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LINK FUND SOLUTIONS LIMITED v THE COMPANIES ACT 2006

Day 2AH0

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1 Friday, 19 January 2024
 2 (10.00 am)
 3 Submissions by MS TOUBE
 4 MR JUSTICE RICHARDS: Sorry, I'm just waiting to make sure
 5 I have got both screens firing up; and I do. Thank you
 6 very much. Yes, that's great. Thank you.
 7 Sorry, before I hear your closings or reply, it's
 8 an amalgam of both, I suppose really; just a couple of
 9 points for Mr Falkowski.
 10 When you were showing me yesterday the FOS
 11 calculations for the other three cases, I was going back
 12 and looking at those after court yesterday. I think I'm
 13 right in saying that those FOS cases were not involving
 14 LFSL. They were against other financial advisers who
 15 were said to have given defective investment advice. Am
 16 I right in that?
 17 MR FALKOWSKI: That's correct, my Lord, yes.
 18 MR JUSTICE RICHARDS: Thank you. I am sure you said that in
 19 your submissions, but I hadn't picked that up.
 20 MR FALKOWSKI: Yes. We adopted the same methodology in
 21 those cases.
 22 MR JUSTICE RICHARDS: Yes. I see, I understand. Thank you.
 23 Overnight I saw Mr Agathangelou's additional
 24 material. I'm just minded to accept that as late
 25 evidence. I'm not going to ask you to make a formal

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1 application to admit the late evidence, unless there is
 2 likely to be any objection to it. Thank you. Right.
 3 MR FALKOWSKI: I am grateful, my Lord.
 4 MR JUSTICE RICHARDS: Thank you. Yes, Ms Toubé.
 5 MS TOUBE: My Lord, that was my one issue of housekeeping
 6 before I started this morning. We have uploaded those
 7 documents which were sent around by Mr Agathangelou to
 8 the share file.
 9 MR JUSTICE RICHARDS: Oh crumbs. Do you know about the
 10 share file? Maybe my clerk does, and she has been
 11 translating everything across.
 12 MS TOUBE: Yes. We also emailed, I think, it to the court.
 13 MR JUSTICE RICHARDS: I have got it and I have read it
 14 anyway; thank you.
 15 MS TOUBE: But importantly, it means that everybody has
 16 access to it.
 17 MR JUSTICE RICHARDS: That is good. Thank you very much for
 18 that.
 19 MS TOUBE: I will come back to it later, but the short point
 20 I will make is that it doesn't take matters any further.
 21 MR JUSTICE RICHARDS: Right.
 22 MS TOUBE: Now, before I start, we wanted on this side of
 23 the court to acknowledge that it's clear that those who
 24 oppose the scheme feel very strongly that the scheme
 25 should not be sanctioned. And we have heard yesterday

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1 some investors speak about the financial difficulties
 2 that they have experienced, as a result of their
 3 investments.
 4 Now, as your Lordship knows, under the settlement
 5 offered by the scheme all the company's assets will be
 6 paid to the investors in the fund together with the
 7 company's remaining rights under relevant insurance
 8 policies, plus the additional voluntary contribution
 9 from the parent, both into the fund and towards the
 10 costs.
 11 We have heard from these creditors, who assert what,
 12 as your Lordship knows, are disputed claims, that they
 13 feel quite strongly that this is not enough money. But
 14 the bottom line is that there is not more money that the
 15 company can offer. This is what its assets are; and
 16 indeed, as your Lordship will know, we say that without
 17 the scheme, it will have significantly less to offer all
 18 investors.
 19 And of course, the court will also bear in mind not
 20 only the interests of those creditors who spoke
 21 yesterday, but as I mentioned in opening, those majority
 22 of creditors who voted for the scheme to go ahead; and
 23 we would say — we would urge your Lordship not to
 24 forget their views, even though they have not been here
 25 to speak on their own behalf.

3

1 In my reply, what I was proposing to do was to deal
 2 first with the points made on behalf of the TTF. Then
 3 I was going to deal with the points made on behalf of
 4 Marcus Parker and then sweep up, insofar as there are
 5 any left, those points that are made by the other scheme
 6 creditors.
 7 So starting with the TTF. The main point made by
 8 the TTF is on the exclusion of the reference of the
 9 claims to FOS by scheme creditors.
 10 MR JUSTICE RICHARDS: I mean, when I read back the
 11 submissions and the objections, FOS and FSCS are
 12 sometimes elided and spoken of in the same breath. It
 13 seems to me that they are slightly different points, and
 14 tell me if you agree with this. It seems that the FSCS
 15 point, if there's no scheme, then we know that disputed
 16 claims proceed against the company; and the company
 17 broadly says two things. Investors might not win, and
 18 if they do win, they might not get paid in full, because
 19 we haven't — because the company hasn't got enough
 20 assets. So those are the two sort of spectres, if you
 21 like, that the company raises.
 22 Now, FSCS means that for retail investors, the
 23 second of those spectres isn't such a problem because
 24 for retail investors, if they, quote, "win", then at
 25 least up to £85,000, they don't need to worry about

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1 whether the company will pay them, because they have got
2 recourse to the FSCS.

3 FOS is slightly different, because FOS offers
4 investors an alternative means of, quote, "winning",
5 that doesn't involve litigation; doesn't involve some of
6 the spectres that perhaps the company raises in the
7 explanatory statement. There is still the risk they
8 might not win, but they have got perhaps a slightly more
9 informal means of trying to win. And if they do pursue
10 FOS claims, and they are not paid, then they have got
11 recourse to the FSCS.

12 So it seems to me that it is not quite right to say
13 FOS and FSCS, in the same breath, together. Have
14 I understood it properly?

15 MS TOUBE: So, your Lordship is right, that there are the
16 two routes to get to the FSCS compensation at this end.

17 The first way is that you bring a claim, you win
18 your claim, the company can't pay it and there -- here
19 is the FSCS here.

20 The other way is to go to FOS. You get your
21 complaint accepted by FOS, and then there's the FSCS
22 here.

23 MR JUSTICE RICHARDS: Yes.

24 MS TOUBE: Now, what we say, and I will develop this in
25 a minute, is that FOS doesn't have just a random

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1 discretion in -- nothing. It has to make its decision,
2 as a matter of law and legal principles.

3 MR JUSTICE RICHARDS: Yes.

4 MS TOUBE: So although it's said: well, they have a much
5 wider jurisdiction, if FOS were to say: well, there's no
6 claim here. Imagine there was no claim, either because
7 it hasn't been established or because the scheme has
8 taken it away. And FOS says: well, I'm going to say
9 that you have got no claim, but I'm still going to award
10 compensation, we would say that that was irrational and
11 we would judicially review it. So it is important to
12 distinguish between the two routes to the FSCS. Your
13 Lordship is right about that. But both of them are
14 uncertain. They are uncertain in different ways.

15 MR JUSTICE RICHARDS: Yes.

16 MS TOUBE: The first one is uncertain because the claim is
17 uncertain and therefore FSCS is uncertain.

18 MR JUSTICE RICHARDS: Yes.

19 MS TOUBE: The second one is uncertain because FOS is
20 uncertain, and therefore FS --

21 MR JUSTICE RICHARDS: Yes.

22 MS TOUBE: And it's also true to say that it might be the
23 case that a FOS claim might be determined faster than
24 litigation, but it's not going to be determined in
25 a number of months.

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1 MR JUSTICE RICHARDS: Yes, thank you. But -- that's very
2 helpful, thank you. And I'm right in my threshold
3 understanding, am I, that the two spectres raised in the
4 explanatory statement, (1) you might not win, and (2)
5 you might not get paid, even if you do win. The second
6 of those, you might not get paid, is of lower concern to
7 retail investors, because of the FSCS?

8 MS TOUBE: So it depends -- assuming that they are people
9 who are otherwise covered, they are otherwise covered.

10 Not all retail investors --

11 MR JUSTICE RICHARDS: Yes, but I'm using this as a --

12 MS TOUBE: Yes, yes.

13 MR JUSTICE RICHARDS: Thank you. That's helpful.

14 MS TOUBE: So what is said against us, and I should say, the
15 target of the submissions that were made on behalf of
16 the TTF were not: you can't get rid of FSCS claims at
17 all. There was no suggestion -- for example, if we're
18 going route 1, let's call it route 1. So route 1 is
19 that you have got to establish your litigation claim and
20 the FSCS compensation comes here.

21 MR JUSTICE RICHARDS: Mm--hm.

22 MS TOUBE: There was no suggestion that you can't compromise
23 those claims. If those claims are compromised, this
24 falls away.

25 MR JUSTICE RICHARDS: Yes, understood.

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1 MS TOUBE: There is nothing there.

2 MR JUSTICE RICHARDS: Yes, I understand.

3 MS TOUBE: The target of the submissions were that you
4 cannot take away the route of going to FOS.

5 MR JUSTICE RICHARDS: Yes.

6 MS TOUBE: Because when you -- and this is what is
7 said: that when you have got FOS and FSCS together,
8 that's something you can't take away.

9 MR JUSTICE RICHARDS: Yes. Although again, there was some
10 elision -- I agree with you that that was the target of
11 the oral submissions. It is a slightly different target
12 in the written submission, because the written
13 submission referenced this letter by Mr Falkowski to the
14 investor advocate that says: I can find no discussion
15 about the statutory protections for retail investors
16 under the FOS and FSCS schemes established by FSMA,
17 statutory protections which in my submission have the
18 nature of inviolability.

