the Review. He and other individuals and entities (variously Mr Watkins, Valleymist Limited, Borncross Limited and Deanweald Limited) had entered into two IRHPs, namely two swaps. The first was entered into in 2002 ("**the 2002 Swap**") and the second in 2005 ("**the 2005 Swap**"), together "**the Swaps**". D carried out reviews of the sale of these Swaps and determined that remediation, in the form of redress, was due.

10. D's redress offer was assessed on the basis of a "tear up" for the 2002 Swap: i.e. on the basis that C would not have entered into any swap arrangement at all had D followed proper processes, and therefore C should not have incurred any of the costs associated with the 2002 Swap. By contrast, the redress offer for the 2005 Swap was assessed on the basis that C would still have entered into a protective IRHP, but one that was structured so as to attract lower costs. C is dissatisfied with the latter determination, insisting, amongst other things, that it too should have been assessed on the basis of a tear up.

11. C does not seek damages for mis-selling, but instead seeks substantial damages for D's breach of statutory duty. That route to a damages claim requires C to have made a "complaint", as that term is defined in the relevant regulatory dispute resolution rules of the FCA ("**the DISP rules**"). A complaint meeting that definition is labelled here as "**a DISP Complaint**". C alleges he made a DISP Complaint in relation to both Swaps, and specifically in relation to the 2005 Swap. D disagrees. This is "**Issue 1**" in the preliminary determinations required to be made here.

12. Having made such a DISP Complaint about the sale of the Swaps, C says that the DISP rules required D to assess that DISP Complaint in a particular way, and that a specific aspect of that duty was an obligation to assess the complaint in accordance with the terms of the Review Agreement. This is "**Issue 2**" in the preliminary determinations required to be made here. If Issue 2 goes against C, then C's alternative claim is simply that D failed to comply with the DISP rules in reaching its assessment of C's DISP Complaint, even if those rules do not incorporate the terms of the Agreement. In either case, C claims that under FSMA 2000 s.138D(2) he is entitled to substantial damages arising from D's breach of statutory duty. All the relevant definitions are set out below.

13. In its defence, D contends that C's claim is fundamentally flawed because it misunderstands the nature of the Review process. D says that the Review process was not contingent on C making a DISP Complaint: C did not participate in the Review as a complainant, but rather as a result of his accepting an invitation to participate. The terms of the Review were set out in the Agreement between D and the FCA that was expressly confidential and provided that no third party had any right to enforce its terms. D says that the explicit nature and purpose of the Agreement is thus inconsistent with the proposition that its terms were incorporated into D's statutory DISP obligations. Instead, the Review was a process quite separate from the DISP process: it was in the nature of a

mediated settlement process leading to an offer of redress which C was free to accept, or he could reject it and pursue his legal rights.

14. The two issues noted above for preliminary determination emerged by way of an order dated 8 April 2019, in which Deputy Master Rhys directed that there be a trial of two preliminary issues ("**the Preliminary Issues**"):

    (a) *Issue 1: "Did the Claimant make a complaint for the purposes of the rules in the Chapter of the FCA Handbook entitled 'Dispute Resolution: Complaints' ("DISP") in relation to the sale of the interest rate hedging products which are the subject matter of the proceedings?"*

    (b) *Issue 2: "If so, was the Defendant bound by the statutory duties under DISP 1.4.1R to assess the Claimant's purported complaint in accordance with the terms of what had been agreed between the Defendant and the Financial Conduct Authority regarding the Defendant's review process into interest rate hedging products?"*

15. These Preliminary Issues are principally questions of law, but the court also heard evidence from two witnesses: first C, who gave evidence as to the circumstances in which he came to participate in the Review and his early engagement with it; and secondly Mr Thompson, a consultant engaged by D, who gave evidence as to the nature of the Review process. Much of the evidence was not in dispute, it being evident from the primary documentation before the court, but where additional input from the witnesses is relevant it is incorporated into the discussion of Issue 1 below. In that discussion I make reference to the evidence provided by Mr Davis, but not to the evidence provided by Mr Thompson. Although I benefited from Mr Thompson's clear input, the court had before it all the original documentation needed to address the Preliminary Issues, and I have referred directly to that, without needing to rely further on his additional perspectives.

16. As noted above, if Issue 1 goes against C then there is no need for a trial; if Issue 1 is in C's favour but not Issue 2, then the trial will be on different terms, not including the terms of the Review Agreement.

3. Legal Background

17. To fully understand C's claim, it is necessary to understand the tiers of legal regulation that govern the provision of financial services and the protection of customers, and the relationship between that detailed statutory scheme and the Review.

18. In so far as relevant here, the hierarchy is delivered by FSMA 2000 and Regulations made pursuant to powers conferred in it, and sections in the FCA Handbook containing the Rules on Dispute Resolution and Complaint Handling ("**DISP**"). That structure then needs to be examined to determine the impact on it, if any, of the Review.

19. For the purposes of this hearing, it is assumed that C is the party entitled to bring any relevant claims in respect of the Swaps, although that will be contested by D should the matter go to trial. It is not contested that C is a "private individual", as defined in the FSMA 2000 (Rights of Action) Regulations 2001/2256, reg. 3, and it is assumed that C is a person eligible to bring complaints under the rules contained in the FCA Handbook, in

particular the DISP rules described below (see DISP 2.7.1R on eligibility). Those assumptions open up the possibilities of the claim outlined below.

3.1 FSMA 2000

20. FSMA 2000 provides specifically for certain claims to be brought by a limited class of private persons for breach of statutory duty where such duties are more typically only actionable by the FCA. The relevant provision is section 138D of FSMA 2000, which, subject to certain exceptions which are not relevant here, provides that:

> "(2) a contravention by an authorised person [here, D] *of a rule made by the FCA* is actionable *at the suit of a private person* [here, C] who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty." (emphasis added)

21. This section enables an eligible claimant to bring an action for breach of statutory duty based on contravention of the rules in the FCA Handbook (as confirmed by the DISP Sch 5 Guidance).

3.2 The FCA Handbook

22. The FCA Handbook includes a series of "rules" made by the FCA under FSMA 2000. One section of the FCA Handbook contains rules relating to Dispute Resolution – the DISP rules, along with related guidance – setting out how certain limited categories of complaints are to be dealt with "*fairly, consistently and promptly*" (DISP 1.4.1R(2)), and providing complainants with further recourse to the Financial Ombudsman Service ("**the FOS**") should they be dissatisfied with the management of their complaint or its outcome.

23. The DISP rules define a "*complaint*" (here, a DISP Complaint) as:

> "*any oral or written expression of dissatisfaction*, whether justified or not, from, or on behalf of, a person *about the provision of*, or failure to provide, *a financial service …which*:
>
> *alleges that the complainant has suffered (or may suffer) financial loss*, material distress or material inconvenience; *and*
>
> *relates to an activity of that respondent … which comes under the jurisdiction of the Financial Ombudsman Service*." (emphasis added)

3.3 The Financial Ombudsman Service (the FOS)

24. FSMA 2000 s.225 required the FCA to set up an ombudsman scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person. These complaints are to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case: FSMA 2000 s.228(2). If a claimant accepts the ombudsman's determination, it is binding on both parties and is final. Otherwise the complainant is treated as having rejected the determination, and can pursue a claim by other means or by judicial review of the ombudsman's decision: *R (British Bankers Association) v FSA* [2011] EWHC 999, [24]).

3.4 The Review Agreement

25. The Review Agreement adopted a common format for all banks participating in the Review, although each individual agreement is expressed as a private confidential contract between the FCA and the relevant bank. The Agreement between D and the FCA, as agreed in June 2012, is in parts: Annex A is a written Undertaking from D to the FCA; the Appendix sets out the terms of the Review; and Annex B sets out the public statement to be made by the FCA at the time the Review was launched. The fine-grained detail of the Agreement will be material if the matter goes to trial, but for present purposes it is its overall structure and operation that is crucial, as this may help determine Issue 2. This 2012 Agreement was amended in 2013 following a Pilot Study for the conduct of the Review: the 29 January 2013 letter from the FCA contained revised terms set out in three Annexes, with Annex 3 dealing with redress determinations. D's response, accepting these revised terms, was sent a few days later. As explained in paragraph [3] above, references to "the Agreement" are to its final version.

26. The Review process was expressly limited to dealing with certain categories of unsophisticated customers, and certain categories of sales (defined within Categories A, B and C, each with different risk profiles), and dealing with them only in certain defined ways and only over the time period of the Review, being from the date of the Undertaking and during the period of the appointment of a mandatory independent reviewer ("**the Skilled Person**"). These essential terms and conditions were all defined in the Appendix.

