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Case No: CO/5690/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2016

Before :

LORD JUSTICE ELIAS
- and –
MR JUSTICE MITTING

- -

Between :

THE QUEEN ON THE APPLICATION OF HOLMCROFT PROPERTIES LIMITED	**Claimant**
- and -	
KPMG LLP	**Defendant**
- and -	
FINANCIAL CONDUCT AUTHORITY	**First Interested Party**
- and -	
BARCLAYS BANK PLC	**Second Interested Party**

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RICHARD GORDON QC and MALCOLM BIRDLING (instructed by **Mishcon de Reya LLP**) for the **Claimant**
JAVAN HERBERG QC and **HANIF MUSSA** (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**
MONICA CARSS-FRISK QC, DANIEL BURGESS and **KERENZA DAVIS** (instructed by **Baker & McKenzie**) for the **First Interested Party**
DINAH ROSE QC and **BEN JAFFEY** (instructed by **Linklaters LLP**) for the **Second Interested Party**

Hearing dates: 25, 26 January 2016

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Approved Judgment

Elias LJ and Mitting J:

Introduction

1. This is the judgment of the Court to which both judges have contributed.

2. This application for judicial review arises out of the mis-selling of certain interest rate hedging products ("IRHPs") by Barclays Bank (the Second Interested Party) and other banks. Barclays undertook with the regulator, the Financial Conduct Authority ("FCA", the First Interested Party) that it would set up a scheme to provide redress to certain customers who had been wrongly sold these products. (In fact at the relevant time the regulator was the FCA's predecessor, the Financial Services Authority, but we will refer to the FCA throughout in this judgment even when action was taken by the FSA.) Barclays agreed that an independent party, KPMG (the Defendant), should oversee the implementation and application of the scheme and that Barclays would make no offers of compensation save with the approval of KPMG. KPMG could only approve offers if it considered that they were appropriate, fair and reasonable. The claimant, Holmcroft Properties Limited, submits that it was made an offer by Barclays which was inadequate and did not satisfy these criteria because it did not include compensation for loss which it alleged was consequential on the mis-sale. It submits that Barclays did not deal fairly with its application for consequential loss and that KPMG acted in breach of public law principles by approving the offer made to it by Barclays. The issues in this application are first, whether in the circumstances KPMG is amenable to judicial review; and second, if it is, whether it acted in breach of the public law principles to which it was subject in approving Barclays' offer.

The factual background

3. The FCA is the regulator for financial services. Its regulatory objectives include the protection of consumers: see sections 2 and 5 of the Financial Services and Markets Act 2000 ("FSMA"). It received a number of complaints suggesting that some banks had been mis-selling IHRPs. These are sophisticated products whose purpose is to protect customers from the risk of fluctuations in interest rates. It was alleged that the banks had been selling inappropriate or unsuitable products and had adopted poor sales practices to the detriment of customers. Between March and May 2012 evidence of mis-selling was disclosed as a result of obtaining information from four major banks (including Barclays) and following up customer experiences. The evidence was reviewed by the FCA's Executive Supervision and Risk Committee who confirmed that there had been unacceptable practices and that a certain group of customers, described as unsophisticated purchasers of these products, had been put at risk. After considering a number of options including remedial action pursuant to section 404 of the FSMA, taking enforcement proceedings under other regulatory provisions and pursuing the matter through the courts, the Committee determined that the appropriate solution was to seek an undertaking from the banks that they would implement a voluntary review and redress exercise. This would involve them reviewing the sales of these products to such customers going back as far as 1 December 2001 and paying compensation where appropriate. In addition, the FCA wanted independent and objective monitoring both of the banks' procedures and of the proposed settlement offers made to individual customers. The cost of that exercise was to be borne by the banks. It was thought that voluntary arrangements of this nature would provide speedy redress to the customers, would avoid difficulties with limitation periods which might defeat claims in civil law, and would not require the FCA formally to establish that when selling these products the banks had been acting in breach of the FCA's rules and procedures.

4. The FCA's objective was achieved by taking two distinct but related actions, and it involved separate dealings with each bank. We are concerned in this application only with the arrangements made with Barclays. First, in June 2012 the FCA successfully conducted negotiations with Barclays where the terms for setting up the review and redress arrangements were agreed ("the Undertaking"). The option for more drastic intervention was available had there been no agreement. It was agreed that procedures would be developed initially by the Bank and would then be scrutinised by an independent reviewer ("IR") with the whole process being overseen by the FCA. The Undertaking specified that the IR would be chosen at the first instance by the Bank but would have to be approved by the FCA whose interest was to ensure that the IR selected had the resources, skills, experience and independence necessary to fulfil its tasks, and that there would be no conflicts of interest. Barclays appointed KPMG as its preferred choice with two other bodies available if in any particular case KPMG was conflicted. The FCA gave its approval to KPMG's appointment.

5. The Undertaking set out the responsibilities of the IR which included an obligation to make regular reports to the FCA on the progress of the scheme. Barclays undertook that they would not make any offer of redress unless the IR considered that the offer was "appropriate, fair and reasonable." The offer was not binding on the customers; if not satisfied with the outcome they could take a civil action or pursue proceedings before the Financial Ombudsman Service (although compensation limits to his jurisdiction meant that in many cases the ombudsman would not be able to give full redress).

6. The second action involved the FCA issuing a Requirement Notice to Barclays on 24 July 2012 pursuant to section 166 of the FSMA. Section 166 confers a power on the FCA to require a regulated party to provide a report, prepared by a skilled person appointed or approved by the FCA, "on any matter about which the Authority has required the provision of information". The skilled person would be the same person as the IR specified in the Undertaking. The Notice required or could require the IR to provide regular reports to the FCA, through Barclays, as well as a report at the end of the exercise setting out their assessment of the redress exercise. The purpose was to assist the FCA to determine whether any of its powers under the FSMA might need to be employed. In the Undertaking the FCA had reserved the right to use any of these powers should that prove to be necessary.

7. The duty imposed on the skilled person was to "provide independent oversight of the approach and methodology implemented by the firm during the proactive exercise and past business review, as well as independent oversight of the application of that approach. The skilled person is also to confirm the appropriateness of redress to customers…" As to the methodology, the FCA was itself extensively involved in approving it. There was a pilot exercise to test the banks' proposed methodologies and extensive discussion between Barclays, KPMG and the FCA before the details of the scheme were finally settled. One of the purposes of the scheme, however, was to distance the FCA from individual cases.

8. Pursuant to the Undertaking, and in anticipation of the section 166 Requirement Notice, Barclays entered into a contractual agreement with KPMG by way of a letter of engagement dated 17 July 2012. KPMG have considerable experience of acting as a skilled person pursuant to section 166 notices. The terms of the agreement were based on KPMG's standard terms for an arrangement of this kind, but modified to tailor them to the particular requirements.

9. The terms of the engagement emphasised that KPMG was undertaking to act only for Barclays, although with some third party rights conferred on the FCA. Accordingly, it

included, inter alia, terms that any reports and associated advice or guidance prepared by KPMG would be confidential to Barclays and the FCA; that the role of KPMG would not include reporting to customers or providing them with information; and that KPMG would attend meetings between Barclays and customers as an independent observer only (and then only if the customer did not object). It was expressly stated that KPMG owed no obligations of any kind towards Barclays' customers.