19 So I took from that that both -- you can't take away
20 either FSCS or FOS. I quite agree that when the oral
21 submissions were made, the focus was very much on FOS as
22 a route into FSCS, but I didn't -- I thought the written
23 submissions put the point slightly more broadly.

24 MS TOUBE: Okay. Well, then, I will deal with --

25 MR JUSTICE RICHARDS: Maybe deal with both.

8

1 MS TOUBE: Then I will deal with both of those. Would your
 2 Lordship just give me one minute?
 3 (Pause).
 4 Mr Al-Attar reminds me, and this was the point I was
 5 sort of groping towards, when I was saying to your
 6 Lordship about retail investors. In order to have
 7 a claim against the FSCS, for compensation from the FOS,
 8 you need to be an eligible claimant with a protected
 9 claim. If you make an application to FOS and FOS gives
 10 you compensation, and you're either not an eligible
 11 claimant or the claim for which FOS -- which FOS
 12 recognises is not a protected claim, you wouldn't
 13 automatically get FSCS protection at the other end.
 14 So if one was successful in the litigation claim,
 15 that -- you would then be an eligible -- a claimant with
 16 a protected claim.
 17 MR JUSTICE RICHARDS: Yes.
 18 MS TOUBE: But if you make an application -- if you succeed
 19 and if it's the right sort of claim, let's just assume
 20 that.
 21 MR JUSTICE RICHARDS: But the right sort of claim is a civil
 22 claim; right? I mean ...
 23 MS TOUBE: Yes. I think it has got, sort of -- yes.
 24 I think it is more tightly defined than that.
 25 MR JUSTICE RICHARDS: Thank you.

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1 MS TOUBE: So you could make a complaint to FOS.
 2 MR JUSTICE RICHARDS: Yes; without bringing litigation?
 3 MS TOUBE: Without bringing litigation. You could be
 4 awarded compensation by FOS.
 5 MR JUSTICE RICHARDS: Yes.
 6 MS TOUBE: But you would then, in order to get your
 7 compensation from the FSCS -- it is a sort of insurance,
 8 if I can put it this way, from the FSCS, you would still
 9 have to prove the thing that FOS just gave me my
 10 compensation award for: I am an eligible claimant and it
 11 was a protected claim.
 12 MR JUSTICE RICHARDS: Oh, thank you. I had not appreciated
 13 that. So it is not enough to go to the FSCS, waving
 14 your FOS money award, saying: here it is, I haven't been
 15 paid. There's a further layer of --
 16 MS TOUBE: There is.
 17 MR JUSTICE RICHARDS: It has to be verified that the FOS
 18 award relates to a, capital Eligible capital claim.
 19 MS TOUBE: Protected claim.
 20 MR JUSTICE RICHARDS: Sorry, capital protected.
 21 MS TOUBE: Yes, you are an eligible claimant and it is
 22 a protected claim. Yes. Yes, okay.
 23 MR JUSTICE RICHARDS: Thank you. Sorry for an initial
 24 digression, but I think it is important for me to
 25 understand the lie of the landscape so that I can

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1 understand the submissions on it.
 2 MS TOUBE: It is, because there isn't a direct mapping one
 3 onto the other. I think that's the point.
 4 MR JUSTICE RICHARDS: Yes.
 5 MS TOUBE: So the two ways in which this, or these possibly,
 6 points arise are, first of all, as a matter of
 7 jurisdiction, can a scheme ever compromise the ability
 8 of somebody to refer a claim to FOS? I will add on to
 9 that: and can it also ever compromise the ability to
 10 claim FSCS compensation, if that point is still made
 11 against me? So that's a jurisdiction point.
 12 And then there's: if the answer to that is yes, that
 13 a scheme can do that, then there's the question of
 14 discretion.
 15 MR JUSTICE RICHARDS: Mm-hm.
 16 MS TOUBE: Once we get into the question of discretion,
 17 we're into the same route as all the other questions of
 18 discretion: is this a scheme having been voted for by
 19 everybody, that the intelligent and honest person acting
 20 in respect of their own interests might reasonably
 21 approve?
 22 So those are the two ways that we need to look at
 23 it, and we have dealt with it in our skeleton but
 24 I think it might help just to deal with it afresh today.
 25 So let's start with the jurisdiction questions.

11

1 MR JUSTICE RICHARDS: Mm-hm.
 2 MS TOUBE: So first of all, can I clear out of the way the
 3 analogy with banks?
 4 MR JUSTICE RICHARDS: Yes.
 5 MS TOUBE: The claims in the present case, as your Lordship
 6 knows, are disputed claims.
 7 MR JUSTICE RICHARDS: Yes.
 8 MS TOUBE: Bank deposits aren't disputed. They are deposits
 9 in a bank. So if there were a scheme of arrangement of
 10 a bank, when you looked at the relevant alternative, the
 11 relevant alternative would have on its side of the
 12 balance sheet the payment of those undisputed deposits,
 13 which would be backed by protection.
 14 Now, that's not the case here; in the relevant
 15 alternative, what you have is disputed claims and
 16 therefore a question mark over whether there is the
 17 ability to refer to FOS and/or, let me put it that way,
 18 the ability to get FSCS compensation.
 19 So bank deposits are also backed by the deposit
 20 protection scheme, and the deposit protection scheme
 21 pays up to £85,000 in relation to bank deposits, within
 22 seven days of a bank failure. And it does that
 23 automatically.
 24 Now, that's a special protection scheme for bank
 25 depositors.

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1 Now, investors, and investors with disputed claims,
 2 are different from bank users, particularly investors
 3 who make claims for compensation of alleged breaches of
 4 rules. So there's no automatic right to compensation in
 5 our case, as opposed to with bank deposits.
 6 So what you would have to do would be to prove your
 7 breach of the rules, either in litigation or in some
 8 sense, in relation to the FOS, before the FSCS can admit
 9 any claim for compensation.
 10 So the big difference between banking deposits and
 11 this is: they are disputed and they have a completely
 12 different system.
 13 Now, the reason why I mention this is because your
 14 Lordship will have seen submissions and heard
 15 submissions in relation to contagion and runs on the
 16 banks, etc, and we just say that's not an analogy that
 17 can be drawn in this case.
 18 So having cleared that out of the way, we deal
 19 second with the question: is it possible to compromise
 20 the rights of scheme creditors against the company?
 21 Because that's the first stage, and the answer is: yes,
 22 that's what schemes do. And we do that under clause 6.1
 23 of the scheme, and that releases the scheme claims. And
 24 it also prevents proceedings in relation to scheme
 25 claims.

1 Now, leaving aside the question of FOS, which is
 2 within the definition of "proceedings", it cannot be
 3 suggested that it is not permissible to release rights
 4 of — or disputed rights of creditors against the
 5 company.
 6 So the scheme can, and does, remove the underlying
 7 rights against the company.
 8 So what we say is that there are no rights against
 9 the company, in respect of scheme claims, either which
 10 the FSCS could provide compensation on, or which the FOS
 11 could properly adjudicate.
 12 MR JUSTICE RICHARDS: Because if, once the — so if the
 13 release of the claim takes effect, and after that
 14 release an investor goes to FOS and says: I'm very
 15 unhappy about X, Y, Z, FOS will say: well, you've
 16 compromised that. Is that the point?
 17 MS TOUBE: Yes, yes. And there are several sort of
 18 subpoints in relation to that.
 19 The first is, and the FCA points it out, in his
 20 skeleton my learned friend for the TTF accepted during
 21 submissions yesterday; that FOS has to be guided by the
 22 law when making a determination of whether to give
 23 compensation.
 24 MR JUSTICE RICHARDS: Yes.
 25 MS TOUBE: Just for your reference, that's DISP 3.6.4 R, and

1 that's in the FCA's skeleton at paragraph 37. That is
 2 the easiest place to pick it up. So FOS can't act in
 3 a way that is contrary to the law.
 4 MR JUSTICE RICHARDS: I mean, at the margins it can,
 5 I imagine. Well, not — so someone might go to FOS and
 6 say: my feelings were hurt and I suffered a degree of
 7 emotional distress because of the way I was treated by
 8 a firm. It might not be a recoverable head of damage at
 9 law. You might not get much joy if you tried to sue for
 10 loss for hurt feelings, but FOS might give you something
 11 for that.
 12 MS TOUBE: Well, that is true, in relation to the quantum of
 13 the claim. So the court might — so the court might
 14 say: I'm sorry, I will give you nothing for hurt
 15 feelings. FOS certainly can; but there's no claim.
 16 MR JUSTICE RICHARDS: I see. That's the distinction you
 17 draw?
 18 MS TOUBE: Yes. So we say that it would not be appropriate
 19 for FOS to seek to adjudicate, given the fact that there
 20 was an effective and lawful compromise of the underlying
 21 claims. And your Lordship has also seen that FOS has
 22 confirmed that although it hasn't reached a final
 23 conclusion, its general expectation is that it would be
 24 appropriate for an ombudsman to consider dismissing
 25 a complaint without considering its merits. So that is