27. The role of the mandatory Skilled Person is significant. This person was seen by the FCA as providing independent oversight of the Review, ensuring that the banks followed the FCA's position and provided fair outcomes for consumers. To that end not only did he report to the FCA under FSMA 2000 s.166 on D's conduct of the Review, but he was also required to (i) design, with D, the methodology for the Category B review, including agreeing the information to be obtained from customers, with this methodology then to be approved by the FCA before being used; (ii) review, and if seen as warranted then override, D's assessment of Category A, B or C customers as meeting the sophisticated customer ineligibility criteria; and (iii) review, and if seen as necessary require reassessment of, any proposed redress assessments (with details all set out in the Appendix). In short, the Skilled Person had a power of influence and veto over material decisions taken by D in the course of the Review.

28. For present purposes only it is accepted that the Swaps were C's Swaps, although the proper parties to the 2005 Swap will be in issue should the matter go to trial. The Swaps were Category B sales. With C being an unsophisticated customer, this categorisation obliged D to write to C to invite him to participate in the Review.

29. If that invitation was accepted, D was then required by the Agreement to conduct a file review supplemented by information C was invited to provide, and then assess whether any breach of the specified Regulatory Requirements had occurred (assessed taking into account matters specified in the Sales Standards), and, if so, what appropriate redress should be offered on the basis of what was "fair and reasonable in the circumstance", with all those terms defined in the Agreement.

30. If a Category B customer received a final offer of redress from D which the customer wished to accept, that would be done on the basis of a final settlement of the redress

claims (although not necessarily of the consequential loss claims, which could be included in a similar fashion or dealt with separately).

31. On the other hand, if a Category B customer received a final redress determination from D which the customer did not wish to accept, then the Agreement provided that D was to indicate that this final determination "*will be treated as* the Firm's final response for the purposes of DISP 1.6.2R and [D] will inform the Customer that he may be eligible to complain to the Financial Ombudsman Service if he is dissatisfied with the Firm's redress determination, and must do so within 6 months" (emphasis added) (Appendix §3.16).

32. Since consumers who do not wish to accept redress offers under the Review retain all their ordinary legal rights, the consequence of this deeming provision is that the sub-group of Category B customers eligible to make claims to enforce D's statutory duties do not need to initiate a DISP Complaint relating to the provision of an IRHP that has caused them financial loss; they can simply assume that the resolution of such a complaint would deliver the outcome offered under the Review, and proceed directly to the FOS, although that jurisdiction is itself limited in the remedies that can be provided. The deeming provision also saves otherwise eligible DISP complainants from the impact of adverse limitation rules.

33. As D notes, this deeming provision would not be needed if C's interventions during the course of the Review necessarily met the definition of DISP Complaints, as in that case the DISP rules themselves would lead automatically to this outcome. On the contrary, what would seem to be needed in those circumstances are explicit exemptions from otherwise routine DISP requirements, especially as to the time for dealing with DISP Complaints and the consequences of failures on that front.

34. Finally, the letter from the FCA to D on 29 January 2013 makes it plain that the FCA had decided against adopting rules which would allow *all* Review participants to access a specially constituted "FOS Scheme" if dissatisfied with the determination of their case. The FCA added that "this means it is extremely important that the Skilled Persons are effective in their role, providing independent oversight and ensuring that the banks follow the [FCA]'s position and provide fair outcomes for consumers".

35. The FCA's public statement at the time the Review was launched, as agreed with the banks, noted that "If customers are not satisfied with the outcome of the review, they will still have the opportunity to refer their complaint to the Financial Ombudsman Service subject to meeting the eligibility criteria. [If they do not meet those criteria], or they believe they have suffered a loss that is more than £150,000, then they will need to consider whether to take action through the courts." This would seem to be C's position.

36. The other defined Categories of IRHP sales should be noted. Category A sales were of products deemed by the FCA to be inappropriate for unsophisticated customers, and the Agreement required D to make proactive offers of redress to all such customers. By contrast, Category C sales were of products considered by the FCA to raise few concerns.

37. These other categories of IRHP sales are only relevant in the present context if they shed light on the relationship between DISP Complaints and the Review process. The Review process itself provides for "**Complaints**" to be made. Whenever the word "Complaint" is used in the Undertaking, it is capitalised, and thus carries the definition set out in the Appendix at §1.3. This is in the same terms as the definition of a DISP Complaint, but

omitting the final rider which requires a DISP Complaint to be about an activity that comes under the jurisdiction of the FOS. There seems to be only one mention of "complainants", not capitalised, in the Undertaking where D's CEO commits to ensuring that D will "treat their complainants fairly". Otherwise the parties involved in the Review are invariably referred to as "Customers", a term specifically defined in the Appendix.

38. The Agreement expressly imposes no obligation on D to review Category C sales unless the customer makes a Complaint (Undertaking at §(a)(ii) and Appendix at §§1.3, 2.1.3). If the Complaint is made during the term of the Review, and the customer is unsophisticated, then the Agreement requires such sales to be reviewed as for the Category B sales – i.e. commencing with an initial invitation into the Review (Appendix §2.1.3). If the Complaint is made after the term of the Review, then the Agreement notes the complaint would be dealt with according to D's "usual complaints handling process and, if applicable, DISP" (as DISP only gives rights to a narrow category of private persons) (Undertaking at §(a)(ii)).

39. Further, D was obliged to write to all Category A and B customers indicating whether they had been categorised as sophisticated, and therefore ineligible for inclusion in the Review. Customers who disputed their categorisation were told that they could "make a Complaint to [D] which [D] will consider under its usual complaints handling procedures and, if applicable, DISP" (Appendix §§3.2.3 and 3.8.1.3).

40. This summary indicates that the expression "Complaint" is only ever used in the Agreement when the customer is entitled to and required to take proactive steps to gain a response from D. As noted above, the Complaint may concern Category C sales, with a positive outcome delivering either an invitation to enter into the Review process or an alternative response if it is too late to be included in the Review process. Alternatively, a Category A or B customer may make a Complaint about D's decision on classification as a sophisticated customer and exclusion from the Review: i.e. the customer can request an "out of scope" review.

41. It appears to have been assumed by everyone that all these permitted complaints met the prescribed definition of a Complaint, but that may not be correct. The "out of scope" complaint is not a complaint "about the provision of … a financial service", so it does not meet the definition of a Complaint in the Agreement, nor the definition of a DISP Complaint: see by analogy ***R (on the application of Mazarona Properties Ltd) v Financial Ombudsman Service*** [2017] EWHC 1135 (Admin) at [31], considered in more detail below. The specific provision in the Agreement requiring these complaints to be addressed in a particular way, however, no doubt renders the mismatch in definitional terms immaterial, but *Mazarona* has real consequences for customers making DISP Complaints.

42. Before leaving the Review Agreement, certain other terms should be noted as material to the Preliminary Issues requiring determination. First, so far as Issue 1 is concerned, what is in dispute here is the relationship between the Review and the normal DISP Complaint rules. The answer is not provided directly by either set of requirements. However, some indication of the intentions may be gleaned from an FCA document headed "*Interest Rate Hedging Products: Frequently Asked Questions by Skilled Persons Part One*":

    - The answer to Question 11, on expectations around customer engagement, indicates that "customers may be eligible for inclusion [in the Review] at any

point while the review is being conducted. Customers can complain under DISP *at any time*" (emphasis added).

- Question 12 asks directly, "Are firms expected to comply with DISP rules during the review?" The answer is, "Where there *is* a complaint, firms are expected to comply with all the applicable DISP rules and to inform customers of their right to refer their complaint to the FOS, where appropriate" (emphasis added).

This might suggest that every communication within the Review process is not automatically to be regarded as a DISP Complaint requiring twin-track Review and DISP processes. But that is not the full basis of C's claim; C also alleges that the facts indicate he indeed made a DISP Complaint. That is considered below.

43. Secondly, and material to Issue 2 on whether the DISP rules incorporate the Review processes, note that the Agreement contains the following clauses:

- **Clause 9** provides that a person who is not a party to the Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 or otherwise to enforce any term of the Agreement.

- **Clause 8** provides that "This is a unique solution to a specific set of [FCA] concerns. It is agreed between the Parties [here, the FCA and D] that nothing in this Agreement or the discussions to date, including all related correspondence, is to be regarded as establishing a precedent for the [FCA's] approach in the event of similar matters or issues arising in respect of other aspects of the Firm's business."