10. In addition to laying down the reporting obligations of KPMG, the terms of engagement also sought to implement the undertaking which Barclays had given to the FCA in which it agreed not to make any offers of settlement without KPMG's agreement that the offer was appropriate, fair and reasonable. Under the terms of engagement, KPMG could not propose an offer and it had no direct dealings with customers; it merely reviewed offers proposed by Barclays.

11. The following terms of the agreement set out the relationship between the parties with respect to individual offers. Clause 3.12 provides:

> "Before any redress is provided to Relevant Category B Customers, the Skilled Person will review each of the Firm's assessments of the appropriateness of redress and the fair and reasonable nature of the Firm's redress proposals, if relevant. If the Skilled Person does not agree with any of the Firm's assessments, the Skilled Person will provide the Firm with reasons for that disagreement and an explanation of why, in the Skilled Person's opinion, an alternative approach is needed. The Firm will then put forward an alternative redress proposal for the Skilled Person to review. The Firm will not issue a redress determination to a Relevant Category B Customer until the Skilled Person has agreed with the appropriateness of the redress and the fair and reasonable nature of the Firm's redress proposal."

12. The outcome of the process would be a provisional reasoned determination leading to an offer to the customer. The offer would refer to the role of the independent reviewer. This is made clear in clause 3.13:

> "The Firm will issue a provisional redress determination to each Relevant Category B Customer on the basis of the proposals agreed with the Skilled Person in paragraph 3.12. The provisional redress determination will explain the basis for the conclusion on redress being due (or not due) and (where relevant) how the redress has been determined. The provisional redress determination will refer to the fact that the redress proposal has been reviewed by an independent third party"

13. Paragraph 3.14 then provided that:

> "In all cases the Firm will issue a final redress determination to each [relevant customer.]"

14. Reading these terms together, it seems to us that the effect is that there was a contractual obligation on Barclays to make an offer, but that it could not do so unless approved by KPMG. If that is right, the ultimate control over the offer rests with KPMG. In fact the parties seem to have been under the impression that Barclays could refuse to make an offer at all if they remained unhappy with KPMG's objections, although they could not make an offer which had not been approved by KPMG. Even if that is a correct construction of the terms, it is a matter of little moment. In his witness statement Mr Ho, the Managing Director of Barclays with responsibility for the operation of the redress scheme, said that for commercial reasons Barclays had decided that if, following discussions, they could not achieve a compromise with KPMG, they would agree to offer terms which KPMG would approve even though they were more favourable to the customer than Barclays considered was justified. So whether Barclays was contractually or only commercially obliged to improve its offer until approved by KPMG as being appropriate, fair and reasonable, as a matter of substance KPMG had the last word as to the acceptability of the offer.

15. Because KPMG had no relationship with the customers, it necessarily reviewed the same material which had been considered by Barclays, although KPMG could indicate that it did not think that a decision on the appropriate offer should be taken without further information from, or representations by, the customer.

The operation of the redress exercise

16. The redress exercise appears to have been conducted in a conspicuously scrupulous way. Once the methodology had been agreed by the FCA and adopted, the process in relation to individual claims was as follows. First, a decision would be taken whether a customer who had asked to have his sale reviewed had been subject to a mis-sale. (In the case of one particularly risky product, called the structured collar, it was assumed in every case that there had been a mis-sale.) Barclays would then make the initial determination of what offer of compensation would be fair and reasonable, and that would be reviewed by KPMG. The initial offer consisted of basic redress, comprising the difference between the payments made on the IRHP and those which would have been made had there been no breach of the regulatory requirements. The amount of compensation would depend upon whether the customer would have bought an alternative product if there had been no mis-sale or no product at all. Simple interest of 8% per annum was added to the loss to reflect the borrowing costs and the loss of an opportunity to use the moneys wrongly paid out.

17. In addition to the basic sum, the customer could seek compensation for consequential loss. The burden was on the customer to show that the mis-sale caused such loss as a matter of fact. This required it to demonstrate that, but for the mis-sale, the loss would not have been incurred. In addition, the loss had to be reasonably foreseeable and therefore not too remote as a matter of law. The issue in this case arises out of Barclays' refusal to pay any consequential loss to the claimant.

18. The IRHP review across the banks as a whole has been an extremely demanding exercise. Over 14,000 customers have received compensation. In relation to Barclays itself, Mr. Jonathan Lovell, one of three KPMG partners involved in the redress exercise, said in his witness statement that almost 400 staff have been involved altogether with, at its peak, some 150 staff members working full or part time. They have included specialist staff such as tax specialists to deal with some of the consequential loss claims, and lawyers to review the legal aspects of such claims. Each proposed offer is subject to detailed analysis by skilled assessors to ensure that it can properly be accepted as fair and reasonable.

19. The FCA has been actively involved in regular meetings with banks and IRs and has had discussions with customers. In addition it receives the regular reports from IRs. Although it has not been involved in individual claims, it has sought to ensure that a consistent approach to compensation claims has been adopted both across the banks as a whole and by different IRs operating in the same bank.

The basis of the claim

20. The judicial review in this case is directed at KPMG's role with respect to the refusal by Barclays to compensate the claimant for consequential loss. KPMG had concluded that Barclays had acted reasonably in adopting that approach. The claimant alleges that in so doing KPMG had reached a decision not properly open to it. It is not now alleged that Barclays were obliged to pay consequential loss but rather that it has acted unfairly in the way it reached its decision. It is alleged that it made its decision to refuse consequential loss on the basis of material, some of it allegedly false, which had not been disclosed to the claimant. As a result the claimant was not able to advance its case on a properly informed basis. KPMG ought not to have approved such a defective process. This is a much narrower ground of challenge than had originally been mounted. We consider the detailed arguments below.

21. There are two principal responses to this claim advanced by both KPMG and the Interested Parties. First, they submit that the application for judicial review is misconceived because KPMG is not amenable to judicial review; it is not exercising a public function so as to attract the principles of public law at all. Second, they contend that in any event Barclays was fully entitled to find that no consequential loss had been suffered and that the process adopted to reach that decision was fair. A fortiori, KPMG could not be liable for approving Barclays' decision and the procedures leading up to it.

22. The question of whether KPMG is amenable to judicial review does not depend upon the particular facts in the claimant's case but rather on the proper characterisation of the redress scheme and its role within it. We shall first address the amenability question and then will consider the substantive merits of the claim. That will require a careful assessment of the way in which Barclays dealt with Holmcroft's claim for consequential loss.

Amenability to judicial review

23. The question whether a body is susceptible to judicial review is not always easily answered. The principles are tolerably clear, albeit stated at a high level of abstraction, and they are not in dispute in this case. But their application in any particular case can be problematic and it is the application of the principles to the circumstances of this case which divides the parties.