1 FOS's initial thought about what it would do.
 2 And if it didn't do that, it would be open to the
 3 company to seek judicial review.
 4 So we say that it is appropriate that having
 5 compromised the underlying claim, there is nothing to go
 6 to FOS and it's therefore appropriate also to compromise
 7 the ability to continue proceedings, just as it would in
 8 relation to any other proceedings relating to that loss.
 9 So the only proceedings that are permitted are those to
 10 enforce the scheme.
 11 Now, the TTF makes a number of points as to why they
 12 say that's not possible.
 13 First of all, my learned friend sought to suggest
 14 that it was not possible to take away claims that had
 15 been established, and my learned friend took your
 16 Lordship to various examples, real life examples that he
 17 said were based on the FOS methodology, to show what
 18 scheme creditors were losing under the scheme and what
 19 they would be able to get from FSCS.
 20 But first — and I make no apologies for repeating
 21 this — none of the claims have actually been
 22 established.
 23 Secondly, as your Lordship noted this morning, the
 24 FOS methodology which the TTF is applying is the
 25 methodology applied in claims made against IFAs and not

1 the company. So there's no read—across.
 2 And when your Lordship pressed my learned friend on
 3 this, as to whether or not these were actual losses that
 4 effectively could be relied upon, he quite fairly
 5 accepted that the result of any complaint to the FOS
 6 might be different. He accepted that the FOS might
 7 reject a complaint or give another compensation amount,
 8 and that the amount, and indeed the existence at all,
 9 was uncertain.
 10 So as a result, far from showing that there are
 11 valuable claims that have been given up, what we have is
 12 uncertain claims that might or might not exist. So
 13 these claims might be what they are said to be, or they
 14 might be zero.
 15 In fact, as my learned friend rightly accepted,
 16 everything in litigation is uncertain. In fact, he said
 17 that only a fool would suggest otherwise. Now, given
 18 that the test we're applying is of an honest and
 19 intelligent investor, by definition, we should assume
 20 that the people dealing with these schemes are not fools
 21 and therefore recognise the uncertainty.
 22 So going back to what happens under the scheme. The
 23 underlying claim is released. The ability to take
 24 proceedings, whatever they are, is not permitted. And
 25 those are the covenants that come on one side of the

1 balance sheet, in return for receiving the settlement
 2 payment under the scheme. So there is consideration for
 3 that release of the claim. And the power of attorney
 4 provided to the company to discharge any claims that are
 5 commenced or continued, whether in litigation or to the
 6 FOS, is just designed to ensure compliance with this
 7 statutory agreement.
 8 So, as I said to your Lordship in opening, we are
 9 not talking about rights against the FOS and we are not
 10 talking about rights against FSCS. We are talking about
 11 the ability to proceed against them.
 12 But even if we were talking —
 13 MR JUSTICE RICHARDS: And the jurisdictional question then
 14 for me is: can I approve a scheme that has in it
 15 something saying: you won't take proceedings before the
 16 FOS?
 17 MS TOUBE: Yes.
 18 MR JUSTICE RICHARDS: That is the jurisdictional question.
 19 MS TOUBE: It is, it is. Let's imagine for a minute that
 20 this was a right. It's not a right, but let's imagine
 21 that it was a right. What we know that schemes can do
 22 is that they can remove, they can compromise any right,
 23 as long as that right is in personam. We know that from
 24 the Lehman case. So as a matter of principle, one can
 25 release such a right.

1 The other thing we know is that if that right is
 2 a right against a third party, which again it's not
 3 a right, but even if it were a right against a third
 4 party, one can release those rights, as long as they are
 5 ancillary to the release of other rights or they are
 6 ricochet claims.
 7 MR JUSTICE RICHARDS: But Lehman doesn't — I mean, the
 8 question is, I think more basic than Lehman, isn't it?
 9 Perhaps — you say more straightforward. This isn't,
 10 you say, a case where rights to take proceedings to the
 11 FOS are being, quote, "released"; this is a scheme
 12 including, as one of the obligations of scheme
 13 creditors, an undertaking not to pursue actions before
 14 the FOS and to appoint people as attorneys to sign
 15 consent orders and stuff like that.
 16 Is there any relevant restriction on my power to
 17 sanction schemes that impose obligations on creditors
 18 not to do stuff? It seems to me that that's the
 19 question.
 20 MS TOUBE: It is the question. And in the normal case, the
 21 answer is: no, the court can do that and does do that
 22 all the time. Imagine this were a right. It's
 23 a personal right, with a ricochet or it's ancillary.
 24 MR JUSTICE RICHARDS: Yes, yes.
 25 MS TOUBE: Or, if it's not a right, whether it is

1 permissible as something which is ancillary to something
 2 else which is permitted, by which I mean the release of
 3 the rights under the scheme plainly against the company
 4 plainly is permitted.
 5 MR JUSTICE RICHARDS: So the — I think you put forward the
 6 short answer to the jurisdiction question is: the
 7 obligation not to take proceedings before the FOS is
 8 nothing other than a natural and ordinary consequence of
 9 the release of a creditor's rights.
 10 MS TOUBE: Yes.
 11 MR JUSTICE RICHARDS: And it is perfectly within my power,
 12 you say, no authority has been suggested to the
 13 contrary, for me to sanction a scheme imposing such
 14 an obligation.
 15 MS TOUBE: Yes, so that is the simple answer.
 16 Now, what's said against us is that there is
 17 something special in the FOS jurisdiction that trumps
 18 the scheme jurisdiction.
 19 MR JUSTICE RICHARDS: Yes.
 20 MS TOUBE: And we say: no, that's wrong. We say that's
 21 wrong for several reasons.
 22 The first reason is that there have been schemes,
 23 different sorts of schemes, but there have been schemes
 24 where scheme creditors have been prevented from
 25 referring potential complaints to FOS.

1 There have been schemes — sorry. We deal with
2 those in paragraph 121 of our skeleton.

3 There have also been schemes that have replaced the
4 jurisdiction of the FOS with the jurisdiction of other
5 countries. Now, my learned friend says: ah well, those
6 are Brexit cases, we don't need to worry about those.
7 But the point we are making is — we are not saying that
8 is on all fours with our case. What we are saying is,
9 if the argument made is that it is never permissible to
10 abrogate the right to refer a complaint to FOS, because
11 FSMA says that and you are never allowed to abrogate it,
12 that can be shown not to be correct, because there are
13 cases where there has been a referral to someone else.

14 MR JUSTICE RICHARDS: Yes. It might be wrong, I suppose,
15 but —

16 MS TOUBE: So — well; I suppose so.

17 So what we are saying is that there's nothing in
18 those cases that would suggest that one cannot do that
19 at all, as a matter of principle.

20 And in fact, we say it would have required very
21 clear wording in FSMA, if it was going to use the
22 court's right to sanction a scheme; and of course there
23 isn't any such wording. The scheme legislation has been
24 on the books for well over 100 years and, in fact, the
25 Companies Act, of course, postdates FSMA.

21

1 Now, what is said against us, or what was said
2 against us in my learned friend's skeleton argument, was
3 that Payward tells you the answer to this case. Now, he
4 accepted, I think, yesterday that Payward was
5 a discretion case in any event. But I think it is quite
6 important to look at what Payward does and doesn't say,
7 and how it interacts with actual scheme cases and we can
8 see that Payward is actually a complete red herring.

9 So can we just quickly look at Payward? It is in my
10 learned friend's authorities bundle, at tab 5.

11 (Pause).

12 So Payward was a case in which there was a firm that
13 was operating outside the UK, that had a Californian
14 arbitration clause in its terms and conditions.

15 As I think your Lordship will have seen, it obtained
16 an award against a consumer in California and then
17 sought to enforce that award in the UK to stifle
18 litigation by that consumer in the UK. You can see that
19 from paragraph 62. That consumer was a British citizen
20 and resident in England, which we can see from
21 paragraphs 1 and 6 of the judgment.

22 The consumer won, for present purposes of relevance,
23 in relation to his argument that it was not — let me
24 put it this way, that UCTA and FSMA were cases which
25 were — in fact, particularly FSMA section 19, which was

22

1 its general prohibition, and 23 which were cases that
2 said that one could not enter into a contract in breach
3 of the general prohibition, those were aspects of UK
4 public policy, given effect under the 1996 Act's
5 provisions.

6 Which, of course, in turn protected the New York
7 convention on arbitration. Your Lordship will see those
8 from paragraphs 2(i) and 67.

9 Now, the question of public policy is considered in
10 paragraphs 101 onwards of the judgment. And
11 Mr Justice Bright pointed out that public policy was
12 something that was contrary to the fundamental
13 conceptions of morality and justice. What the court
14 went on to do was to consider various sections. First
15 of all, the Consumer Rights Act and its enactment of the
16 EU directive on unfair terms and consumer contracts.
17 The court considers those between paragraphs 104 and 117
18 and concludes that they represent public policy.

19 Then the court goes on to consider these particular
20 sections of FSMA. And we can see those at paragraph 118
21 onwards, that it is the general prohibition section, the
22 contravention section and the agreement section. And
23 the court concludes that those sections were also part
24 of UK public policy, and the court reaches that
25 conclusion in 122 of the judgment.

23

1 So the court concluded that enforcement of the
2 arbitration award would be contrary to the public policy
3 objects of those particular provisions of the
4 Consumer Rights Act, that is paragraphs 124 to 152.

5 And then that the enforcement of the arbitration
6 award would also be contrary to the public policy
7 objectives of the particular provisions of FSMA; that is
8 paragraphs 153 to 157. Now, Payward is perhaps
9 unsurprising as a case; UCTA and FSMA's general
10 prohibition would be outflanked, if all one did was to
11 have an arbitration clause and then got an arbitration
12 award.

13 But what Payward doesn't do is to hold that all
14 aspects of FSMA and the FCA rules are manifestations of
15 UK public policy. It also isn't a scheme case; it is
16 a case about discretion and arbitration awards.