- **The 29 January 2013 letter from the FCA** notes that "*it is important* … that *the redress criteria we are setting out here* [which occupied six pages of detailed provisions set out in Annex 3 of this letter] and in particular the test on [counterfactuals] *is only for the purpose of this redress exercise. We are not changing our rules in this area or setting out new guidance*" (emphasis added).

- **This same letter of 29 January 2013 from the FCA** also notes the FCA's "expectation … that you will conduct the review on this [slightly modified] basis…Of course, you may wish to provide more favourable outcomes for consumers generally or in specific cases." This suggests that neither the Review mechanism nor the banks' approach to it was constrained, at least in an upward direction, by the strict legal rules that might otherwise apply in determining redress, nor, in particular, that "more favourable outcomes" in one case compelled the delivery of more favourable outcomes in all cases.

44. The facts set out in the previous paragraph can be taken to indicate that there was no intention on the part of the FCA that the requirements of the Review would have any wider application beyond the conduct of the Review itself. In particular, they specifically provide that the requirements of the Review will not be incorporated into rules or guidance applying in other contexts. For present purposes, that would suggest the requirements of the Review will not be incorporated into the general DISP rules unless some further argument for that can be found elsewhere.

45. I return to these various issues in the analysis of the two Preliminary Issues, but first it is necessary to provide some additional factual background.

4. Factual background

46. The court was presented with a great deal of factual background the detail of which will be material if the matter goes to trial and damages need to be assessed. Here the primary focus is on the facts necessary to determine Issue 1. Those facts are set out in detail from para [66] onwards in the course of addressing Issue 1.

47. As a precursor to that, the essential contextual background is noted below.

48. In 1997, C says that he and a Mr Watkins acquired an interest in a property at 13-15 Folgate Street in London ("**the Property**"). C says that Valleymist Limited ("**Valleymist**") owned the legal title to the Property, which was subdivided into two sections: (i) the ground floor and the upper four floors of the Property, which were let as office space, and the plant room in the basement; and (ii) the remainder of the basement, which was let as a restaurant. C says that Valleymist held the legal title for the office space "as nominee" for himself and Mr Watkins, and held the legal title in respect of the restaurant element "as nominee" for Borncross Limited ("**Borncross**"). C says he and Mr Watkins were the sole shareholders of Borncross. Despite this complex ownership structure and the various counterparties, C is the only claimant in the claim for damages for breach of statutory duty by D.

49. On or around 15 February 2002, C, Mr Watkins, Valleymist and Borncross entered into a loan agreement with D for £8 million ("**the 2002 Loan**"). A few days later, on 19 February 2002, C, Mr Watkins, Valleymist and Borncross entered into the 2002 Swap with D. This was a 10-year interest rate swap. On or around 12 August 2003, the 2002 Loan was re-financed by a £7,839,377 loan between the same parties.

50. In July 2003, C says he bought out Mr Watkins' interests in both Valleymist and Borncross, becoming the sole shareholder and director of both nominee companies.

51. In January 2005, C says that Valleymist was replaced by Deanweald Limited ("**Deanweald**"), which then held legal title to the office element of the property for C and the restaurant element for Borncross.

52. On 26 January 2005, the 2002 Swap was broken with break costs of £177,158. Those break costs were then embedded into the 2005 Swap, which was a new 18-year swap between D and C, Borncross and Deanweald. On 28 January 2005 C, Deanweald and Borncross entered into an 18-year loan agreement with D for £9 million ("**the 2005 Loan**"), which replaced the 2002 Loan as refinanced.

53. D says that C was aware that interest rate hedging was a condition of D providing the 2005 Loan; C disputes this. There is no express term in the 2005 Loan, which was in any event entered into after the 2005 Swap had already been agreed. The terms of the 2005 Loan included covenants in respect of the total rental income that Deanweald was required to receive from tenants occupying the Property.

54. C says that in 2007 the tenants of the Property's office space (FirstCity Insurance Group Limited ("**FCIG**")) approached him seeking a rent reduction. C says that he was unable to agree to the rent reduction because of covenants in the 2005 Loan. C says that in April 2007, following the failure to secure a rent reduction, FCIG's board decided to sell the company. C says that on 15 June 2007 Savills valued the Property at £15.75 million

pounds if vacant, at £19 million with existing tenants and at £20 million if planning permission was obtained to build new Grade A offices.

55. In late 2008, C says he instructed Thinking Space, a specialist architectural firm, to report on the viability of converting the Property into a hotel. D says that Thinking Space's report referred to a small hotel with approximately 80 bedrooms, and that this is in contrast to the hotel which C now claims that he would have built at the Property but for the 2005 Swap, which is a high-density low service provision hotel with 183 bedrooms. C says that he did not pursue the hotel option further in late 2008 because FCIG was still in occupation under a long-term lease which did not contain a landlord break clause. Moreover, the 2005 Loan contained a clause by which C, Deanweald and Borncross gave an undertaking to D that FCIG would remain as tenant until at least January 2010.

56. Until January 2010, loan and hedging payments were duly made in respect of both the 2005 Loan and the 2005 Swap. However, payments due on 28 April 2010 were not paid. D made a formal demand for payment on 23 June 2010.

57. In April 2010, an administrator was appointed to wind-up FCIG following the sale of its goodwill and certain fixed assets. As a result, FCIG's lease was surrendered.

58. On 5 July 2010, D appointed King Sturge as LPA Receivers over the Property.

59. On 26 July 2010, in the light of the non-payment of the loan payments, D terminated the 2005 Swap, and debited the break costs of £1,419,000 to Deanweald's current account with D, following which the account was overdrawn by £1,659,874.61.

60. On 28 January 2011, King Sturge sold the Property and the net proceeds of sale (£7,093,628.36) were credited to Deanweald's current account, leaving Deanweald's total indebtedness to D, so D says, at approximately £3.5 million, presumably after crediting the sale proceeds against the secured 2005 Loan debt. C, by contrast, argues that the sale proceeds credited to Deanweald's current account repaid the 2005 Swap break costs in full.

61. In April 2011, C says that the purchasers of the Property obtained planning permission to convert the property into a hotel, which has subsequently been developed.

62. On 12 February 2013, Borncross was dissolved.

63. Later in 2013, C was invited to participate in the Review. The details of those communications between D and C are set out in full below, since they are material to resolving Issue 1.

5. Analysis of Issue 1: Did C make a DISP Complaint for the purposes of the DISP rules in relation to the sale of the Swaps?

64. The essential precondition to C's asserted claim against D for breach of statutory duty is that C made a DISP Complaint to D. The significance of this preliminary gateway issue seems not to have been appreciated at the time C's claim was launched, but was certainly clear following the 2019 order of Deputy Master Rhys directing the trial of the two Preliminary Issues before this court.

65. In this hearing, C advanced several arguments in support of his assertion that he had indeed made a DISP Complaint in relation to the 2005 Swap. I deal with each in turn. Note, however, that if C is to succeed on this issue then his argument has to deliver the conclusion that C's communication with D met the definition of a DISP Complaint (see para [23] above). In the present context, this requires C to show that his communications expressed dissatisfaction about the provision of a financial service which has caused C financial loss. All the elements are essential.

5.1 C's first argument: As a matter of fact, C's communications with D were in their nature apt to meet the legal definition of a DISP Complaint

66. This argument is addressed in considerably more detail than the other arguments, since it rests on a full appreciation of the detail of the relevant communications between C and D. I do not consider C's claim to be made out on the facts presented, and indicate why that is so in what follows (see paras [69]-[100]). C also makes several legal arguments concerning the way these facts should be interpreted. I also do not find those compelling (see paras [103]-[121]).

5.1.1 C's Particulars of Claim

67. The formal pleadings on the issue are slender, and make no reference to the definition of a DISP Complaint. C's Amended Particulars of Claim ("**APoC**") simply assert the fact of "a complaint" being made "under the IRHP Redress Scheme" (i.e. under the Review) (APoC §§ 41, 42). In particularising when these complaints were made, C asserts that complaints were made about the 2002 Swap in or around October 2013, and about the 2005 Swap by letters dated 22 May 2014 and 13 June 2014 (APoC §§41, 42). The primary focus of APoC §§41-45 is not so much on this detail as on the alleged duties owed by D in assessing "the complaints of customers who complained under the IRHP Redress Scheme in accordance with the terms of the said agreement, in order to comply with its statutory duty under DISP 1.4.1R" (APoC §44). In short, the critical assertion concerns Issue 2, with it seemingly assumed C could utilise the DISP rules. But C's ability to use those rules depends on a positive answer to Issue 1.