24. It is now firmly established that the mere fact that the source of power is contract does not of itself necessarily result in the conclusion that public law principles are inapplicable. If a body is exercising public functions, even though the mechanism for carrying out those functions is contract, it may be subject to judicial review. In *R v Panel on Take-Overs and Mergers, ex parte Datafin* [1987] QB 815 at p. 847, Lloyd LJ said this:

> "I do not agree that the source of the power is the sole test whether a body is subject to judicial review… Of course the source of the power will often, perhaps usually, be decisive. If

> the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review…
>
> But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may… be sufficient to bring the body within the reach of judicial review… The essential distinction is between a domestic or private Tribunal on the one hand and a body of persons who are under some public duty on the other."

25. In *Datafin*, the Court of Appeal held that the Panel on Take-Overs and Mergers was subject to judicial review because it was "established under authority of the Government". The powers that it exercised were in effect mandatory and coercive. As Lloyd LJ put it (p.846) "the panel regulates not only itself, but all others who have no alternative but to come to the market in a case to which the code applies".

26. The question of amenability therefore requires a careful analysis of the function in issue as Dyson LJ, as he then was, observed in *R(Beer) v Hampshire Farmers Markets Ltd* [2004] 1 WLR 233, para.16:

> "... the law has now been developed to the point where, unless the source of power clearly provides the answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law. It may be said with some justification that this criterion for amenability is very broad, not to say question-begging. But it provides the framework for the investigation that has to be conducted. …"

27. We were referred to a number of cases which fall on one or other side of the line. Ombudsmen schemes designed to resolve disputes between businesses and their customers which are set up purely as a result of a private agreement between firms which have consensually submitted to the jurisdiction, and without any statutory basis, are not subject to judicial review: see *R v The Insurance Ombudsman Bureau ex parte Aegon Life* [1994] CLC 88, followed in *R (Mooyer) v Personal Investment Authority Ombudsman Bureau Limited* [2001] EWHC (Admin) 247. Mr Gordon QC, counsel for the claimant, relied in particular on the following observation of Rose LJ in the *Aegon Life* case (page 91) in which he derived certain principles from some observations of the members of the Court of Appeal in the case of *R v Jockey Club ex parte Aga Khan* [1993] 1 WLR 909:

> "A body whose birth and constitution owed nothing to any exercise of governmental power may be subject to judicial

> review if it has been woven into the fabric of public regulation or into a system of governmental control (per Sir Thomas Bingham at pp.921C and 923H) or is integrated into a system of statutory regulation (per Hoffmann LJ at p.931H) or is a surrogate organ of government (per Hoffmann LJ at p.932D) or but for its existence a governmental body would assume control (per Farquaharson LJ at 930B and Hoffmann LJ at 932B) …"

28. The claimant submits that the criteria referred to by Rose LJ are plainly met here. Although KPMG in formal terms exercises its powers pursuant to its private terms of engagement with Barclays, it has been woven into the system of government control. But for the presence of an independent body effectively regulating, albeit not initially determining, what is fair and reasonable compensation, the FCA would have had to assume direct control over that question. The function of KPMG as the skilled person was undertaken in pursuance of the FCA's regulatory objectives; indeed, the FCA itself referred to KPMG's function as being a "key aspect" of the scheme. The FCA had to approve its appointment and KPMG had to approve all offers by applying the fair and reasonable criteria. It also had to report on the progress of the scheme, and on any disagreements with Barclays, to the FCA. Moreover, Barclays was not merely contractually bound to KPMG; it was under a statutory obligation by virtue of section 166(5) to co-operate with it. KPMG's approval of the offer made to the customer was critical in order to give the customer confidence that the offer had been objectively considered and was supported by the regulator. Each offer said this:

> "KPMG as the Independent Reviewer has provided oversight of the Bank's review of your case in accordance with their obligations to the FCA."

29. Mr Gordon emphasises that he is not suggesting that all functions exercised pursuant to or in connection with a section 166 role as a skilled person will constitute the exercise of public functions subject to public law principles. His submission is limited to saying that KPMG's role with respect to the approval of offers falls into that category. That is a function which the FCA has required as part of its regulatory objectives and in practical terms the FCA has thereafter washed its hands of any individual decision.

30. Each of the other parties submits that there is insufficient public flavour in KPMG's function to make it amenable to judicial review. Whilst conceding that the contractual origins of KPMG's power is not decisive, they submit that it is nonetheless an important feature weighing against amenability. They also rely upon the fact that Barclays itself was not subject to any formal regulatory mechanism so far as the offers are concerned. It was only the Undertaking, voluntarily entered into with the FCA, which required Barclays to confer upon KPMG as the appropriate independent party, the power to approve offers. Nothing in section 166 enabled the FCA to compel Barclays to allow KPMG to exercise that role.

31. Moreover, the terms of the letter of engagement expressly excluded any duty owed to customers or indeed any relationship between KPMG and the customers at all save as observers of any meetings between the customers and Barclays. The courts should be reluctant to impose public duties where private rights had been expressly excluded. It was also important to note that the customers could refuse to accept the offer and instead choose to take private civil proceedings against Barclays or go to the Ombudsman. Furthermore, ultimately the FCA retained the power to take action against Barclays if, as the claimant alleged, Barclays were refusing to improve an offer which was unfair or unreasonable or had

been reached in a procedurally unfair manner. Any refusal by the FCA to take steps to remedy the alleged wrong-doing would in principle be subject to judicial review.

32. Mr Herberg QC, counsel for KPMG, relies upon the decision in the *Aegon Life* case to support his argument. In that case the Insurance Ombudsman Bureau ("IOB") was established by private agreement to decide complaints against companies who were members of IOB and had acceded to its jurisdiction. It had the power to award compensation against customers but there was no method of enforcement. By section 10 of the Financial Services Act 1986, the Life Assurance and Unit Trust Regulatory Organisation ("LAUTRO") was recognised from April 1988 as a self-regulating organisation regulating the carrying on of insurance business. Under para. 6 of schedule 2 to the Act, its complaints committee was given power to resolve complaints made against members of LAUTRO. It was common ground that in the exercise of that function, LAUTRO was subject to judicial review. There was a degree of common membership between the IOB and LAUTRO. LAUTRO effectively delegated to the IOB its complaints investigation function in cases where the IOB was dealing with a complaint made against an IOB member who was also a LAUTRO member. It was submitted that since the IOB was effectively exercising this important function in place of LAUTRO, who would have had to perform it had the IOB not done so, and since LAUTRO would have been subject to judicial review in the exercise of that function, the IOB should likewise be so subject.

33. The Divisional Court (Rose LJ and McKinnon J) rejected this argument, holding that the IOB as a body created by contract was not subject to judicial review before the statutory regulation powers were conferred upon LAUTRO, and it did not become so afterwards. Rose LJ said this (p.94):

> "In my judgment, it does not necessarily follow that because the regulatory decisions of LAUTRO are susceptible to judicial review, the decisions of public bodies set up by LAUTRO pursuant to its regulatory powers are likewise susceptible."

34. Later he added that:

> "even if it can be said that [the IOB] has now been woven into a governmental system, the source of its power is still contractual, its decisions are of an arbitrative nature in private law, and those decisions are not, save very remotely, supported by any public law sanction."