17 Now, in the present case, the issue raised by the
18 TTF and its assertions have to be looked at in the
19 context, of course, of the schemes of arrangement.

20 First of all, as your Lordship knows, the sanction
21 of a scheme arrangement is discretionary. But the
22 discretion is to impose a compromise or arrangement of
23 rights.

24 And as we have pointed out in our skeleton and as
25 I have said to your Lordship this morning, there is no

24

1 limitation on the source of rights that could be
2 compromised. They can be statutory, they can be
3 contractual, they can be tortious. All that matters
4 is: are these in personam rights? And they are.

5 The scheme creditors' claims are all personal
6 rights. They are breach of statutory duty claims and
7 they are claims in tort and they are claims in contract.

8 Secondly, a scheme of arrangement is not permitted
9 if it is a mere expropriation and my learned friend
10 referred, I think, in his skeleton to the NFU case. We
11 don't need to go to that, because it's generally agreed.
12 Of course, one cannot take away someone's rights without
13 giving them something in return. But the scheme does
14 give these creditors something in return for any rights
15 that they are giving up.

16 So there is nothing contrary to UK public policy in
17 having a scheme of arrangement that is a compromise, is
18 not an expropriation and doesn't breach anything else.

19 But more importantly, in the context of a scheme
20 jurisdiction, schemes can do more than other contracts
21 can do; and in this context, can I draw your Lordship's
22 attention to the Cape case, which we put in, once we saw
23 my learned friend's skeleton argument, at the back of
24 our bundle at tab 45.

25 Now, Cape was a scheme of arrangement that dealt

25

1 with asbestos claims, amongst other things. And it was
2 common ground in that case that there was no breach of
3 UCTA, because it wasn't a contract or notice within the
4 meaning of the Act. But the question was: could the
5 scheme of arrangement override the provisions of UCTA?
6 And Mr Justice David Richards, as he then was, deals
7 with this question at paragraph 74 onwards of the
8 judgment. So it is page 1264 of the bundle.

9 MR JUSTICE RICHARDS: Yes.

10 MS TOUBE: And you will see that first of all, the judge
11 sets out the relevant provisions of UCTA. And then he
12 goes on to consider whether the court lacked
13 jurisdiction to sanction the scheme award, but
14 inevitably declined to sanction it. You will see that
15 at paragraph 78. And at paragraph 79 he sets out
16 Mr Pascoe's submissions on this. You will see:

17 "First, he submitted that a scheme of arrangement
18 can do no more than could be done by the parties if they
19 were individually to give their assent to a contract in
20 the same terms. As a contract term to which
21 section 2(1) of the 1977 Act applied would be
22 ineffective, so the court could not sanction a scheme
23 which contained a term to the same effect. This
24 submission ... confuses a major purpose of the statutory
25 provisions for schemes of arrangement with the full

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1 scope of those provisions. In the great majority of
2 cases, a scheme will give effect to an arrangement with
3 classes of creditors or members which could be achieved
4 by their unanimous assent. This is not, however,
5 expressed in the statute as a requirement of the scheme
6 of arrangement."

7 And you will see further down in that same
8 paragraph:

9 "Schemes of arrangement can therefore contain
10 provisions for financial assistance which, if contained
11 in a contract, would not be just ineffective but would
12 involve the commission of a criminal offence and would
13 be illegal and void. It might be said that this is a
14 statutory exception, but it seems odd indeed to have an
15 express statutory exception to a supposed implicit
16 condition of an express statutory procedure. More
17 likely, it is a statutory acceptance that a scheme of
18 arrangement can in appropriate circumstances accomplish
19 more than a contract."

20 And then we can go on at paragraph 81 where he deals
21 with:

22 "Mr Pascoe's third submission was that section 2(1)
23 of the 1977 Act applies not only to exclusion causes of
24 the usual sort but also to compromises."

25 You will see he goes on to say:

27

1 "I have held that section 2(1) does not apply to
2 a scheme of arrangement, so that strictly this
3 submission is not in point. It would nonetheless be
4 material to a consideration by the court of its
5 discretion to sanction the scheme if it were the case
6 that ... 2(1) would render material parts of the scheme
7 ineffective if they were contained in a contract. Even
8 then it would not be decisive. Parliament has not
9 qualified the breadth of the court's discretion under
10 section 425 [which is the precursor to the current
11 scheme] and, if in all the circumstances the court
12 thought it right to sanction the scheme, it should do
13 so."

14 So your Lordship will recall that Payward, which was
15 an UCTA case, in that case the court would not exercise
16 the right -- exercise its discretion in relation to
17 an arbitration award which was a breach of UCTA. But
18 here is the court saying that in a scheme jurisdiction,
19 that is not the same.

20 In fact, it is even more important because he
21 says: even if it is a criminal offence and even if it
22 renders a contract void, it still does not override the
23 scheme jurisdiction. He says it is a matter of
24 discretion.

25 So Payward isn't a case about schemes, isn't a case

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1 about jurisdiction , and in any event, in a scheme
 2 jurisdiction , it would be wrong.
 3 So what we say in relation to the jurisdiction point
 4 is that there is no jurisdiction point in relation to
 5 the FOS or FSCS, whatever way you look at those claims.
 6 As for the points on discretion we deal with those
 7 in our skeleton at paragraphs 123 to 130 and those are
 8 really the points I have already made. It is uncertain
 9 when, and indeed whether, the — FOS would decide any
 10 complaints, or for that matter, whether the FCA would
 11 succeed in whole or in part in imposing a restitution
 12 award on the company.
 13 Moreover, as your Lordship has seen, FOS is
 14 statutorily required to charge the company £750 per
 15 claim after the first three claims. So when looking to
 16 see: does it make sense for the scheme to have done what
 17 it is doing in relation to the FOS claims, you have got
 18 uncertain claims, you don't know when they are going to
 19 be decided; they are going to cost money to the company.
 20 They might be subject to judicial review. So when you
 21 ask yourself the question: is this a scheme one that
 22 an intelligent and honest person acting in respect of
 23 their interests might reasonably approve? The answer is
 24 yes.
 25 MR JUSTICE RICHARDS: Yes. And am I right that — FSCS gets

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1 an airing and gets specific mention in the explanatory
 2 statement. Does FOS get —
 3 MS TOUBE: Yes.
 4 MR JUSTICE RICHARDS: Would you mind showing me that?
 5 MS TOUBE: Absolutely. So ...
 6 Does your Lordship want me to show you the FSCS
 7 points or just the FOS points? I have that —
 8 MR JUSTICE RICHARDS: No, because when I was thinking
 9 about — or reviewing yesterday, I saw clearly, in the
 10 disadvantage section, it's said: a disadvantage of the
 11 scheme is that you lose access to FSCS and that is put,
 12 sort of, in words of one syllable. I couldn't
 13 immediately see a reference, saying: and by the way, you
 14 also lose the right to use the procedure in FOS. That's
 15 what I'm getting at.
 16 MS TOUBE: So the first thing is that the existence of the
 17 FOS complaints was at part 4, paragraphs 20 to 22. So
 18 if we go to page 680 of the bundle, at tab 30.
 19 MR JUSTICE RICHARDS: Ah right, okay.
 20 MS TOUBE: So these were the ongoing FOS complaints.
 21 MR JUSTICE RICHARDS: So a description of what FOS is, and
 22 there are 455 that have been referred to FOS — oh, 104
 23 have been referred to FOS, yes.
 24 MS TOUBE: And then, the fact that the scheme claims
 25 include, but are not limited to these outstanding FOS

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1 complaints, that is at paragraph 5, part 7. So if we
 2 look at page 684. You will see:
 3 "Scheme Claims include, but are not limited to, any
 4 outstanding related FOS Complaints."
 5 MR JUSTICE RICHARDS: Sorry, page 684?
 6 MS TOUBE: It is paragraph 7.
 7 MR JUSTICE RICHARDS: I see it. Yes, thank you, yes.
 8 MS TOUBE: And also paragraph 15(a), which is at 686.
 9 MR JUSTICE RICHARDS: I see. And is it — it's not a — the
 10 reference to FSCS is — right at the beginning, in the
 11 chairman — in the overall overview bit, and it's listed
 12 explicitly as a disadvantage. Would it have been better
 13 to say: not only are you losing access to FSCS, when
 14 articulating the disadvantages, say: and also you are
 15 losing access to the more informal procedure in FOS?
 16 MS TOUBE: So the answer to the question is, first of all,
 17 when everyone picks over an explanatory statement,
 18 inevitably somebody will say: well, I would have
 19 understood this better if you had said this in this
 20 place or that in that place. But what we have to do is
 21 to read the explanatory statement as a whole.
 22 So when you look at what scheme claims are, and when
 23 you look at what proceedings are, under the scheme
 24 itself, you can see that scheme claims and proceedings
 25 relating to scheme claims are all released because

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1 that's what it says.
 2 If you look, for example, at page 659, under
 3 "Disadvantages of the scheme":
 4 "If the Scheme goes ahead, Scheme Creditors will not
 5 be able to pursue the Scheme Claims in the Scheme
 6 against the FSCS."
 7 So could it also have said: whether those scheme
 8 claims are underlying claims for litigation or
 9 underlying FOS claims or outstanding FOS claims? You
 10 can always add more in. But the definitions, one has to
 11 read it with the scheme itself, and the definitions do
 12 make it clear that you are talking about FOS claims,
 13 outstanding FOS complaints and proceedings make clear
 14 that you are also talking about reference to FOS.
 15 MR JUSTICE RICHARDS: I see.
 16 (Pause).
 17 MS TOUBE: So for example, if you look at page 732 and the
 18 definition of "Proceedings".
 19 MR JUSTICE RICHARDS: Yes, I saw this when I was looking at
 20 the scheme; proceedings, yes.
 21 MS TOUBE: So you see referral to the FOS expressly spelt
 22 out there.
 23 MR JUSTICE RICHARDS: Yes.
 24 MS TOUBE: But what we heard from my learned friend
 25 yesterday was that what was important was that the