68. The first specific reference C makes to a DISP Complaint is in C's Reply to D's Defence, at §18.1, and still only briefly, with C asserting that "The communications … pleaded [in APoC §§ 41 and 42] were complaints falling within the [DISP definition] in that they were expressions of dissatisfaction about the provision of a financial service". Here, and in the hearing before me, C's focus was on the "expression of dissatisfaction" element of the several elements set out in the definition of a DISP Complaint (see the full definition at para [23] above). In further support of this in C's Reply, in relation to the 2002 Swap, C refers to his telephone call of 21 October 2013 with D and his emails to D on 4 and 6 November 2013. In relation to the 2005 Swap, C quotes from D's two separate replies to C's letter of 22 May 2014 to demonstrate that D itself regarded that letter from C as making a complaint.

5.1.2 C's Witness Statement

69. C's Witness Statement ("**WS**"), which served as evidence in chief, sets out further documentation, with the originals of all communications available to the court.

70. C was cross-examined on his witness statement. Mr Davis struck me as an honest and truthful witness, who admitted that the events in question all occurred some time ago when he had far less awareness of the issues now in dispute than he does now. To that extent there is perhaps some inevitable reframing of the recalled detail to fit the desired ends. That was evident in parts of the cross-examination, as detailed below, and is also evident in Mr Davis' WS. However, to Mr Davis' credit, I did not think he allowed that to distract him from giving his honest recollections in answer to the questions posed.

5.1.3 The early communications between C and D

71. **4 June 2013 to 7 October 2013: D's invitation to C to participate in the Review**. Between 4 June and 7 October 2013, D sent 4 letters to Valleymist (one of the legal signatories to the 2002 Loan and Swap agreements) and/or to C, and made one unsuccessful attempt to telephone C. The letters were in relation to the 2002 Swap only, and explained the Review process and invited participation. C says that he cannot recall receiving the first two of these letters (WS §28).

72. **21 October 2013: C telephoned D.** This was in response to the above attempts by D to make contact. The transcript of the recorded part of the call confirms that little of substance was exchanged, and, objectively, nothing that suggests C was calling to make a complaint, or that he made a complaint in the course of the call, whether a DISP Complaint or other form of complaint. Coverage of the call, as detailed in the transcript, is as follows:

    - D indicated that D had wished to make further contact to discuss the earlier letter.

    - C apologised for being slow to respond, indicating that he was "having trouble trying to locate any paperwork" because "it's now obviously a few years ago…" and he could not find the relevant loan agreement, though he thought it was about the Valleymist 2002 Swap, but "my memory is a bit vague". D promised to provide further information.

    - C specifically raised the issue of the 2005 transaction, asking "Would you be dealing with that as well or is that a colleague of yours or is nobody dealing with that?" D could not answer that question, but promised to make a fuller search. The next day D emailed to say the issue was being pursued.

73. In his witness statement, C says that he asked about the 2005 Swap "because [his] *complaint* was about the 2005 Swap as well as the 2002 Swap" (WS §33, emphasis added, and contrast PoC §41 referring only to the 2002 Swap). Nevertheless, at this stage there is clearly nothing in the communications between C and D that suggests "dissatisfaction about the provision of a financial service", nor is there any suggestion that C (or his associated companies) had suffered "financial loss, material distress or material inconvenience" as a result of that provision. Indeed, the next communication makes it plain that at this stage C was unsure whether there was any loss at all.

74. **4 November 2013: C emailed D**. This was a long email following up on the earlier telephone conversation on 21 October 2013, "to share my thoughts with you at this stage … I start by voicing some basic questions." The email was specifically about both the 2002 and 2005 Swaps. There then follow seven numbered points, reflecting five questions posed by C and his own responses to them. In summary, the points made are these:

- "1. Would I have been better off had the hedges not been in place? Perhaps not surprisingly the answer to this question is emphatically yes."

- "2. By how much? I do not know but with your help think we could have a fair stab at determining it. I set out the information I see as pertinent in this respect later in this email."

- "3. Why did I enter into the hedges? … I do not recall any particular conversation about them one way or the other. It was simply assumed from the outset that it was a fundamental requirement of the overall arrangements that the risk of an increase in interest rates be protected; in the same way as a full legal charge over the property forming the security would be required, or that the Bank would have the right to call in the loan if an event of default occurred."

- "4. Would I have entered into the hedging agreement if I had not understood them to be a requirement of the overall arrangements? The answer here is …undoubtedly I would have sought some protection … I am a cautious man and would therefore have sort [sic] to avoid the risk of a default occurring … the sums involved with the particular loans here would certainly have demanded protection. However, on reflection, the specific hedges entered into were not the appropriate instruments … The more suitable hedge would have been … a 'cap and collar' or perhaps 'cap and floor'."

- "7. Why I did not pursue this option at the time is a fair question … but there was a very great deal going on in my commercial life at the time … [with a long explanation of that]… Perhaps a more significant question is why was it never explored and offered by the Bank? I would like to know the answer to that question."

C also replied to D's earlier offer to provide further information, and listed his requests, including requests for information that would permit him to calculate the hypothetical costs he would have incurred had a more appropriate cap and collar been entered into in place of the two Swaps.

He then added:

> "With this information to hand I think we will be able to start to determine the extent, if at all, to which my net worth has been eroded as a result of entering into the hedging arrangements under review and whether therefore it is worth pursuing. I look forward to hearing from you accordingly."

75. In his witness statement C was keen to characterise this email communication as a complaint, and in particular a DISP Complaint. At WS § 35, C says:

> "In effect I was complaining … It would be a mistake and perverse to view my, perhaps, somewhat genteel use of language as anything other than dissatisfaction with the fact that my

> investment ambitions had been completely frustrated because of the 2005 Swap. Whilst I was grateful [D] proposed to review the sale of the 2002 Swap and, I assumed, the 2005 Swap, that did not detract from the fact that their existence in the form entered into was legitimate cause for my complaint."

This is despite the fact that the 2013 email itself makes no reference to C's investment ambitions being completely frustrated because of the 2005 Swap. All that comes very much later.

76. Under cross-examination, too, C repeated this characterisation:

> "Having been put on inquiry, I regarded what I said here [in this email] as having made a complaint and I understood there's a regulatory regime whereby banks have to deal with that complaint. I didn't know what it was at the time, and I was getting the information for that purpose" (Transcript Day 1 p 14, ll 32-33 and p 15, ll 1-2).

Later a slightly different formulation is adopted:

> "Well, I think I was [formulating a complaint]. My understanding subsequent to this time was that there were certain regulations in place which the bank have [sic] to follow in order to deal with the complaint. I was dissatisfied with the swaps that I bought in 2002 and 2005 and I was pleased that that was being looked into" (Transcript Day 1 p 16 ll 26-29).

77. The desire to characterise this communication as one falling within the DISP definition is evident, but the effort does not enable C to get over the problem that, whatever he might have intended at the time, and whatever he now recalls of those intentions, the issue of whether C made a DISP Complaint can only be assessed on the basis of what C actually communicated to D. It is evident from C's email, and as C confirmed under cross-examination, at this stage C did not know whether he had suffered a loss and did not complain in his email that D's provision of a financial product had caused him loss.

78. It follows that this 4 November 2013 email communication to D lacks one of the essential elements of a DISP Complaint. Moreover, that element is not delivered by inference from the earlier communications. Nor does D's initial communication to C raise the inference of C having suffered a loss: C is merely one of the Category B customers to whom D must write in order to establish whether a loss might have been suffered, and, if so, what redress might be appropriate under the Review should C opt in to that scheme.

79. The more natural reading of C's communication to D is that C is simply expressing his desire to work with D within the Review framework, initially to determine whether indeed a loss may have been suffered such that it would be worthwhile having his transactions reviewed. C proposed that the loss would need to be assessed by comparing his position now with the position he would have been in had he selected, or had the Bank offered, a more suitable alternative. This inference was confirmed under cross-examination:

> "This was all new to me … I've been put on notice, put on enquiry that there may be something to be investigated and I was trying to help with that investigation" (Transcript Day 1 p 14, ll 5-7; also see p 16, ll 23-24, 30-34).

80. I make some comments later on the need to distinguish clearly between communications which express dissatisfaction about the provision of a financial service which has caused loss, and the inevitable later communications where the parties need to communicate in order for D to calculate that loss and evaluate what response, if any, should be made to address the complaint: see below at para [114].