35. Ms Carss-Frisk QC, counsel for the FCA, placed emphasis on the decision of the House of Lords in *YL v Birmingham City Council* [2007] UKHL 40; [2008] 1 AC 95. In that case the question was whether a private care home provider was exercising a public function so as to bring it within the definition of a public authority within the meaning of section 6 of the Human Rights Act 1998. The provider made a place in a care home available to a client of a local authority in pursuance of the authority's statutory duty to provide the client with residential accommodation. If the provider was a public authority when terminating the contract of care with the client, the power of termination would have to be exercised in accordance with Convention principles. The issue is not the same as whether a body is exercising a public function rendering it amenable to judicial review, but the courts have recognised that there is some analogy between the two situations: see *Parochial Church*

Council of Aston Cantlow v Wallbank [2003] UKHL 37; [2004] 1 AC 546, para. 52 per Lord Hope; and *YL* itself, per Lord Mance at paras. 86-87.

36. In *YL* their Lordships held by a bare majority (Lords Scott, Mance and Neuberger; Lord Bingham and Baroness Hale dissenting) that the care home provider did not fall within the scope of section 6. It was accepted by the majority that the provider was carrying out activities which were the means by which the local authority's statutory duties were being carried into effect; and furthermore, that if the local authority had provided the accommodation itself, then as a public body caught by section 6 it would have been subject to Convention principles when exercising a power of termination. Even so, the majority held that in exercising its power of terminating the care contract, the private provider was not exercising a public function so as to bring itself within the scope of section 6. Lord Neuberger observed that "the fact that a service can fairly be said to be for the public benefit cannot mean, as a matter of language, that it follows that providing the service itself is a function of a public nature" (para. 135). Later in his judgment he described the function of providing care as having a "public connection" with the statutory duty imposed on the authority, but it did not amount to the exercise of a "public function". Lord Neuberger accepted that the fact that a private body was carrying out a function which the paying public party could do for itself was a factor pointing towards the conclusion that it was exercising a public function, "but only to a limited extent" (para. 144). He also noted that this was not a case where the local authority was contracting out a duty. The local authority had no duty to provide accommodation itself; its duty was to secure the provision of accommodation although it had a power to provide the accommodation if it wished to do so.

37. Ms Carss-Frisk submits that this case supports a number of propositions favourable to her case. She says that it shows that the court will not readily impose public functions where a private body contracts out of commercial motives; that there was nothing inherently public in KPMG's functions since banks could, and sometimes do, secure skilled assistance in the matter of compliance; that even if it could be said that KPMG was playing an indispensable role in the operation of the redress scheme, and that it had a connection with the public duties of the FCA, is not enough to make it amenable to judicial review; nor was it enough that the function it was performing would have been a public function has the FCA undertaken to perform it itself; and finally, this was not something that the FCA had a statutory obligation to perform.

Discussion

38. We have not found this question to be easy to resolve but ultimately we consider that KPMG's duties do not have sufficient public law flavour to render it amenable to judicial review. We reach this conclusion for a number of interrelated reasons, although there are certainly pointers in favour of amenability.

39. We accept that KPMG was clearly "woven into" the regulatory function, to use the expression of Rose LJ in the *Aegon* case. Its function in approving the terms of any offers was critical in achieving the twin aims of objectivity and acceptability. As a matter of substance it could veto any offer which it did not approve and effectively compel Barclays to tailor its offer accordingly. Whether that was the contractual effect of the arrangements or not is of little moment; it was certainly the commercial reality. In our view there is some artificiality in treating KPMG as merely assisting Barclays in its compliance obligations, as occasionally happens in the ordinary course of affairs. This was more than a mere private arrangement and the Bank would never have conferred the veto power upon KPMG unless

required to do so by the FCA as part of its regulatory functions. Moreover, Barclays did not have a free hand in the appointment; it had to be approved by the regulator. The voluntary arrangement was coupled with the reporting requirements which were imposed by statute. KPMG was undertaking its duties both for Barclays and for the FCA so as to assist the latter in the effective performance of its regulatory functions.

40. Moreover, there was a clear public connection between its function and the regulatory duties carried out by the FCA. But as the authorities show, that does not of itself suffice to render it amenable to judicial review.

41. Notwithstanding these powerful pointers in favour of amenability, we have finally concluded, not without some hesitation, that the public element is not sufficiently strong for the following reasons.

42. First, although the FCA had a number of more draconian powers it could have exercised, it nonetheless chose to adopt an essentially voluntary scheme of redress. Barclays were left to remedy their own errors and to identify, and where necessary provide redress for, unsophisticated customers who had been sold these products improperly. At this stage the FCA simply reserved the right to use more draconian statutory powers should the need arise. No doubt one of the circumstances where it might do so is if the report from KPMG which Barclays had to secure pursuant to a section 166 requirement concerning the redress scheme suggested that the scheme had not operated satisfactorily. For the purpose of obtaining that report, it did need to employ its statutory powers. But KPMG's role in the individual case, as vital as it was, could not have been imposed upon Barclays by the FCA in the exercise of its regulatory powers.

43. Second, the fact that KPMG's powers were conferred by contract is important, albeit not determinative, and in that context it is relevant that KPMG had no relationship with the customers at all. Also relevant is the fact that KPMG were not actually appointed by the FCA to do anything at all. All the regulator did was to approve their appointment as someone who had the skills and experience to carry out the functions which Barclays had to secure, pursuant to their voluntary undertaking. That approval of the appointment itself cannot suffice to attract pubic law duties, as the claimant conceded.

44. Third, the authorities, in particular *Aegon Life* and *YL*, show that the fact that private arrangements are used to secure public law objectives does not bring those arrangements into the public domain sufficient to attract public law principles. Those cases were admittedly concerned with factually dissimilar considerations, as Mr Gordon stresses, but they do suggest that the courts are reluctant to find amenability to judicial review merely because a private body is carrying out functions at the behest of a public body which, if performed by that public body, would be subject to public law principles. The fact that KPMG in reviewing offers was assisting in the achievement of public law objectives is not enough to subject them to judicial review.

45. Fourth, the FCA had no regulatory obligation to carry out the role which KPMG played had there been no willing skilled advisor. Indeed, it is highly unlikely that it would have had the resources to act in that way. It would have had to use other statutory means of securing appropriate redress. This reinforces the first point, that the arrangements were voluntary albeit under the cloud of more drastic statutory sanctions; and moreover, that they only directly engaged Barclays who could have kept KPMG out of the picture by choosing a different skilled person.

46. Finally, it is of some relevance that the FCA was not disqualified by the arrangements from taking a more active role in particular cases. It is obvious that one of the purposes underlying the scheme was that the FCA should not have to become involved in particular cases, and no doubt they would in almost all cases refer any complaints back to Barclays and KPMG. But if a claimant alleged that they were being treated unfairly by both Barclays and KPMG, the FCA would need to explore that complaint, even if only cursorily, to satisfy itself that there was no obvious failure in the operation of the arrangements which they had set up to provide redress. The FCA would potentially be subject to judicial review if it failed to regulate in an appropriate manner, although we do not underestimate the difficulty of establishing a breach in any particular case.

47. In short, there was no direct public law element in KPMG's role; and although it played an important part in the redress scheme, that of itself was also voluntarily undertaken albeit under threat of potentially more onerous statutory sanctions.