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1 parties -- what was important was that the parties
 2 thought they had FSCS cover, if I can put it like that.
 3 MR JUSTICE RICHARDS: Yes.
 4 MS TOUBE: So what was important to them was: do you have --
 5 are you able to proceed against the FSCS or not? So we
 6 refer to the FOS claims, we refer to the jurisdiction of
 7 FOS. It is in the definition of scheme claims, what
 8 they are. "Proceedings" has referral to the FOS in
 9 them. And it is clear from the scheme, from the
 10 repeated references which your Lordship will have seen,
 11 reading the explanatory statement, that one is not able
 12 to pursue the FSCS, and that in the alternative, one
 13 might be able to do.
 14 So all of those points are there, in the explanatory
 15 statement.
 16 MR JUSTICE RICHARDS: Yes.
 17 MS TOUBE: So if you read the explanatory statement as
 18 a whole, and assuming, as we do, that it is
 19 an intelligent and honest person reading them, the
 20 points are there; it is spelt out.
 21 MR JUSTICE RICHARDS: Thank you.
 22 MS TOUBE: So that was all I was going to say about the
 23 TTF's points. Then I was going to turn to the points
 24 that were made by Marcus Parker.
 25 MR JUSTICE RICHARDS: Yes, thank you.

1 MS TOUBE: The first point that is made is an assertion that
 2 the scheme creditors were not properly consulted and
 3 informed, and there are three parts to this allegation .
 4 The first is allegations relating to the misleading
 5 explan, as it 's said to be.
 6 The second is allegations is that the chair of the
 7 investor committee didn't provide an independent or
 8 effective means for consultation.
 9 And the third is an assertion that the scheme is not
 10 the result of negotiations with the scheme creditors.
 11 I was going to deal with those in turn.
 12 So let me start with the allegations made about the
 13 explanatory statement being misleading. I would like to
 14 make five preliminary points.
 15 First of all , and this might sound like a jury
 16 point, but it 's actually important; it was said on
 17 behalf of Marcus Parker that they represent 7,000 scheme
 18 creditors . Now, only 3,394 creditors voted against the
 19 scheme; and we know that from page 1020 of the bundle.
 20 So the one thing we know is that not all of those 7,000
 21 scheme creditors voted against the scheme.
 22 Secondly, I will remind your Lordship that the
 23 question isn't: is this the best scheme? But it is: is
 24 it one for which an honest and intelligent member of the
 25 class might vote?

1 Thirdly, your Lordship heard from the investor
 2 advocate yesterday, including after he heard further
 3 detail about how it was said that the explanatory
 4 statement was misleading; and he still takes the view
 5 that the explanatory statement was not misleading; and
 6 that it sets out the right position and the relevant
 7 available options.
 8 Fourthly, even Mr Dickenson, who did complain, he
 9 said it was a one-sided document, he accepted that the
 10 negative aspects were all covered.
 11 And fifthly , as your Lordship will know, lots of
 12 people, the FCA, the FSCS, the investor advocate, the
 13 investors , Marcus Parker and Leigh Day, all of them had
 14 input into the documents. All of them made comments.
 15 And the investor advocate expressed the view that where
 16 those comments were appropriate, they were included.
 17 So I think as I said yesterday, there were lots of
 18 eyes on this document.
 19 And as I suppose I should say, as I just said to
 20 your Lordship, that doesn't mean it is a perfect
 21 document, but that's not the test.
 22 In relation to the law, let me make three points in
 23 relation to the law.
 24 First of all , your Lordship will have in mind the
 25 points I made in opening about what job the explanatory

1 statement has to do.
 2 And connected to that is my second point; as we
 3 referred to, in paragraph 144 of our skeleton, by
 4 reference to Sunbird, the question is: is there
 5 sufficient information to enable the creditors to decide
 6 whether the scheme is in their interests? And we say
 7 that the answer to that is clearly yes. In fact, the
 8 scheme company made significant efforts to ensure that
 9 that was the case.
 10 The third point is that it 's really important to
 11 notice that, contrary to what my learned friend said,
 12 the court is not asked in this context to consider what
 13 an investor would take from the explanatory statement on
 14 a cursory view. Or, for that matter, reading one
 15 paragraph and forgetting the rest of the document. What
 16 they are required to do as an intelligent creditor is to
 17 read the explanatory statement as a whole and that also
 18 means together with the scheme. And in this context,
 19 perhaps it is just worth drawing your Lordship's
 20 attention to the quotation from BAIC that we set out in
 21 our skeleton argument at paragraph 146.1. It is a short
 22 paragraph. Can I just invite your Lordship to read
 23 that?
 24 MR JUSTICE RICHARDS: Yes.
 25 (Pause).

1 Yes.
 2 MS TOUBE: So let's deal in turn with the assertions that
 3 are made against us.
 4 The first is in relation to the 77% point. And we
 5 deal with this in paragraphs 153 to 157 of our skeleton.
 6 Your Lordship heard my learned friend on this point at
 7 length yesterday. He suggested that it was unclear what
 8 the 77% recovery was about and said that people were
 9 misled by this, and your Lordship also heard from
 10 Ms Baldwin that she had misunderstood the position.
 11 So the first point here is that it's important to
 12 recognise that what the court is looking at here is the
 13 communications between the company and the creditors.
 14 The court is looking at the explanatory statement and
 15 the scheme. And also the FAQs and the videos and any of
 16 the other matters that were sent out by the company.
 17 What the court is not looking at is FCA press releases,
 18 press reports, any other matters that are not under the
 19 control of the company.
 20 So that is why I said that the documents sent by
 21 Mr Agathangelou didn't take the matter further. They
 22 are not under our control. We can't do anything about
 23 what those say. What we can do is make sure that the
 24 explanatory statement sets it out correctly.
 25 MR JUSTICE RICHARDS: But if the company is formulating its

1 explanatory statement, against a backdrop of comments by
 2 others that is inaccurate, is it incumbent on the
 3 company just to make sure that the explanatory statement
 4 deals with such a backdrop as it's aware of?
 5 So for example, if there is lots of comment in the
 6 press that says: investors are going to get 77% of their
 7 loss under this scheme, does the company then become
 8 under some sort of special and additional duty, when
 9 formulating its document, to say: 77% of the FCA amount,
 10 by the way, not like the press are saying, 77% of your
 11 total loss.
 12 I mean, I float the question, not to suggest that
 13 I have reached any conclusions on it, but to float the
 14 question, given what I heard.
 15 MS TOUBE: And we would say that the answer is no.
 16 MR JUSTICE RICHARDS: No, okay.
 17 MS TOUBE: What the company has to do is to state the
 18 position correctly, and it did.
 19 So there were lots of disparate points made around
 20 the 77% point.
 21 The first point that was made was: it isn't clear
 22 where the figure comes from. It is not clear in the
 23 explanatory statement where it comes from. And the
 24 answer is that it's a percentage of the maximum return
 25 under the scheme, as a percentage of the 298 figure.

1 That is clear from the worked example table --
 2 MR JUSTICE RICHARDS: Yes.
 3 MS TOUBE: -- that I showed your Lordship yesterday.
 4 MR JUSTICE RICHARDS: Because I found the -- I mean, I hear
 5 loud and clear the submission that the correspondence
 6 between Mr Agathangelou and the FCA sheds no light on
 7 that. I saw in that correspondence a very different
 8 justification of the 77% figure, that it's 77% of, not
 9 the FCA amount, but it's the 77% of the net asset value
 10 of the fund on 4 June, taking into account all capital
 11 distributions that have been received in the interim.
 12 It seems a very odd justification of 77%.
 13 MS TOUBE: It is 80% of that.
 14 MR JUSTICE RICHARDS: Right.
 15 MS TOUBE: Which is also stated in the explanatory
 16 statement, but it is 77% of the figure that the FCA
 17 comes up with.
 18 MR JUSTICE RICHARDS: Thank you. Well, that is what the
 19 explanatory statement says.
 20 MS TOUBE: Yes, and that's correct. And your Lordship will
 21 know, of course, that was correspondence with the FCA,
 22 not with us.
 23 MR JUSTICE RICHARDS: Yes.
 24 MS TOUBE: Then there was -- I don't mean to belittle the
 25 point, but there was the suggestion that by not using

1 the words "FCA total amount", people didn't know what
 2 the 298 million was. And we say that it is clear, when
 3 you read the explanatory statement as a whole, that
 4 298 million is the figure that is being talked about all
 5 the way through.
 6 If we just look at the explanatory statement, at
 7 tab 30, page 657, you can see, in paragraph 15, which
 8 starts just over the page before that:
 9 "The maximum possible amount of the Settlement Fund
 10 is 230 million, which is approximately 77% of the amount
 11 which the FCA complains was the loss incurred by
 12 investors who continue to hold shares in the WEIF on and
 13 after the Suspension Time ..."
 14 Then it sets out the figure; the FCA total amount.
 15 And then you will see the 80% point which comes directly
 16 after that.
 17 Now, I think what Mr Crossley said was: well, you
 18 can't expect people to remember that when they are
 19 reading it later in the document, but if you read the
 20 explanatory statement as a whole, then you can expect
 21 them to read it and they should have been able to read
 22 it in the same way.
 23 MR JUSTICE RICHARDS: Yes.
 24 MS TOUBE: Then there was, I think, a complaint about the
 25 FCA's explanation of what the figure was; and how they