81. Finally, and although it is not relevant to answering the question posed in Issue 1, I note for the record that this email makes it clear that C himself would have adopted some form of protective IRHP arrangement with both the 2002 and 2005 loans. C reiterated this under cross examination (Transcript Day 1 p 14, l 24). Reference is also made to this issue in D's letter of 5 May 2015, indicating that this email communication of 4 November 2013 from C was not, but could have been, taken into account in assessing the redress due under the 2002 Swap, whereas it was specifically taken into account in assessing the redress due under the 2005 Swap.

5.1.4 The later communications between C and D

82. **6 November 2013: C emailed D again, this time more briefly.** In this email, C indicated that even though D would not provide calculations based on the hypothetical preferable cap and collar mentioned in his previous email, he would likely be able to produce his own first draft of the loss calculation. He also indicated he would like to "take up" the offer to meet, possibly with the independent person (ie with the Skilled Person), but he suggested leaving matters until D had had an opportunity to obtain and consider the relevant documentation. In closing, C said:

> "I have to say that, having been put on enquiry, the potential sums involved do indeed appear to merit serious examination and I commend the Bank and the Regulator for bringing the matters to my attention."

83. Under cross-examination, C resisted any characterisation of this final comment as "not in ordinary parlance making a complaint" but rather an expression of gratitude (Transcript Day 1 p 17, ll 16-19). Similarly, in his Witness Statement (at WS §37), C characterises this email as indicating his decision "to opt in to the Review, meaning, a review to investigate whether my *dissatisfaction* with the 2002 and 2005 Swaps was justified" (emphasis added).

84. But, again, there is nothing in this email communication that delivers the several elements necessary to constitute a DISP Complaint.

85. Similarly the closing comment in **C's email to D of 26 November 2013**, where C again queried the omission of the 2005 Swap, but added that C was content for D to continue its investigations because "I was not even aware that there was a possible issue here until I received your correspondence…".

5.1.5 The "out of scope" issue in relation to the 2005 Swap

86. **December 2013 to April 2014: email communications between C and D.** These communications can be considered more briefly. It is common ground that from the very first telephone conversation between C and D on 21 October 2013, C had been intent on alerting D to the existence of the 2005 Swap and C's wish that this swap should also be included in the Review. On 24 April 2014, C emailed D saying that he "presume[d]" that D was reviewing both the 2002 Swap and the 2005 Swap. On 25 April 2014, C was informed that at that time the Review was "only concerned with the [2002 Swap]". At the time, D considered the 2005 Swap to be outside the scope of the review because the customers were not classified as a private or retail customers at the time of the sale. Nevertheless, that entailed some complications, as the redress determination for the 2002 Swap required the break costs for that swap to be paid to the parties to the 2005 Swap, since the 2002 break costs had not been paid at the time, but had been rolled over and embedded into the 2005 Swap. This led to some confused communications, out of which it finally became clear that the 2005 Swap had not been reviewed at all.

87. **2 May 2014: letter from D to C.** This letter notified C of the Basic Redress Determination in relation to the 2002 Swap. There is further communication on this issue, but it is not a matter for this hearing. C has accepted D's basic redress offer.

88. **10 May 2014: email from C to D.** C asked that the 2005 Swap also be included within the Review process: "An initial point that mystifies me [about the communications in respect of the 2002 Swap redress offer] is why the [2002 Swap] arrangements have been reviewed but you say those involving [the 2005 Swap] are not eligible for review. Are you able to enlighten me as to why you say this?" This is plainly not the making of a DISP Complaint. This query is reiterated in emails on 12 and 16 May 2014.

89. **22 May 2014: email from C to D.** Finally, in an email from C, C noted that the parties may have been "at cross purposes" over the enquiries in his 12 May and 16 May emails, and adds that "I believe there is another product that should be reviewed and this is the [2005 Swap] … I confirm that I would like the [2005 Swap] to be reviewed and can see no reason why the conclusion would not be the same as [the one] reached for the 2002 product … Could you please confirm that you are separately reviewing the [2005 Swap] and that it is non-sophisticated and eligible for review…"

90. **23 May 2014: D replied to C** to explain that it would carry out an investigation into the 2005 Swap.

91. **10 June 2014: CB Complaints wrote to C.** There were further brief communications, primarily concerning the 2002 Swap, and then on 10 June 2014, CB Complaints ("**the Complaints Handling Team**") sent C a letter explaining that:

> "We acknowledge that you disagree with the Bank's findings that [Deanweald] is not eligible for inclusion in the [Review] … Your 'out of scope challenge' has been logged as a *complaint*, and we will investigate this taking into account all of the points you have raised [and we will] endeavour to provide … our full response as soon as possible" (emphasis added).

92. This seems to be the first time that the word "complaint" was used, and used here by D. In retrospect, it is now apparent that C's query of 22 May 2014 concerning D's treatment of the 2005 Swap was treated by D as an "out of scope" challenge, and passed to D's Complaints Handling Team, a group independent of the Review team.

93. **13 June 2014: C responded by letter to the Complaints Handling Team**. C said:

> "I was not aware that the bank has [sic] reviewed [the 2005 Swap] at all; consequently, I am not sure why you say I am unhappy with the findings that it is ineligible. … The impression I gained from [D's earlier Review team email] was that [the 2005 Swap] had simply been overlooked. If, however, your letter means that the Bank has reviewed it already – a fact, as I say, I was unaware of – and found it ineligible, I confirm *I do wish the issue to be dealt with as a formal complaint*. Moreover, if that is the case, I would also like to know the detailed reasons for the Banks's findings, not least because the position is completely at odds with the finding in respect of [the 2002 Swap]" (emphasis added).

94. C confirmed in cross-examination that this was "possibly the first I used the word 'complain or 'complaint'. I don't think it's the first time I complained" and "I think I was making a complaint about [the 2005 Swap] back in November 2013" (Transcript Day 1 p22 ll 21-22, 31).

95. The Complaints Handling Team replied on 19 June 2014 indicating they would add this letter to "the complaint file". C followed up on this reply by sending an email on 20 June 2014 to D (in the Review team), attaching the reply, and saying that "the essence of which seems to continue to maintain that a review has taken place against which a complaint has been registered. I am not sure what, if anything turns on this, but would be grateful if the Bank's position could be made clear as I am increasingly confused about it".

96. There then followed a series of communications between D's Review team and C and between D's Complaints Handling Team and C. These emails might legitimately have left C confused, although by the end of the chain it is clear that the Review team had initially considered the 2005 Swap to be out of scope, but, given C's 22 May 2014 email, the matter had been sent to the Complaints Handling Team for further consideration. That took longer than the statutory 8 weeks that was permitted for dealing with DISP Complaints, thus leading to a **letter from the Complaints Handling Team to C on 17 July 2014** indicating that C may be entitled to refer the issue to the FOS. There is then a **further letter from the Complaints Handling Team to C on 25 July 2014** indicating that C's "out of scope" challenge had been upheld. **On 31 July 2014 the Review team wrote to C** and two of his associated companies inviting them to have the 2005 Swap considered in the Review. C accepted this offer.

97. Given that the purpose of this 31 July 2014 letter to C from the Review team was to offer to review the 2005 Swap – thus indicating the out of scope complaint had been resolved in C's favour – there is a most confusing assertion by D that "the Bank notes your *complaint* on 22 May 2014 [i.e. the "out of scope" complaint] … and that the Bank is yet to issue its final response. Your *complaint* will be handled as part of this Review and the response that you receive will be the Bank's final response to your *complaint*."

98. C maintained under cross-examination that although the out of scope issue had been resolved in his favour, there was still in play his broader complaint "about the sale of the swap" (Transcript Day 1, p 25 l 26). But nothing more than is detailed above was in evidence in support of that view. In my view there is nothing in the detail of these communications which asserts dissatisfaction about the 2005 Swap itself and the fact that its provision caused C a financial loss. What is expressed is dissatisfaction about the non-inclusion of the swap in the Review process. In short, there is nothing in these later communications amounting to a DISP Complaint.

99. One point of law may be added here. Although D treated this "out of scope" issue as a "complaint" by C made on 22 May 2014, and dealt with it under the DISP procedures, these "out of scope" complaints do not meet the legal definition of a DISP Complaint: see the analogous issue addressed in ***R (on the application of Mazarona Properties Ltd) v Financial Ombudsman Service*** [2017] EWHC 1135 (Admin), para [31].

100. No further communications between C and D are pleaded as constituting DISP Complaints.

101. In summary, I find that the factual evidence presented by C does not support his claim that he made a DISP Complaint about the 2005 Swap, since his communications do not capture the essential elements of dissatisfaction about the provision of a financial service that has caused him loss.