48. We recognise that it may be said that without some recourse to public law proceedings against KPMG, there is no effective redress to ensure that fair and reasonable offers are made. But that was also true in the *Aegon Life* case. Moreover, any public law remedy is a limited one. There would be no damages against KPMG absent a civil cause of action. The only relief would be to set aside the approval of the unfair offer and Barclays would have to consider the matter again. In this context it is not so surprising that there may be no effective redress – save perhaps exceptionally against the FCA itself - where both Barclays acts unfairly and KPMG does not identify the unfairness. The aim of the 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, for those cases where the scheme does not allegedly work as it should.

Two additional points

49. There are two additional matters which we briefly address. First, we have been sent written submissions on the question, raised by Mitting J in the course of argument, whether there may be a contractual right for a customer to sue Barclays in contract if an offer made is not fair and reasonable, on the basis that a customer could, by accepting a standard offer to be subject to the scheme, create a contract with Barclays under which Barclays were obliged to make a fair and reasonable offer (or at least that any offer it did make would be fair and reasonable.) We are told that there are currently cases before the court raising this possibility but counsel have suggested, and we agree, that we should not assume that any such right would be available. Another possibility, about which we heard no submissions at all, is whether KPMG itself could be liable in negligence, although that might face formidable difficulties.

50. Even if there are such rights in private law, we accept, as Mr Gordon submits, that the availability of these remedies does not go directly to the question of amenability but rather to the issue whether an application for judicial review should be rejected on the grounds that there is a more appropriate alternative remedy: see the observations of Lords Bridge and Oliver in *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533 (HL) at pp. 562 and 569 respectively. Having said that, if it were to be established that either of these rights do

exist – and in particular if there is a contractual remedy directly against Barclays – they would certainly be more appropriate remedies to pursue.

51. The second issue is the submission by the defendant and interested parties that there would be adverse consequences if we were to find that KPMG were amenable to judicial review. It is said that it would discourage companies like KPMG from taking on a skilled person's role under section 166. In part, it is fair to say, this was on the premise that the claimant was initially submitting that the public law duties could be inconsistent with, and impose obligations extending well beyond, the duties undertaken in the terms of engagement. That argument is no longer being advanced. In our view that is a matter of little, if any, weight given the more limited nature of the duties now contended for. First, the trigger for the exercise of the duties advanced by Mr Gordon is very limited and relates only to the approval of offers. Second, the public law duties would not add to the private law obligations already existing. Third, we have no hard evidence that it would have the effect alleged.

The nature of any public law duties

52. If our conclusion is wrong and KPMG is amenable to judicial review, the question which arises is how it has to exercise its powers. The original grounds advanced by the claimant contended that KPMG should itself have dealt with the claimant by making information available to it and considering its representations. That is wisely no longer pursued. The nature of KPMG's functions is limited by the terms of its engagement with Barclays. As Toulson LJ observed in *R (Associated Newspapers Limited) v Lord Justice Leveson* [2012] EWHC 57 (Admin):

> "The duty of fairness does not exist in a vacuum…the starting point for any consideration of [a person's] duty of fairness is the task which he was appointed to perform ..."

53. In our judgment, KPMG was clearly not subject to the range of public law duties originally proposed by the claimant. Public law could not impose duties which undermined the basis of the private contractual arrangements. Any public law duty would have to be framed in a manner which is consistent with the terms of engagement. There was no public law obligation to create an independent reviewer. Any public law duties can therefore only relate to the functions which the FCA has chosen indirectly to confer upon KPMG, and must be consistent with the manner in which those functions can be exercised.

54. This means, as Mr Gordon accepted, that the customer could not expect KPMG to consider material not available to Barclays. It would have to make its assessment of the fair and reasonableness criteria on the same basis as Barclays. As we have said, it could, however, take the view that Barclays ought not to make an offer without further information or representations, as the case may be.

Was there an error in the particular case?

55. The case advanced by the claimant is now much narrower than originally framed. It is no longer alleged that KPMG ought to have had any dealings directly with the claimant. It is not even alleged now by Mr Gordon that the only fair and reasonable offer which Barclays could properly have made in the circumstances was to approve the claim for consequential loss. The limited basis of challenge is that Barclays did not act fairly because they failed to provide the claimant with the information on which they had concluded that no consequential

loss had been suffered; that the claimant was thereby prevented from making an informed response to Barclays' provisional decision; and that KPMG had acted unfairly and in breach of its public law duties in approving Barclays' stance. Mr Gordon submits that Barclays should have disclosed in full their records on Holmcroft to the claimant in order to allow the claimant to make properly informed representations about its consequential loss.

56. The correspondence in relation to the claim was as follows. The claim for consequential loss was advanced by Holmcroft in extensive submissions dated 22 July 2014 with supporting documentation. This was in fact out of time but Holmcroft had been permitted an extension of time to advance their claim. It was for a sum in the region of £5.2 million. Barclays responded setting out in detail its preliminary reason for rejecting the claim by two letters dated 5 September. Essentially the reason was that Barclays did not accept that the mis-selling had caused the loss. The two letters were identical save that each was directed to a different IHRP: one related to the swap and the other to the collar. There were further submissions in response made by Holmcroft's solicitors on 19 September 2014. Barclays then gave its final ruling, confirming its original decision, on 6 October having had regard to Holmcroft's representations.

57. Ms Rose Q.C., counsel for Barclays, accepts that Holmcroft was entitled to be given sufficient details of the reason for rejecting the claim to enable them to make properly informed representations but she says that these did not need to be the full records. It was sufficient for Barclays to provide Holmcroft with a summary or gist of the information on which it relied. She submits that this was so provided by the two September letters in which Barclays notified the claimant of its provisional decision to refuse redress for consequential loss.

58. In our judgment Ms Rose is correct in her legal submission. The obligation is to act fairly in a context where the essential financial information is known to both parties. Moreover, the purpose is to ensure that the claimant can properly question the basis on which Barclays reached the provisional decision that no compensation for consequential loss should be offered. In our judgment it is enough in that context to provide the gist of the bank's reasoning and the material on which it was based. We do not accept that there is any obligation to provide the full records available to the bank, or even those records on which the bank has relied. It is enough that the bank fairly summarises the reasons why it has reached the decision in circumstances where the customer has a proper opportunity, and is sufficiently informed, to be able to respond to, and if appropriate take issue with, those reasons.

59. In order to determine whether there was proper disclosure, we first consider the information contained in Barclay's records which had a bearing on Barclay's decision, and then compare that with the information which was disclosed to the claimant in the provisional decisions. The purpose is to see if the summary of the reasons advanced therein fairly reflected the underlying records. If it did, there would be no unfairness in fact to the claimant and, even if KPMG had failed to satisfy itself that the process was acceptable, there would be no relevant claim because there would be no breach by Barclays. In any event, we go on to consider whether KPMG did review the process.