1 got to it. And he said: oh well, it is all terribly
 2 confusing. I think that was what his submission
 3 effectively was.
 4 And you will see reference to that at page 677,
 5 which is paragraph 8. Your Lordship saw that yesterday.
 6 Again, you will see maximum restitution payment reduced
 7 from 306 to 298 and then:
 8 "A spreadsheet setting out the FCA Redress
 9 Calculation is available ..."
 10 And you can click through to that and we saw
 11 yesterday what it said.
 12 Now, that was put into the explanatory statement,
 13 because Marcus Parker asked us to put it into the
 14 explanatory statement. They said that people needed to
 15 know how it was worked out. So not only did we put it
 16 in there; we put it in there, specifically because they
 17 asked us to put it in there, and one could click through
 18 directly to see it.
 19 The figure of 298 million is not only referred to
 20 there, but it is also referred to in the worked example
 21 table, which we saw yesterday.
 22 It is also referred to, I think as your Lordship saw
 23 yesterday, in the FAQs; that is at page 2012. I don't
 24 need to take you back to that. And the investor
 25 advocate has taken the view that this breakdown is

1 actually particularly helpful to investors and, in fact,
 2 he shared it, in order to explain the 77% figure, every
 3 time he was asked.
 4 So if what the complaint is, that we didn't use
 5 whatever the right words were, but we did explain that
 6 it's 298 million, this is how it works, this is how it
 7 will be worked out, and the words "FCA total amount"
 8 were used and they are referred to in the worked example
 9 and there is an explanation of how you get there, there
 10 is nothing in this explanatory statement that supports
 11 what my learned friend says.
 12 Now, if his assertion is: yes, but if I thought my
 13 loss was something different, I would think that I was
 14 getting the 77% of my loss, whatever I thought -- my
 15 disputed loss, whatever it was.
 16 But that's not what the explanatory statement says.
 17 The explanatory statement is very careful to say
 18 something completely different; and it explains exactly
 19 what it does say.
 20 Now, what were investors really concerned about? As
 21 my learned friend says, they were really concerned about
 22 what they would get under the scheme, what they would
 23 get per share. And your Lordship again sees from the
 24 worked example table that that's very, very clearly set
 25 out.

1 But over the page, which I don't think your Lordship
 2 has seen, which is page 664, it explains how this works,
 3 what each of these columns mean, and then there is
 4 a worked example and that worked example explains the
 5 77%, but also how much he was going to get paid.
 6 And just while we are here, your Lordship will also
 7 see that there was a complaint made about not setting
 8 out the range. Well, here is the range. If he only
 9 receives the initial payment, he will be receiving about
 10 61%. And if he receives all of it, he will be receiving
 11 77%. So there's the range set out as well.
 12 Now, the pence per share is also in a number of
 13 other places in the explanatory statement. If we look
 14 at page 657, and this is just after the bit we were
 15 looking at earlier. If we look at paragraph 17:
 16 "For a fuller illustration of the potential returns
 17 for share [this is in bold], please go to the worked
 18 example on page 10."
 19 And then if we look at page 660, in the blue box,
 20 you will see the second paragraph explains the 77%, and:
 21 "Please see page 10 'Pence per Share Distributions
 22 and Worked Example' for more information about how to
 23 calculate potential distributions."
 24 MR JUSTICE RICHARDS: So investors are not just told 77% of
 25 FCA total amount. They are told: you say at crucial

1 junctures in the scheme documents to refer to the table
 2 which will tell them exactly what they get per share
 3 of -- shares of the relevant class that they hold?
 4 MS TOUBE: They are, and in bold, and in blue boxes, and
 5 referring back to the worked example at each time.
 6 So we say there is nothing to the suggestion that
 7 people didn't understand the 298, they didn't understand
 8 what they were getting, pence per share; they didn't
 9 understand what the range was --
 10 MR JUSTICE RICHARDS: Well, some people will have
 11 misunderstood, won't they? We heard Ms Baldwin who we
 12 know did misunderstand.
 13 MS TOUBE: I should have put that differently. The question
 14 is: was this misleading? Was this explanatory statement
 15 misleading? And the answer is that when you read it as
 16 a whole, no.
 17 MR JUSTICE RICHARDS: Yes.
 18 MS TOUBE: So that's the points around 77%.
 19 Then there were the points about the relevant
 20 alternative. I have addressed your Lordship about the
 21 relevant alternative yesterday. It is an insolvency if
 22 the claims are upheld and I should make that clear. We
 23 are not saying an immediate insolvency, but fighting the
 24 claims and then a future insolvency if the claims are
 25 upheld.

1 Now, the relevant alternative is the alternative
2 most likely to occur if the scheme does not happen. It
3 is not necessarily the only possible alternative, but it
4 is the most likely alternative. And this is a case
5 where the relevant alternative was being carefully
6 considered and set out in the explanatory statement.
7 And there is no evidence to suggest that there is
8 another relevant alternative, just speculation about
9 another deal that might be done. And as your Lordship
10 knows, that is not a relevant alternative.

11 It was also suggested that the company wouldn't
12 really dispute the claims. Mr Dickenson suggested that
13 the company was a shell; and so this was an empty
14 threat. But as your Lordship knows, the company has the
15 sums that it has realised from the sale of about
16 79.5 million, as well as its net assets which are about
17 45 million. So it has 124.5 million, even before it
18 realises anything from its insurance policies or the
19 parent.

20 So it certainly does have the money to defend the
21 claims and it has said on evidence that it would do so,
22 if the scheme is not approved.

23 (Pause).

24 It was also, I think, suggested that it wasn't made
25 clear that the scheme was a settlement of disputed

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1 claims, but that was made clear in the explanatory
2 statement, at paragraph 2, the first page, at page 655.
3 (Pause).

4 MR JUSTICE RICHARDS: Sorry, give me that reference again,
5 please?

6 MS TOUBE: 655.

7 MR JUSTICE RICHARDS: Thank you.

8 MS TOUBE: So this is all really a better scheme argument,
9 where there's no evidence that that's the case, and in
10 any event that's not the test.

11 Then there was a suggestion — then comes the third
12 party releases points. So the explanatory statement is
13 said not to properly state that the scheme prevents
14 claims against third parties, in practice. I think
15 that's the way it's put against us.

16 MR JUSTICE RICHARDS: Just so I'm clear. Third parties.
17 The third parties we are talking about here — it's
18 people like Hargreaves Lansdown, is it? Is it the
19 investment manager? I would just like to get my head
20 about who the potential third parties are that investors
21 might want to make claims against.

22 MS TOUBE: It could be those people, but it is anybody who
23 the investors might have the same claim against, as they
24 have the —

25 MR JUSTICE RICHARDS: No, I understand that. I'm just

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1 trying to understand, who are the likely candidates?

2 MS TOUBE: Yes. Hargreaves Lansdown are being sued already.

3 MR JUSTICE RICHARDS: Yes. Yes, okay.

4 MS TOUBE: So just to put it in context. We have got three
5 sets of releases which come under the scheme. We have
6 got the general release, which is the release of the
7 company from claims against it. We have then got the
8 affiliate release, which is the release of other members
9 of the group, in relation to claims, including the group
10 contribution deed, in consideration for the provision of
11 the parent contribution.

12 And then we have got the adviser release; that is
13 also the director release, for scheme claims and claims
14 in relation to the implementation of the scheme.

15 MR JUSTICE RICHARDS: And you say those are all entirely
16 straightforward, entirely normal, because fraud claims
17 are being excluded?

18 MS TOUBE: That's right; and they're either normal, because
19 you always release people in relation to implementation
20 of the scheme, or they're normal and fine, because they
21 ricochet or — are necessary.

22 MR JUSTICE RICHARDS: Yes. Although — sorry. I know ...

23 The ricochet effect, it seems to me that the
24 ricochet effect has been somewhat — "engineered" is
25 a pejorative term, it is not intended to be pejorative.

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1 But the ricochet arises because the company has entered
2 into deeds of indemnity, indemnifying advisers and
3 indemnifying group companies.

4 MS TOUBE: Yes.

5 MR JUSTICE RICHARDS: Should I worry about the fact that
6 a ricochet effect has been engineered or might not have
7 arisen but for those?

8 MS TOUBE: No, there are countless cases that say that is
9 absolutely fine. The fact that something is
10 artificial — Gategroup is the obvious one in relation
11 to deed poll. There is a discussion by

12 Mr Justice Zacaroli in relation to artificiality in that
13 case; and he says, as long as it is okay, it does not
14 matter that it has been artificially created.

15 MR JUSTICE RICHARDS: Okay. So it is not a silly question
16 to ask. It has been asked before and it has been said
17 to be all right. Could you give me that reference
18 again? Gategroup?

19 MS TOUBE: Gategroup, yes. I don't think that is in the
20 bundle. It is a restructuring plan case.

21 MR JUSTICE RICHARDS: Okay.

22 (Pause).