102. But C has further arguments, and I consider those next.

5.2 C's further arguments: As a combined matter of law and fact, C's communications with D were in their nature apt to meet the legal definition of a DISP Complaint

103. C advanced a series of additional arguments either in writing or during the oral hearing all directed at showing that as a matter of combined law and fact, C had made a DISP Complaint in relation to the 2005 Swap.

104. **First,** C maintained that the plain words of the rules defining a DISP Complaint are apt to meet the facts of what C did. I was directed to *R (British Bankers Association v FSA* [2011] EWHC 999, at [38], where Ouseley J noted the "breadth" of the DISP definition. Even conceding this breadth, however, it remains the case that a communication cannot be characterised as a DISP Complaint unless it meets the several clearly specified criteria.

105. In the paragraphs above I have considered in detail all the communications that were put in evidence to support C's claim in this regard. For the reasons given, I am not persuaded that these communications contain the essential elements required to constitute a DISP Complaint.

106. **Secondly,** it was noted that C intended to make a complaint, even if D did not appreciate that fact and respond accordingly. Neither side advanced the view that C's intention was material, but prior to C's cross-examination it was suggested that I might myself consider that it was. I do not regard C's intention as material in meeting the definition of a DISP Complaint. With or without the relevant intention, C's actions simply need to meet the criteria of a DISP Complaint, and I have already held that they do not.

107. **Thirdly,** C argued that the Review process was itself a "complaints handling scheme". Even if true, which seems doubtful, this would only be relevant to resolving Issue 1 if it carries the inference that communications within that scheme should be regarded as DISP Complaints.

108. In support of this approach, C's counsel suggested that the Agreement between D and the FCA was merely the means of providing a rapid coordinated response to the significant bank failings that had been exposed, and doing so by a process that would deliver fair outcomes for customers, without requiring those customers to exercise their usual legal rights proactively.

109. That is all true. But it does not follow that, for DISP-eligible complainants, the Review was a substitute for the usual DISP entry process, so that all communications within the Review should be regarded as the equivalent of DISP Complaints. C presented no evidence in support of this corollary.

110. The Review was not set up as a "complaints handling scheme" as those words would be commonly understood; it is, as Arden LJ noted, a set of "customer redress arrangements" – or a customer redress scheme – set up by the FCA: ***R (Holmcroft Properties Ltd) v KPMG LLP*** [2018] EWCA Civ 2093, para [1]. But even if the Review could be seen as a "complaints handling scheme", it is explicitly a scheme designed to deal with the complaints made by the FCA to D, not complaints made by C to D. It was the FCA that required D to implement the Review under an Agreement which gave participant customers such as C no legal rights to enforce its terms. This is true even of Category C customers, and even though they could only receive an invitation to enter the Review after they had indeed made a Complaint about the provision of a financial service causing them loss.

111. In advancing C's contrary argument, great reliance was placed on the Court of Appeal decision in ***CGL Group Ltd v Royal Bank of Scotland plc*** [2017] EWCA Civ 1073. This does not assist. At para [100], Beatson LJ (with other members of the court concurring) simply says, "It is possible to imagine a number of similar *customer complaints schemes* [ie similar to the Review] which are designed to confer benefits and which have some formality and structure" (emphasis added). There is no other reference to a "customer complaints scheme", and the context of this comment contains nothing further to assist C, and C did not advance further arguments which might assist. I return to the ***CGL Group*** judgment in the context of Issue 2.

112. C also relied on ***R (on the application of Mazarona Properties Ltd) v Financial Ombudsman Service*** [2017] EWHC 1135 (Admin) as indicating that what led claimants into the Review was a "complaint". That proposition was not in issue in this case, and the only part of the judgment which might be taken as suggestive of it is at para [25], where the judge outlined the analysis advanced by claimants' counsel (who is C's counsel in this case) but not accepted by the judge. What the judge decided was something quite different. It was that the particular complaints advanced by bank customers concerning the bank's withdrawal of redress offers made pursuant to the Review did not come under the jurisdiction of the FOS under FSMA 2000 s.226 because those complaints did not meet the definition of a DISP Complaint: they were not complaints about the provision of, or failure to provide, a financial service, nor were they complaints about the conduct of a FSMA 2000 s.404 redress scheme.

113. The decision in ***Teresa Day and Michael Galpin (t/a Appledore Clinical Services v Barclays Bank plc*** [2018] EWHC 393 (QB), relied on by D, does not take the issues much further, but what can be gleaned from it is against the argument presented by C. In a strike out hearing by the defendant bank, HH Judge Waksman QC (as he then was), at para [28], declined to allow the claimants to amend their particulars of claim at the hearing so as to allege that participation in the Review itself constituted the making of a DISP Complaint, when they had up until then explicitly accepted the contrary. What follows in that paragraph is obiter, but from a judge with considerable experience in the field. He appears to make three important points. First, any assertion that a DISP Complaint has been made would need to be supported by evidence of a communication meeting all the elements set out in the definition of a DISP Complaint: it could not simply be assumed from entry into the Review process. Secondly, there is a clear distinction between the steps taken to enter into the Review process (or, it might be noted, the steps taken to make a DISP Complaint), and any subsequent communications intended to deliver proof of financial loss: these latter inputs could not sensibly be regarded as new complaints about the provision of a financial product. Finally, he appreciated that certain eligible parties were given the right to apply to the FOS about the outcome of the Review process "as if it were [the outcome of a review of] a complaint … [but that] does not mean that the whole thing is a complaint to begin with". This third distinction, albeit obiter, is contrary to C's position. The conclusion is not defended, but, for the reasons already given, I agree with it.

114. In the oral hearing, D also made reference to the second distinction noted by HH Judge Waksman QC in ***Appledore***: i.e. the distinction between the steps taken to enter into the Review process (or, by analogy, the DISP process), and any subsequent steps intended to deliver a resolution of the problems thus highlighted. This distinction is not material here, since I have held that none of the communications put in evidence meet the test of a DISP Complaint. But it is easy to conceive of cases where the distinction may indeed matter. In those circumstances I would have followed the obiter remarks in ***Appledore***, and drawn a distinction – which would need to be translated to the DISP context – between communications which constitute the complaint and communications where D has recognised that a complaint has been made and is in the process of dealing with it.

115. Finally, and by way of an analogy also going against the inference advanced by C, it is notable that other proactive customer redress schemes that are set up under FSMA 2000 s.404, where the banks invite participation rather than waiting for a complaint from the customer, are only brought under the DISP rules by specific reference in the DISP rules themselves: the conclusion does not follow automatically simply because the redress scheme is dealing with financial services about which customers might be entitled to make a DISP Complaint.

116. **Fourthly,** in communicating with C about D's Final Redress Determination in relation to the 2005 Swap, D used the term "complaint" on a number of occasions. C suggests that this indicates that the Review had been concerned to deal with "complaints", which must themselves meet the definition of a DISP Complaint given the very broad definition of this term in the FCA Handbook. But the relevant letter, sent by D to C on 20 March 2017, simply indicates that C's continued failure to accept D's Final Combined Redress Determination (for basic redress and consequential loss in relation to the 2005 Swap) will mean that "any queries [that are subsequently received from C] will be handled by the Bank's Customer Complaints team in line with the Bank's usual complaints handling

procedures". The next paragraph continues, "[t]his does not affect your legal or regulatory rights, which you are free to pursue should you wish to". The letter then notes that the Final Combined Redress Determination "constitutes the Bank's final response for the purposes of Rule 1.6.2 [of DISP]". This then opens up the FOS jurisdiction without needing to start a normal complaints process from the start, as noted earlier (see paras [31]-[33] above), and the letter immediately continues, "[i]f you remain *dissatisfied with the Bank's response,* you have the right to refer your *complaint* to the Financial Ombudsman Service, free of charge – but you must do so within six months of the Bank's final response … If you do not refer your *complaint* in time, the Ombudsman will not have our permission to consider your *complaint*, and will only be able to do so in very limited circumstances" (emphasis added). All of these references to a "complaint" are references to C's potential dissatisfaction with the final redress response he has just received from the Review, and creates a new right to go direct to the FOS, as D had agreed with the FCA in the Agreement and associated Undertakings.

117. **Fifthly,** C notes that Review participants could complain to the FOS, whose jurisdiction is predicated upon a DISP Complaint having previously been made to D. That is certainly the normal prerequisite. The fact that this prerequisite does not apply to Review participants rests entirely on a deeming provision included in the letter of final offer sent to Review participants, noted in the previous paragraph. Were that deeming provision not included in the letter, there would be no automatic access to the final stage of the disposal of a DISP Complaint via this route. See the consideration of this at paras [31]-[33] above.