Barclays and Holmcroft: the relationship

60. The nature and evolution of the relationship between Barclays and the claimant can be summarised as follows.

61. In March 2005 Barclays advanced £2 million to Holmcroft and £400,000 to Holmwood Nursing Home Limited ("HNHL") to support the purchase of the freehold land, buildings, and fixtures and fittings at the Holmwood Nursing Home for £2,700,000. The loan to Holmcroft was repayable by monthly instalments over 17 years. The freehold land and buildings were bought by Holmcroft and the fixtures and fittings by HNHL. Holmcroft let the nursing home to HNHL on a 25 year lease at an annual rent of £285,000. An IRHP in the form of a simple interest rate collar expiring on 31 March 2015 was entered into between Holmcroft and the bank in respect of its borrowing only. Both facilities were secured by, amongst other things, a first legal charge over the nursing home. Both loans were restructured as a 20 year repayment loan of £2.4 million to Holmcroft on 21 March 2007, similarly secured.

62. Thereafter, Barclays made further advances to Holmcroft, principally for the purpose of acquiring other land and buildings with a view to their development and onward sale. All were repayable at short notice. All borrowings were secured by first legal charges over all properties.

63. Both Holmcroft and HNHL operated current accounts with Barclays, each with an overdraft facility.

64. On 10 April 2008 Holmcroft entered into a second IRHP with Barclays. It was an interest rate swap agreement to hedge £1,500,000 until 10 April 2011.

65. In their review of the two hedging agreements, Barclays calculated that as at 28 April 2011 the total net cumulative payments made under the collar amounted to £167,592.44 and under the swap, when it expired on 11 April 2011, they amounted to £146,424.64 – a total of £314,027.08. By their letter dated 22 July 2014 Holmcroft's solicitors asserted that the "principal hedging payments" totalled £337,750.36. We do not know why there is a difference between these two figures, but as it is not material to the outcome, we have neither sought nor attempted a reconciliation. We are content to proceed on the basis that Holmcroft's solicitors' calculation (based upon that made by a forensic accountant retained by them) is correct.

66. The consequential losses claimed by Holmcroft are all said to flow from Barclays' decision made and implemented in May 2011 to refuse to renew and/or call in its advances to Holmcroft and to appoint Law of Property Act receivers of its properties. The decision to call in advances was made on 11 May 2011 and receivers were appointed on 17 May 2011.

67. The determination of the claim that the claimant suffered consequential losses (over and above those allowed for by the 8% interest on hedging payments refunded already offered by Barclays) turned upon whether or not Holmcroft could prove, on the balance of probabilities, that Barclays would not have acted as they did in calling in the advances and appointing the LPA receivers but for the impact of the hedge fund payments on the affairs of Holmcroft. Whether they could discharge that burden depended upon the financial position of Holmcroft - and Barclays would claim of HNHL as well, given its financial importance to Holmcroft - and its relationship with Barclays. For the purpose of the assessment, it must be assumed that Barclays would have acted in good faith but, in legitimate protection of its own proper interests, would only offer compensation for consequential loss where it considered that it was right to do so.

68. The best evidence of Barclays' own perception of the affairs of Holmcroft and HNHL and how it should deal with them are contained in its internal records known as "Zeus" records. To the extent that they record agreements and figures, they can be taken to be completely accurate. To the extent that they record the views of bank officials they can be taken to be an accurate record of genuinely held views. To the extent that they record, as they do, things said to them by their customers, principally by Robert Kibble, sole shareholder in HNHL and principal discretionary beneficiary of the trusts under which the shares in Holmcroft were held, they can be taken to be a true summary of what bank officials understood that they had been told, although they may not in all respects accurately record what they were told. The picture painted is illuminating.

69. When the possibility of entering into a banking relationship with Holmcroft and HNHL was first canvassed in February 2005, Barclays was enthusiastic:

> "First rate opportunity to acquire quality new business in an attractive sector. Highly profitable and with experienced management who are already running the business." (5/5/1292).

70. By 14 July 2009 a note of concern had arisen. The manager of HNHL, James Kibble, Robert Kibble's brother, had resigned. That, together with the delay in recruiting a replacement had caused occupancy to fall to 75%. The overdraft of both companies had deteriorated, HNHL's because of trading issues, but Holmcroft's largely due to the impact of debits under the collar and swap arrangements.

71. On the next review on 22 October 2009 two significant concerns were noted: HNHL's profits and generated cash were used to fund Holmcroft's debts and expenditure (principally, it seems, on development costs); and corporation tax amounting to £465,000 (on HNHL profits) had been unpaid for three years. Under the heading "Recommendation including any conditions" the reporting official, Martin Rowe, noted that HNHL's trading performance which was "absolutely crucial here" remained robust despite recent problems but also that there was "no overall cash generation" and that the corporation tax liability "could have a major impact". He noted that Robert Kibble stated that he was intent on achieving asset sales soon and in particular the disposal within 6 -12 months of two of the development sites, from which the debt owed to HMRC would be cleared. Mr Rowe recommended two actions on the part of Barclays: that the collar and swap be reversed to a loan and that the development of another site should not be funded by Barclays.

72. On 28 October 2009 Mr Rowe visited the nursing home and met Robert Kibble. The concerns which he had noted earlier had not yet been addressed. In particular, there was no repayment programme for the HMRC liabilities; Mr Kibble had been unable to sell any of the development properties and instead had let them; the overdraft facilities of both Holmcroft and HNHL were fully drawn and occasionally exceeded and a small County Court judgment had been registered against HNHL; the hedging agreements were still working against Holmcroft. Mr Rowe described these as a "series of tell-tale signs" and, with Mr Kibble's agreement, referred the accounts to Barclays' Business Support Unit.

73. The next review was on 9 February 2010 and was conducted by Fiona McDonald, Director of Barclays Business Support. She noted that Holmcroft and HNHL had regularly exceeded their facilities and had refused an offer of a professionally conducted cash flow review. Mr Kibble had told Barclays that he had decided to close the home and that social

services were removing the first four patients immediately – a statement which he later said was untrue and had been made to teach her "a lesson on control". A quick professional cash flow review concluded that the business could operate within existing facilities, provided that all income from the properties owned by Holmcroft was received – but not all was. Mr Kibble said that corporation tax of £108,000 had been paid so far and the next instalment of £100,000 would be paid within two weeks. He expected to pay £180,000 (i.e. the balance) from a joint venture development. Ms McDonald stated her concerns to him, which included not knowing "how, where or even if" tenants were paying rent, not paying corporation tax for three years to the point that HMRC had attempted to distrain on the assets of HNHL and high personal expenditure.

74. In her next review on 18 May 2010, Fiona McDonald noted that Mr Kibble said that the nursing home would again be rated two stars and that he had reached agreement with HMRC about the corporation tax arrears, which had reduced to £272,000. Rental income from property other than the nursing home should have been £9,500 per month, but between September and December 2009 it had only been £4,000 per month. Mr Kibble was unclear why this was so. On Holmcroft's current account, a number of items had been returned to maintain the overdraft limit. Mr Kibble said that there was a potential buyer for one of the development properties, but Ms McDonald said that Barclays would not assist with the financing of its development. She also noted that Mr Kibble had requested that she be removed from the case, an invitation which was not accepted because, in her and her colleagues' view, the problem was with the messages which she was conveying and not with her.