23 MS TOUBE: Yes. I'm reminded that in relation to the
24 parent, the parent is putting in money as well.

25 MR JUSTICE RICHARDS: Thank you. Sorry, I took you out of

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1 your course there, but that was on one of my lists of
 2 question, so it was a convenient point to ask it.
 3 MS TOUBE: Not at all.
 4 (Pause).
 5 Mr Al—Attar and I also — no, I'm just accusing him
 6 of doing a case with me. Mr Justice Miles, in
 7 Swissport, also deals with this point, and that is in
 8 the bundle; and we will give you that reference.
 9 I think it is in the skeleton, actually.
 10 MR JUSTICE RICHARDS: Thank you. Sorry, I distracted you
 11 with that question.
 12 MS TOUBE: Not at all. I think that is also in the
 13 skeleton.
 14 So what's unusual in this case, what's new in this
 15 case, is the contribution reduction mechanism and I know
 16 your Lordship said you wanted to understand how that
 17 worked. We deal with it in paragraphs 131 to 140 of our
 18 skeleton.
 19 MR JUSTICE RICHARDS: I think I understand how it works.
 20 I just want to make sure there is nothing about it — or
 21 make sure I understand all aspects of it that you think
 22 I should worry about. I think you say I should worry
 23 about nothing, but I would just like to understand the
 24 pinch points, if there are any there.
 25 MS TOUBE: Well, the argument that is made against us is not

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1 that it is wrong as a matter of principle.
 2 MR JUSTICE RICHARDS: Yes. No one seems to be saying that.
 3 MS TOUBE: The argument that is made against us is that
 4 practically it stops us from getting litigation funding.
 5 MR JUSTICE RICHARDS: Just to deal with — no one is saying
 6 it is wrong as a matter of principle, but I suppose
 7 I just need to be satisfied that it is not wrong as
 8 a matter of principle. And you say that it is not
 9 a release; it's just a mechanism; no third party claims
 10 are being released, so I don't need to worry about the
 11 provisions of the release of third party claims. It's
 12 just an ancillary covenant, for understandable reasons,
 13 that you have articulated in your skeleton argument, to
 14 deal with ricochet risk, to say: if you do make claims
 15 against these third parties, there is a mechanism to
 16 ensure that the company gets access to any — to cash
 17 representing its final contribution liability, so that
 18 it can always be sure that it can satisfy its
 19 contribution liability.
 20 MS TOUBE: Exactly. And the alternative to it, and this is
 21 important, what we could have done is bind everybody
 22 into the scheme and get them released through the
 23 scheme.
 24 But the problem with that would have been that we
 25 would have to have valued the contribution claims; and

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1 bearing in mind that we are not even valuing the
 2 underlying claims, that is one of the reasons, of
 3 course, we are paying out by reference to what the
 4 shares are. We would have had to have come up with some
 5 way — well, first of all, we would have had to have
 6 worked out what those contributions were going to be.
 7 Then we would have had to have valued them and then we
 8 would have had to pay them something.
 9 MR JUSTICE RICHARDS: Yes, that was the bit I didn't quite
 10 understand, because you don't do that with affiliate
 11 claims or investor — no one has gone around and valued
 12 potential claims against affiliates or claims against
 13 advisers. I didn't quite understand why you would have
 14 to do that.
 15 MS TOUBE: No, that's right. So advisers aren't creditors.
 16 MR JUSTICE RICHARDS: Right, I see.
 17 MS TOUBE: So the — these are people that the scheme
 18 creditors might have a claim against, which then
 19 ricochet back.
 20 MR JUSTICE RICHARDS: Right. But the third parties are the
 21 same.
 22 (Pause).
 23 Maybe we will just ...
 24 MS TOUBE: That's right, that's right, correct.
 25 MR JUSTICE RICHARDS: Maybe we could just ground — it is on

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1 my list of questions for you, and now perhaps is the
 2 time for it. It's 41.4.2.2 of your skeleton. I don't
 3 quite understand that, and I am sure I am being slow,
 4 but I wonder if you could just explain it to me.
 5 So what is being canvassed here is the alternative
 6 that you were about to explain orally, is: we could have
 7 bound everyone in; we could have just released all of
 8 these claims against third parties as well.
 9 MS TOUBE: So I'm going to slightly duck this and ask
 10 Mr Al—Attar, who was responsible for coming up with this
 11 brilliant idea, to explain it to your Lordship, rather
 12 than his whispering it to me.
 13 MR JUSTICE RICHARDS: That is fine. Shall we take a break
 14 there?
 15 MS TOUBE: It may only take two minutes.
 16 MR JUSTICE RICHARDS: Why don't you do it now.
 17 MS TOUBE: Shall we just finish this point?
 18 MR AL—ATTAR: My Lord, you have to distinguish between
 19 people who are scheme creditors and third parties
 20 against whom scheme creditors might have claims. You
 21 can't expropriate a scheme creditor's rights, so you
 22 have to pay them something. The ricochet jurisdiction
 23 works like this. You are a scheme creditor. You have
 24 a claim against a third party, who if you pursue that
 25 claim, will have a claim that is incoming against the

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1 scheme company. That is your triangle of rights. So
 2 you put a covenant on the scheme creditor, be it
 3 a release or a promise not to sue, to stop them suing
 4 the third party.
 5 MR JUSTICE RICHARDS: Yes.
 6 MR AL—ATTAR: That is not a right against the company, so
 7 that gives rise to the scheme jurisdiction which is by
 8 rights against the company, which is: how on earth do
 9 you do this? The rationale that we have explained
 10 coming down from the Court of Appeal in Lehman scheme
 11 number 1, is that, because of the ricochet claim, when
 12 you impose that covenant or release on the scheme
 13 creditor, you are doing so within the purview of the
 14 scheme jurisdiction, because ultimately it is connected
 15 with a right against the company that would ricochet in.
 16 MR JUSTICE RICHARDS: Yes. Thus far, I understand all of
 17 that thus far.
 18 MR AL—ATTAR: So that is the basic premise. Now, we have
 19 a set of essentially, let's call them tort claims. They
 20 are statutory claims, but let's think of them as joint
 21 liabilities and tort to discuss the concept. So you are
 22 a scheme creditor who has been wronged by the handling
 23 of Link in relation to the WEIF. That is the basic
 24 idea.
 25 And you say: there are two people, or more, who have

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1 caused or contributed to my loss, and I have to
 2 articulate the claims against both of them. So I have
 3 a claim essentially for breach of statutory duty against
 4 LFSL; and I might have a claim against, for example,
 5 Hargreaves Lansdown for, let's say loosely, the wrong
 6 advice.
 7 MR JUSTICE RICHARDS: Mm—hm.
 8 MR AL—ATTAR: And if you were to claim against
 9 Hargreaves Lansdown, asserting that it is the same loss,
 10 Hargreaves Lansdown would have a claim against the
 11 company.
 12 MR JUSTICE RICHARDS: For a contribution?
 13 MR AL—ATTAR: Right. So there's two ways we can, as
 14 a company, can normally deal with this. We can impose
 15 a covenant on the scheme creditor, not to sue
 16 Hargreaves Lansdown.
 17 MR JUSTICE RICHARDS: Yes.
 18 MR AL—ATTAR: Obviously —
 19 MR JUSTICE RICHARDS: And you would say, if you did that,
 20 you would say it is closely connected with the scheme
 21 and it is therefore the ricochet; you just —
 22 MR AL—ATTAR: It is jurisdictionally permitted, that is for
 23 sure. Is it fair? That is the issue. So we have
 24 recoiled from that, because people want to sue third
 25 parties who would expect to be solvent.

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1 MR JUSTICE RICHARDS: Yes. But in your skeleton, you
 2 don't — at 44.2 — 41.4.2.2 you don't just say: we have
 3 recoiled from this because we don't think it is fair.
 4 And this was the point I didn't understand. You say: we
 5 have recoiled from this because we don't think we can,
 6 because we would have to value the potential claim —
 7 MR AL—ATTAR: Let me explain this. So option 1 for dealing
 8 with these claims is that you take away the scheme
 9 creditor's rights against the third parties, and like
 10 the basic concept I have explained. That generates
 11 a question: is it fair to do so? For example, there are
 12 cases where there are undisputed claims, for example
 13 against parent guarantors, where there have been
 14 attempts to strip the guarantee. And if you try and
 15 strip an undisputed claim against a solvent guarantor,
 16 then it does not take much to see why that is unfair,
 17 and the courts have understandably slammed those cases
 18 that have done that. So we are not going to do that.
 19 We have not imposed that solution.
 20 Now, the second solution we might have done is to
 21 say: well, look, you have got claims against us. You
 22 have also got claims against them. If you have a claim
 23 against them, they would have a claim against us. So at
 24 this point in time, we could actually say that you are
 25 all scheme creditors. You, because you assert claims.