118. The argument raised here is also an argument raised by C in the context of **Issue 2**. In both contexts it is material that DISP 1.6.2R comes after a series of rules setting out the procedures for dealing with DISP Complaints, and it requires D to respond to such complainants within eight weeks with its final response or its reasons for being unable to resolve the complaint within the eight week deadline, and, in either case, indicating to the complainant that they now have the right to take the matter to the FOS. None of the Review processes were conducted in compliance with the DISP rules up to this DISP 1.6.2R point: the starting point of a DISP Complaint was irrelevant (D was required to invite participation, as it did with C, who himself indicates he would not otherwise have realised that anything might be done for him); the procedures were as set out in the FCA Agreement, not as in these DISP rules; and the eight week time limit was simply irrelevant – many matters, including C's, took very much longer to resolve in proper compliance with the FCA Agreement. All of that necessarily meant that a person such as C would have no automatic right to rely on DISP 1.6.2R if they were dissatisfied with the outcome of the Review. They would instead have to start all over again, making a properly compliant DISP Complaint about the provision of a financial product (in C's case, the 2005 Swap), when of course it would be likely – inevitable surely – that D would reach a conclusion under the DISP rules that was no more generous than that delivered under the Review Agreement. To avoid that, and the likely limitation constraints C might encounter, C was granted a right to take his dissatisfaction with the outcome of the Review – not his dissatisfaction with the outcome of the resolution of a DISP Complaint – to the FOS. This right was specifically given by D to C in the letter sent from D to C. That letter also makes plain that C may of course pursue any other legal and statutory rights he has.

119. This interpretation – i.e. that C's right to move from the Review regime into the FOS regime to complain about the outcome of the Review process was specifically granted by D to C rather than arising automatically under the DISP rules – is confirmed in the letter from D to C on 20 March 2017. This was written to C because he had failed to respond to the initial letter from D of 28 February 2017 communicating D's final redress determination in respect of the 2005 Swap. The second letter reiterated C's right to complain to the FOS within the specified time limit. It added that, "If you do not refer your complaint in time, the Ombudsman *will not have our permission to consider your complaint* and will only be able to do so in very limited circumstances. For example, if the Ombudsman believes that the delay was a result of exceptional circumstances" (emphasis added). This letter, like other Review-related letters from D, followed the pro forma models agreed with the FCA. The phraseology presumably reflects a common view held by the FCA and D that the rights of the FOS to consider complaints about the outcome of the Review process do not arise automatically under the DISP rules. I agree with that view of the legal position.

120. I am therefore not persuaded by C's contention that these final communications between D and C indicate that D was subject to the DISP rules when dealing with a claim within the Review, as C suggests – this is material to Issue 2 – much less that they indicate that C had initially made a DISP Complaint.

121. **Finally,** and sweeping up a number of distinct points made by C, it does not assist C's argument to show that he *could* have made a DISP Complaint during the course of the Review. Both the terms of the Review and the DISP rules generally make it plain that the Review process does not bar access to the DISP process. If any Review customers resorted to the DISP process, D would have to report those numbers to the FCA, along with the numbers of other customers who made non-Review related DISP Complaints. None of this is disputed. But none of this assists C. He is still left having to prove, on the facts, that a DISP Complaint was made. I have held that the facts do not support that contention because the separate essential elements in the definition of a DISP Complaint are not made out.

5.3 Conclusion on Issue 1

122. In conclusion, and for all the various reasons set out here, I find in relation to Issue 1 that C did not make a DISP Complaint for the purposes of the DISP rules in relation to the sale of the Swaps. It follows that C has not succeeded in making out the essential precondition to all his asserted claims against D for breach of statutory duty, as, in order for C to pursue those claims, he needed to show that he had made a DISP Complaint to D. From this it follows that the matters alleged by C cannot now proceed to trial.

123. This conclusion renders Issue 2 immaterial. Nevertheless, the issue was argued at length, and I deliver my conclusion on it on the assumption that, contrary to my findings, C did indeed make a DISP Complaint.

6. Analysis of Issue 2: Was D bound by the statutory duties under DISP 1.4.1R to assess C's purported DISP Complaint in accordance with the terms of what had been agreed between D and the FCA regarding D's review process into interest rate hedging products?

124. Issue 2 raises a pure point of law. The question is only material if C has made a DISP Complaint. The answer to Issue 2 will then determine the rules which govern D's assessment of that DISP Complaint.

125. C's claim is that, having made a DISP Complaint, the DISP rules require D to assess the DISP Complaint, and a specific aspect of that duty is an obligation to assess it in accordance with the terms of the Review Agreement (see APoC §44). Issue 2 thus addresses head on C's assertion that DISP rules for dealing with DISP Complaints in respect of C's 2005 Swap incorporate all the rules and processes agreed between D and the FCA for the conduct of the Review.

126. On the assumption that this marrying of the two processes can be achieved – i.e. that Issue 2 is answered in C's favour – then C's claim is, as his counsel put it, "analogous to a claim for judicial review" of D's compliance with the required Review processes, and a claim for damages for breach of statutory duty in respect of any shortcomings.

127. It is common ground that if a DISP Complaint has been made, then it would of course need to be assessed in accordance with the DISP rules: see especially DISP 1.4.1R(2), requiring DISP Complaints to be assessed "fairly, consistently and promptly", and the relevant guidance, at DISP 1.4.2G(2)and (3), indicating that firms "may" consider "similarities with other [DISP] complaints received" and "relevant guidance published by the FCA".

128. It is also common ground that, in conducting the Review, D was contractually bound to the FCA to implement the detailed methodology agreed with the FCA which specified the types of claims which were to be considered and the criteria to be applied in assessing redress and compensation determinations.

129. C's reason for wanting the DISP treatment of complaints to be married with the Review treatment of particular IRHPs is clear. For example, C seeks, amongst other things, to have his 2005 Swap redress claim assessed on a tear up basis, as was done under the Review in respect of his 2002 Swap. This would be significantly more advantageous to C. His suggested legal route to this end relies on D's statutory duty pursuant to DISP 1.4.1(2)R to deal with DISP Complaints "fairly" and, crucially, "consistently", with the DISP guidance indicating that in delivering this D may consider similarities with other complaints received. This, C suggests, would necessarily mean that the redress claims for both Swaps should have been assessed on the same basis of a tear up. That may not follow, of course, but all this would be determined at trial, although only if both Issue 1 and Issue 2 are answered in C's favour.

130. So far as Issue 2 is concerned, C must show that the DISP rules, and in particular DISP 1.4.1R, require D to assess C's purported DISP Complaint in accordance with the terms of what had been agreed between D and the FCA regarding D's Review of IRHPs.

131. C's arguments in support of this claim are not numerous, and in many cases overlap with the arguments presented in relation to Issue 1. I address them in turn, but can indicate now that I find none of them persuasive.

132. **First,** C maintains that the Review was D's complaints handling mechanism and so both the DISP rules and the Review processes applied concurrently. I have already disputed the characterisation of the Review as a complaints handling mechanism and the consequences that might follow: see above, noting especially the authorities considered at paras [110]-[114]. But even if the initial premise is right, the suggested conclusion does not necessarily follow. The DISP rules themselves make it plain how a DISP Complaint is initiated, and then how it must be determined. Those rules do not expressly indicate that the requirements of the Review must be incorporated and followed in reaching a determination on a DISP Complaint, and it is not clear why an inference to that effect ought to be drawn. If an analogy is needed, the DISP rules expressly do not operate concurrently with the rules applying to the only type of consumer redress scheme mentioned elsewhere in the DISP rules: see DISP 1.1.11AR. The same logic would seem to apply still more powerfully to the quite independent and non-statutory requirements of the Review, and C presented no argument to persuade of the contrary.

133. **Secondly,** and in much the same vein, C contends that D is bound by the DISP rules to comply with the requirements of the Review. But this merely asserts what must be proven. It is not disputed that D must comply with the requirements of the Review in carrying out the Review. Nor is it disputed that if C makes a DISP Complaint, D must deal with it under the DISP rules. But the missing link is to show that, in assessing a DISP Complaint, the DISP rules require D to comply with the requirements of the Review. C did not offer much beyond assertion in support, bar repeating that the Review process was a customer complaints scheme. I have already held that this does not advance matters.

134. I prefer D's argument that the duty it owes to comply with the Review Agreement arises because D bound itself contractually to the FCA to comply, not because the DISP rules bound it to comply.