75. In her next review on 6 December 2010, Fiona McDonald noted that the nursing home had achieved a two star rating again, but occupancy was below what was expected. HNHL still owed corporation tax. Rent was still not being paid into the Holmcroft bank account and in each of the months August to November 2010 it was less than the minimum amount of £8,500 per month which Mr Kibble had agreed should be paid.

76. Only one of four flats which he had agreed to market to reduce short-term debt was on the market. The properties had been re-valued and the nursing home had dropped in value substantially. Ms McDonald decided that the capital repayment holiday on the 20 year loan which had been allowed following the transfer of the account to Barclays Business Support should cease. She decided to call a meeting of colleagues to discuss the next steps. She wanted this to be the placing of all the property development sites on the market to repay the short-term debts. She proposed to tell Holmcroft/HNHL that short-term facilities must be repaid by expiry or Barclays would appoint LPA receivers. She noted that the debt service ratio was 1 – on the basis that rental income was fully paid.

77. By the next review, on 11 May 2011, her patience was exhausted. Because her words demonstrate her state of mind when the decisions critical to this case were taken, we set some of them out verbatim. Under the heading "Previous strategy", she wrote:

> "As discussed …we have given the customer his last chance in our meeting in January to
>
> - Put four flats and four houses on market for sale at prices recommended by agents – with a view of repaying all debt except loan related to nursing home.

- Provide Bank with authority to liaise with agents.
- Ensure all interest and loan repayments met.
- Provide evidence of amounts outstanding to Revenue.
- Provide management accounts for home.
- In return, Bank to restructure expired loans onto an on demand basis and extend the overdrafts."

78. Accounts for HNHL to 31 December 2010 showed a decline in trading profit from £506,435 to £96,000. Notes (we assume to the accounts) show that the 2010 results were affected by regulatory issues which required HNHL to spend an additional £300,000 in staff training which caused lost revenue of £100,000. The accounts provided for corporation tax liabilities of £376,000, all payable immediately, of which £164,790 had been paid. In her "update" Fiona McDonald noted that she had been told that HMRC were content to accept £10,000 per month. Under the heading "Property", she noted:

> "All the rental monies are still not making it to the bank account each month – our agreement was he would pay in a minimum amount of £8,500 per month – so far August £4,500, September £4,400, October £5,750, November £6,255, December £7,250, January £6,150, February £5,250, March £7,575 and £5,728 April – so getting better, but still a long way to go.
>
> The company had also agreed to market the four flats and four houses with two agents – one chosen by them and one chosen by us at prices recommended by the agents. I have received an authority to liaise with both agents, but neither agent has been able to confirm that they have instructions to market the properties – the customer is insistent that he has issued the instructions, but his story isn't consistent with previous conversations and the matter has been outstanding since our meeting in January.
>
> The customer also talked about his preference to sell the nursing home rather than the rental properties, but advises that he has turned aside an offer of £5.7 million (which is £1 million above our valuation) preferring to get the occupancy above 45 and get a price in excess of £6 million. This has further confirmed my thoughts that he has no intention of selling the rental properties and I believe that if he did put them on the market today, he still has no intention of letting a sale proceed."

79. Under the heading "Revised strategy" she recommended that an end be brought to the banking relationship:

> "This case has now been with me for the last 18 months and no progress has been made in improving the management

> information, account conduct or repayment of our facilities. If we don't take control, we will never see repayment of our facilities.
>
> As a two stage approach I recommend:
>
> > Formal demand on Holmcroft Properties Limited.
> >
> > Begbies appointed as LPA receiver on all the properties to collect the rental income and sell the properties.
> >
> > Depending how the customer reacts to this we may need to upgrade the appointment to full administration on both companies to protect the assets – but that would be subject to further discussion and credit sanction down the line.
> >
> > I will review the options for repayment of the nursing home facilities when we see how the customer reacts to the LPA receiverships". (5/5/1405 and 1407).

80. Barclays' hand was forced in relation to HNHL by the decision of HMRC to petition for its winding-up for unpaid corporation tax and PAYE/NIC liabilities of approximately £295,000. Accordingly, Begbies Traynor (Central) LLP were appointed administrators on 7 June 2011. The position was in fact somewhat worse. HMRC had notified a claim of £226,949.75 for corporation tax, penalties and interest for the years ending 31 January 2008, 2009 and 2010; a further £75,229 for the year ending 31 January 2011; and a further claim for unpaid PAYE and NIC contributions for the year ending 5 April 2011 of £67,595. As at 7 June 2011, there was a total estimated deficiency of £347,835.

81. Because of the way that Mr Gordon has presented Holmcroft's case, the focus of our attention must be on what Holmcroft's advisers were told by Barclays, in response to Holmcroft's claim for consequential losses. Indeed, as we have said, Mr Gordon disclaimed any attempt in these proceedings to demonstrate that the substantive conclusion of Barclays and/or KPMG on the issue was flawed or wrong; but the financial background to the issue which we have to determine cannot be ignored. The following conclusions can safely be drawn:

i) HNHL was, by May 2011, in serious financial difficulty. Its difficulties were not, to any extent, caused by the payments made under the hedging agreements.

ii) HNHL's position could only have been rescued by an immediate sale of the nursing home or by the immediate provision by Holmcroft to it of a sum of the order of £300,000. To do so, Holmcroft would have had to have sold some of its development properties immediately.

iii) Fiona McDonald and her colleagues had lost confidence in the willingness or ability of Holmcroft to take the steps necessary to rectify the situation, in particular, to collect rent from the development properties and to sell some of them; or alternatively to sell the nursing home.

iv) Because of the manner in which the accounts of both Holmcroft and HNHL had been conducted, she and her colleagues intended substantially to reduce Barclays' commitment to them – so as to limit it to the outstanding 20 year loan.

v) The payments made under the hedging agreements were a significant contributory factor to the overall adverse financial position of Holmcroft, but even had they not been made, the problems set out above would still have been acute; and it is unlikely that Barclays would or should have acted differently.

82. The consequential loss decision summarises the records set out above in the following terms:

> "Bank records from July 2009 note that an inspection by the Care Quality commission ("CQC") at the Property had resulted in two deficiencies being identified. The records note that this adverse report led to a disagreement between Mr Kibble and his brother, who was manager at HNHL and which resulted in his departure from the care home business. In the absence of a manager for the care home, the CQC requested that no new residents were admitted, which in tandem with some resident deaths, resulted in the occupancy rate falling to 75%. At the same time HNHL experienced difficulties with processing criminal record checks via the Police and Local Authorities which delayed employment of staff and placed a higher reliance on more expensive agency staff.
>
> The above factors resulted in a strain on cash flow with some excesses on the Holmcroft overdraft, resulting in a request for a temporary increase in the overdraft from £50,000 to £150,000 until 30 September 2009. The Bank approved the short-term limit increase to £75,000. (Ultimately this limit remained until the appointment of Administrators in June 2011). HNHL also benefited from an overdraft limit of £150,000.
>
> As at 28 October 2009 you had made net cumulative payments in respect of IRHP1 of £66,078.25. However, after deducting the cost of the Replacement IRHP, your net payments in respect of IRHP1 would have been £54,811.53 (being £66,087.25 - £11,266.72). In respect of IRHP2, as at 28 October 2009 you had made net cumulative payments of £53,856.18.
>
> Bank records from October 2009 note that a referral of the management of your account to BBS was requested (and sanctioned) on the basis of:
>
> - the accrual of three years of unpaid HM Revenue & Customs ("HMRC") liabilities of circa £400,000 to HNHL without an agreed repayment programme;

- a poor one star CQC rating and five statutory requirements for improvement issued to the care home;

- serviceability concerns as all surplus funds from the care home were being utilised to service the other borrowings on Holmcroft;

- delays in selling properties in Holmcroft resulting in the pursuit of a rental strategy which had further affected serviceability and placed a greater reliance on the performance of the care home

- excesses on some accounts and the existence of 'hardcore' debt in the Holmcroft and HNHL overdrafts;

- the IRHPs creating more pressure on the Holmcroft overdraft;

- a County Court judgment being lodged against the care home;

- Mr Kibble was looking for additional funding via Holmcroft to purchase property on a 'quick turnaround' to ease the overall position;

- the care home effectively supporting too much debt, whilst encountering its own operational issues.

Bank records from October 2009 note that Mr Kibble had met with another lender to explore alternative funding.

Bank records from February 2010 note that following the transfer of your accounts to BBS, you had regularly exceeded certain facility limits. Mr Kibble did not wish to use suggested external accountancy advice to provide a focused cash flow review, and intimated that he had decided to close the care home. Work on the cash flow position was subsequently agreed to be undertaken by Begbies Traynor Group, which concluded that even at a lower level of profitability, HNHL and Holmcroft could service the existing borrowing commitments. However it was noted that not all rental income was being received into the accounts of Holmcroft. Other concerns were noted such as:

- the general operational and financial management of the care home;

- lack of understanding/management as to the position regarding property rental income;

- the significant accrued HMRC debt which resulted in attempted distraint of physical assets at the care home;

- continued requests to switch all borrowings to interest only, when the financial information provided demonstrated existing serviceability; and

- continued high personal expenditure by Mr Kibble when the two businesses were in financial distress.

Bank records from May 2010 note that:

- management information in respect of the care home remained poor, however the account was operating within the facility;

- following a recent CQC inspection at the care home an improvement to two stars was anticipated;

- there was ongoing liaison with the HMRC regarding a repayment plan for the arrears;

- investigations were ongoing as to the discrepancies in respect of rental income;

- some items were being returned to maintain the limit in respect of the property account;

- in respect of Holmcroft, there was a potential buyer for a site known as Highbanks (which Mr Kibble wanted to develop, but which the Bank was unwilling to finance).

Bank records from December 2010 note that along with the continuing occupancy, management information and HMRC issues, the properties in Holmcroft had been re-valued, with a substantial reduction in the value of the care home, resulting in an overall loan to value position of 74%.

Below is a brief summary of the financial position of Holmcroft and HNHL noted in Bank records from December 2010:

	2010	2009	2008
	£'000	£'000	£'000
Holmcroft			
Turnover (rental income)	-	291	285

Operating profit	-	266	247
Interest payable	-	411	262
Profit/(loss) before tax	-	(144)	(14)
HNHL			
Turnover (care home income)	1,597	1,724	1,781
Operating profit	113	516	481
Interest payable	13	9	9
Profit/loss after tax	74	365	346
Dividends	326	365	200

It was noted that the financial results for HNHL for 2010 suffered due to regulatory issues with the Local Authority which resulted in improvement expenditure in the region of £300,000 and lost revenue of up to £100,000 when the care home was unable to take on any new residents. In addition, due to the untimely production of the financial statements, Corporation Tax liabilities had accrued for the years ended 2007, 2008 and 2009 in the region of £376,000.

IRHP2 expired after 3 years, with your final payment being made on 11 April 2011, after total net cumulative payments of £146,424.64. No further scheduled monthly payments were made.

As at 28 April 2011 you had made net cumulative payments in respect of IRHP1 of £167,592.44. However, after deducting the cost of the Replacement IRHP, your net payments in respect of IRHP1 would have been £156,325.72 (being

> £167,592.44 - £11,266.72). No further scheduled monthly payments were made.
>
> Bank records from May 2011 noted that:
>
> - the Bank was not being fully appraised of the ongoing payment position in respect of the HMRC debt;
> - all rental income was still not being received into the agreed Holmcroft accounts;
> - despite assurances that agents would be instructed to market and sell certain properties in Holmcroft, this had not progressed;
> - an offer for £5.7m had been rejected for the care home, with HNHL, preferring to attempt to increase occupancy and achieve a sale price in excess of £6m;
> - no progress had been made in respect of the timely receipt and improvement of management information; and
> - given the various ongoing issues and concerns, and the passage of time with no progress in respect of the relationship between Holmcroft, HNHL, Mr Kibble and the Bank, the appointment of LPA Receivers was appropriate.
>
> The Bank appointed LPA Receivers over various properties owned by Holmcroft on 17 May 2011."

83. As can be seen by comparing that summary with the summary and extracts of the records set out above, it is accurate and substantially complete. The only relevant omissions are the observations of Martin Rowe in his notes of 22 and 28 October 2009 about the adverse impact on Holmcroft's current account and overdraft of the hedging payment and his recommendation that they reverse them to a loan. The omission did not materially affect the ability of Holmcroft to make properly informed representations to Barclays and KPMG. Holmcroft knew how much it had paid and what the direct impact on its finances was. It did not need to be told that they had had an adverse impact on its financial position. Nor would knowledge that Mr Rowe, a relationship manager, had recommended that the arrangements be reversed to loan have assisted them: it was the view of Fiona McDonald and her colleagues in Barclays Business Support which counted, not that of Mr Rowe.

84. That apart, the further points made at length, in the witness statement of Paul William Garrett, managing director of an Isle of Man company which provided corporate services to Holmcroft, amount to no more than quibbles. Moreover in part they relate to points no longer being advanced. They need not be separately addressed.

85. Holmcroft's solicitors' letters dated 22 July and 19 September 2014 demonstrate that they did have sufficient information to make informed representations to Barclays and KPMG. Their case on causation was always twofold;

i) But for the hedging payments, Holmcroft would have had a credit balance on its current account.

ii) Barclays and KPMG were wrong to treat the financial difficulties of HNHL as having any material impact on the position of Holmcroft.

They advanced it, and gave detailed reasons to support it. They did not then (or now in reality) take issue with the accuracy or content of the summary of the Zeus records set out in the consequential loss decision. If they had wanted to they had ample opportunity to do so. They did not need copies of the Zeus records to permit them to do so.

86. For those reasons, even if KPMG were under the public law duty for which Holmcroft contends, there was on the facts no unfairness by Barclays in the procedure adopted and therefore there could be no material breach by KPMG of any public law duty to secure fair process.

87. In view of this conclusion, it would in fact be immaterial whether KPMG had properly reviewed the case or not. But in fact there is clear evidence that they did carry out the task which they were required to do pursuant to the undertaking. Each of the September letters to Holmcroft stated in terms that KPMG had considered and confirmed the offer of redress. KPMG also expressly reviewed the offer again following the further letter from Holmcroft dated 19 September. There is no basis for saying that they were in breach of any public law duty, even assuming that they were subject to such duties.