135. If there is a further suggestion implicit in C's second argument that the DISP rules must necessarily incorporate the requirements of the Review given their subject matter, then that would seem merely to repeat the first argument, and I am not persuaded.

136. Further, as D pointed out, if the DISP rules did indeed incorporate the requirements of the Review, then, theoretically, a person who had opted out of the voluntary Review process in favour of making a DISP Complaint (odd though such a move would be) would nevertheless be subjected to the requirements of the Review. The oddity of this suggests that the initial assertion is wrong.

137. **Thirdly,** C suggests that the Review is within the purview of the DISP rules because it is "relevant guidance published by the FCA" (see DISP 1.4.2G(3)). This is not sustainable. DISP 1.4.2G(3) is itself only guidance, but the Review is certainly not "relevant guidance published by the FCA". It is not guidance to D – it is mandatory; and it was not published by the FCA – it was explicitly confidential to the parties.

138. **Fourthly,** there are the particular arguments raised by C in relation to Issue 1 and the FOS jurisdiction which are relevant to Issue 2. I considered those earlier, and was not persuaded: see paras [117]-[120] above.

139. **Fifthly**, there are specific terms in the Review Agreement and specific commitments and assertions in communications between the FCA and D which suggest that the Review Agreement is not to be applied more widely, beyond the conduct of the Review itself. By

inference, the terms of the Review are not to be incorporated into the DISP rules. See the earlier discussion at para [43-44].

140. **Finally,** a number of the legal arguments advanced by D in its defence suggest that C's claims in relation to Issue 2 cannot be made out. The primary argument advanced by D is that C's claim is fundamentally flawed because it misunderstands the nature of the Review process. As D puts it, C's claim, if accepted, would entail the court adding to the DISP 1.4.1 regime the terms of an Agreement that was confidential between D and the FCA and which expressly gave no rights to third parties such as C. Similarly, it would upset the delicate statutory regime whereby most of the regulatory rules imposed on D (and other banks) are not actionable by private individuals; the exceptions are strictly limited, provided through FSMA 2000 s.138D, giving private individuals a cause of action only in limited circumstances. It would be surprising, D suggests, if this statutory provision were also to entitle such private individuals to a cause of action for breach of a private contractual arrangement between D and the FCA by way of the Review Agreement. These points are compelling, and C seems unable to respond other than by resort to characterisations of the Review as a complaints handling process.

141. D stresses that the Review process was not contingent on C making a DISP Complaint, and indeed was quite separate from the DISP process: it was in the nature of a mediated settlement process. C did not participate in the Review process as a complainant, but rather as a result of his accepting an invitation to participate in the Review. C's interactions with D during the course of the Review process are fully consistent with that context. The terms of the Review were agreed between D and the FCA, and those terms expressly provided that no other person had any right to enforce the terms of the Agreement, unlike the DISP rules. Indeed, it was a confidential agreement between the D and FCA which the parties did not contemplate customers would ever have access to. In short, D suggests that the proposition that the terms of the FCA Review Agreement were somehow incorporated into the D's statutory DISP obligations is inconsistent with the nature and purpose of the Review Agreement. This description, too, is compelling.

142. Although there are no cases directly on point, those that were put before me strongly support D's interpretation of the status of the Review Agreement, not C's.

143. I start with ***CGL Group Ltd v Royal Bank of Scotland*** [2017] EWCA Civ 1073, [2018] 1 WLR 2137. In that case the Court of Appeal held that banks owed their customers no common law duties of care in relation to their conduct of the Review. Moreover, as already noted, the terms of the Review itself indicate that private parties have no contractual rights under the Agreement. It follows that the only avenue left to customers wishing to enforce the terms of the Review is to argue that they have statutory rights to do so because somehow the Review has become incorporated into the statutory duties owed by banks such as D to the FCA. This is the question raised by Issue 2. Beatson LJ raised the issue inferentially. He noted (see especially paras [85]-[87]) that it was the deliberate intention of Parliament in enacting FSMA 2000 to retain most of the enforcement powers against banks in the hands of the FCA, and that the non-private customers before him were outside the limited class of customers able to sue the banks under FSMA 2000 s 138D for breach of their regulatory duties. At para [87], he added, moving from considerations of FSMA 2000 to considerations of the Review, that, "If a bank fails to comply with the terms of the Review agreement it is the responsibility of the FCA to bring enforcement proceedings." Both sides argued this assertion went in their favour in relation to Issue 2: D took the sentence on its own terms, while C insisted it followed

assertions about the rights of non-private customers under the statute, and was similarly implicitly limited to non-private customers. I prefer D's interpretation. Taken in context, Beatson LJ clearly considered the Review Agreement to be a contract between the banks and the FCA, enforceable by the FCA, albeit that it was settled within the context of the regulatory framework (see especially paras [85], [89], [91], [92]).

144. In a decision that is indirectly helpful to D, the Court of Appeal in ***R (on the application of Holmcroft Properties Ltd) v KPMG LLP*** [2018] EWCA Civ 2093 held that the decisions of the Skilled Person who was required to confirm all settlement offers are not subject to judicial review. As Arden LJ explained, at para [55], it was not necessary to protect customers in this way since a customer "would be free to reject the offer [of redress] and his legal remedies against the bank for the misselling would be unaffected". In reaching this conclusion, Arden LJ referred specifically to the Divisional Court's reasoning ([2016] EWHC 323 (Admin)) at [48]: "The aim of the [Review] scheme is to remedy a pattern of improper selling. The broad regulatory objective is met if the banks adopt schemes to put the matter right and thereafter seek to implement them in good faith with close supervision from an objective and independent party. It does not guarantee a fair outcome in each and every case, but there is still the availability of civil actions, or possibly recourse to the Ombudsman [i.e. the FOS], for those cases where the scheme does not allegedly work as it should."

145. It surely follows from ***Holmcroft*** that it would be completely counterproductive to insert the Review procedures into the very same non-Review routes that are specifically indicated as providing protection from any possible failures of the Review process itself. This is notwithstanding that the Review process has its own protections embedded, which perhaps render it unlikely that such failures will occur, although it is precisely such failures that C is alleging here.

146. One final point is made by D, pointing out that it would be odd if C were able to sue D for non-compliance with the Review processes and the allegedly unacceptable outcomes thereby delivered, when D is not in ultimate control of ensuring compliance: that role falls to the Skilled Person. The final redress offer made to C in relation to his 2005 Swap was one which could not be made by D alone, but had to be agreed by the Skilled Person. This too goes against C's arguments on Issue 2.

147. In conclusion, for all the reasons noted above, I can see no reason why the DISP rules should be seen as incorporating the Review rules, and a good number of reasons for seeing why they should not. It follows that I am not persuaded by C's arguments in relation to Issue 2, and I would answer the question in the negative: i.e. D was not bound by the statutory duties under DISP 1.4.1R to assess C's purported DISP Complaint in accordance with the terms of what had been agreed between D and the FCA regarding D's review process into interest rate hedging products.

7. Conclusion

148. C's complaint against D is that D did not, amongst other things, assess the basic redress due to C in respect of his 2005 Swap "fairly and consistently" as the DISP rules require, because, within the Review, D did not do with the 2005 Swap what it had done with the 2002 Swap even though, according to C, there was no relevant distinction between the

two. Having rejected the options open to him under the Review process, C now seeks to proceed with a claim against D for breach of statutory duty.

149. In order to determine whether such claims should be allowed to proceed, Deputy Master Rhys directed, on 8 April 2019, that there be a trial of two Preliminary Issues.

150. For the reasons set out in detail earlier, my answers to the questions posed by these Preliminary Issues are as follows:

> *(a) Issue 1: "Did the Claimant make a complaint for the purposes of the rules in the Chapter of the FCA Handbook entitled 'Dispute Resolution: Complaints' ("DISP") in relation to the sale of the interest rate hedging products which are the subject matter of the proceedings?"*

Answer: No, C did not make a complaint (a DISP Complaint), as that term is defined in the relevant section of the FCA Handbook, in relation to the Swaps.

> *(b) Issue 2: "If so, was the Defendant bound by the statutory duties under DISP 1.4.1R to assess the Claimant's purported complaint in accordance with the terms of what had been agreed between the Defendant and the Financial Conduct Authority regarding the Defendant's review process into interest rate hedging products?"*

Answer: No, D is not bound by the statutory duties under DISP 1.4.1R to assess C's purported DISP Complaint in accordance with the terms of the Review Agreement agreed between D and the FCA.

151. It follows from these answers to the Preliminary Issues that C is not entitled to bring any of the claims set out in his Amended Particulars of Claim, having failed to meet the essential gateway conditions.