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1 Them, because if you pursue those claims, they would
 2 have claims so they are contingent creditors.
 3 MR JUSTICE RICHARDS: Under the contribution claim?
 4 MR AL—ATTAR: Exactly. So we could expand the scheme.
 5 MR JUSTICE RICHARDS: I see, yes.
 6 MR AL—ATTAR: We could have a wider class of scheme
 7 creditors and this is the point made in the skeleton,
 8 but because we can't take away people's rights without
 9 compensation, we would have to pay more to that span of
 10 class.
 11 MR JUSTICE RICHARDS: Ah I see.
 12 MR AL—ATTAR: And because we have a limited fund we would
 13 dilute the return.
 14 MR JUSTICE RICHARDS: I see. Can I play it back to you, to
 15 make sure I have understood it. So what is canvassed in
 16 41 — 41.4.2.2 is a world in which scheme creditors are
 17 not just former investors in the fund, but are also
 18 third parties who might be sued; and you scheme and
 19 contribute their right to a contribution.
 20 MR AL—ATTAR: Yes.
 21 MR JUSTICE RICHARDS: Sorry, you scheme their rights to
 22 a contribution. And what you are saying is that it
 23 wouldn't be a good idea, because if we took a — if we
 24 released their right to a contribution, we would have to
 25 pay them something; and there would then be money going

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1 out of the door, if I can put it bluntly.
 2 MR AL—ATTAR: We have a limited pot.
 3 MR JUSTICE RICHARDS: And there would be less to pay to the
 4 investors.
 5 MR AL—ATTAR: That is exactly it.
 6 MR JUSTICE RICHARDS: Okay, you have explained it. Sorry,
 7 I had not followed it from the skeleton.
 8 MR AL—ATTAR: That's why when we say that it is novel it's
 9 because we have tried to, as it were, square the circle
 10 in favour of the scheme creditor, by providing us with
 11 certainty of release because otherwise we won't get the
 12 parent contribution and the scheme will not fly.
 13 MR JUSTICE RICHARDS: I understand.
 14 MR AL—ATTAR: Allowing them to sue third parties. And the
 15 way the contribution mechanism is — works is that it
 16 allows a full suit against a third party and it allows
 17 retention and recovery of that third party's fair share.
 18 MR JUSTICE RICHARDS: Yes, it's that — the thing we have
 19 just been discussing; I hadn't followed from the
 20 skeleton. I do now follow it. I'm sorry. I think it
 21 probably was right for me to make sure I understand the
 22 contribution reduction scheme, but I think I do
 23 understand it.
 24 MR AL—ATTAR: I am obliged. Thank you, my Lord.
 25 MR JUSTICE RICHARDS: Thank you. Shall we break there?

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1 MS TOUBE: My Lord, yes.
 2 MR JUSTICE RICHARDS: Let's come back at just a bit after
 3 11.30. Actually, make let's make it 25 to, because it
 4 is quite a long morning for the transcribers. Let's
 5 come back at 25 to.
 6 (11.21 am)
 7 (A short break)
 8 (11.34 am)
 9 MR JUSTICE RICHARDS: Yes, Ms Toube?
 10 MS TOUBE: So my Lord, having understood what the CRM does,
 11 what is said about it is that it, in practical terms,
 12 bars proceedings against third parties. And as we said
 13 to your Lordship, there is no evidence that that
 14 dissentive actually occurs.
 15 In fact, the only evidence we have is evidence to
 16 the contrary. Can I ask your Lordship to turn up
 17 paragraph 25.1 of Mr Reid's first witness statement? It
 18 is at page 213 of the bundle.
 19 (Pause).
 20 MR JUSTICE RICHARDS: Yes.
 21 MS TOUBE: So I would just invite your Lordship to read
 22 paragraph 25.1, which goes over the page.
 23 (Pause).
 24 MR JUSTICE RICHARDS: Yes.
 25 MS TOUBE: So there is only one set of proceedings, which

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1 has been issued so far; and that set of proceedings, it
 2 has been made clear, will continue, no matter what
 3 happens with the scheme.
 4 And your Lordship will also note, just as an aside,
 5 the second point, which of course is FOS claims, if they
 6 exist, in relation to those claims — in other words,
 7 the third party claims — those will still exist.
 8 (Pause).
 9 So there's nothing wrong with this. There's nothing
 10 to show that, in practice, it does have this effect.
 11 There's nothing wrong with the explanatory statement, in
 12 the way it explains these things.
 13 There's nothing also, as we set out in the skeleton,
 14 the suggestion that it would work to modify this
 15 somehow, to limit it to what's paid under the scheme,
 16 because there would be a gap between the two in that
 17 event anyhow, but that's not what the scheme does,
 18 that's not what the scheme said it did; what it said it
 19 did is what it does do which is, it does not prevent
 20 claims being brought against third parties.
 21 (Pause).
 22 MR JUSTICE RICHARDS: Yes.
 23 MS TOUBE: So the next point that's made in relation to the
 24 explanatory statement are the assertions that are made
 25 in relation to Mr Drummond—Smith, the chairman of the

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1 investor committee. And we have dealt with those in
 2 paragraph 162 to 166 of our skeleton.
 3 Now, your Lordship saw yesterday, some bits of the
 4 engagement letter of Mr Drummond—Smith. But it is worth
 5 looking at another point in that letter, which is very
 6 important; and I know your Lordship has not seen it yet.
 7 This is at tab 36, page 970 of the bundle. And your
 8 Lordship will see there, paragraph 4:
 9 "As Chair, you shall be an independent
 10 contractor ..."
 11 Etc:
 12 "As detailed at paragraphs 7 and 8 ... in performing
 13 your function as Chair, you will act independently from
 14 the Company, and will have regard only to the Committee
 15 and the investors of the WEIF in performing your role."
 16 So that is an overriding principle of independence.
 17 Now, what is said in Mr Reid's witness statement —
 18 what is said against us is: but look, he was supposed to
 19 present a webinar saying that the scheme was fair; how
 20 could he be independent if he said that? And in
 21 Mr Reid's witness statement he said: well, obviously if
 22 he had reached a different conclusion, he would not have
 23 been asked to present such a webinar and then what is
 24 said in response to that is: ah but look, it says he has
 25 to do it. The answer is that he has to act in pursuance

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1 to his obligations and having regard only to the
 2 committee and the investors, if the committee and the
 3 investors had taken the view that the scheme was not
 4 fair, he could not have undertaken that. He could not
 5 have presented a webinar suggesting that it was fair.
 6 Not only that; if the investor committee had reached
 7 the view that the scheme was not fair, it was going to
 8 be very difficult to proceed with it anyhow, because
 9 obviously they needed to get a vote from creditors in
 10 favour.
 11 So Mr Reid makes it clear that he wouldn't have been
 12 required to do this, if the investor committee hadn't
 13 reached the conclusion it did. But it did. And as
 14 I said to your Lordship yesterday, Mr Drummond—Smith was
 15 not the only member of the investor committee. There
 16 were seven other members of that committee who voted in
 17 favour, and one who said that they couldn't reach
 18 a conclusion.
 19 So the points on independence are wrong and, in any
 20 event, not causative of anything. And the scheme
 21 creditors were, therefore, properly consulted.
 22 Now, Mr Etkind made a few more points, in relation
 23 to Mr Drummond—Smith. He suggested that, I think, the
 24 whole investor committee were guilty of deceit and
 25 hadn't done their job; and in fact, made lots of

1 complaints about what the committee should have done.
 2 Can I just deal with some of them?
 3 First of all, he suggested that the committee should
 4 have considered the real losses, and this is a point
 5 I have made before: that the investor committee was
 6 not — the investor committee was not in any position to
 7 make a decision about what real losses there were,
 8 because they are all disputed. Also, of course, there
 9 is a Marcus Parker and Leigh Day representative and
 10 other investors who no doubt would have known what their
 11 claimed losses were.
 12 He said that the committee should have taken legal
 13 advice about the FSCS position. Now, in fact, they did
 14 do that. We can see that from page 966 of the bundle.
 15 And that is paragraph 3.19 of the report. I'm sorry,
 16 paragraph 3.18 of the report.
 17 MR JUSTICE RICHARDS: 3.18?
 18 MS TOUBE: 3.18.
 19 MR JUSTICE RICHARDS: Yes, thank you.
 20 MS TOUBE: He said that — I think the assertion was made
 21 that the chair of the committee didn't disclose his
 22 position to the court; but of course, the engagement
 23 letter was exhibited to the report at the convening
 24 hearing.
 25 And I should say, there was no complaint made at the

1 convening hearing of any issues in relation to his
 2 independence, despite that engagement letter being
 3 there.
 4 So the bottom line is that there's nothing in this
 5 point and there's no misrepresentation in the
 6 documentation.
 7 Then the next point that's made is in relation to
 8 director releases. As I understand this point, it is
 9 accepted that there was reference to the director
 10 releases in the explanatory statement, as there was.
 11 Just for your note, that is at page 693. But what is
 12 also said is that it should have been in the directors'
 13 interests part of the document. And our answer to that
 14 is twofold. It is normal for it not to be in the
 15 directors' interests point. But in any event, you have
 16 to read the explanatory statement as a whole, and it was
 17 clear in the releases section. So again, nothing in
 18 that point.
 19 There was a point made in some of the notices of
 20 opposition, but not maintained by anybody yesterday;
 21 that the explanatory statement was misleading because it
 22 didn't expressly set out what the role of the FCA was,
 23 and what they had done.
 24 Now, as I say, I don't know if that is being
 25 maintained, but we do deal with that in paragraphs 158

1 to 161 of our skeleton. I wasn't proposing to say
 2 anything more about that.
 3 So then the other points that are made in relation
 4 to this issue, which is not proper consultation and
 5 information, which are made in my learned friend's
 6 skeleton and he raised, albeit more briefly yesterday,
 7 the chair — again, the chair of the committee wasn't
 8 an independent or effective means for scheme creditors
 9 properly to be consulted. We say this point falls away
 10 for the same reasons I have already explained.
 11 The next point was that the scheme was not the
 12 result of negotiations with creditors. My learned
 13 friend fairly accepts that there is actually no
 14 obligation to negotiate with creditors. But in any
 15 event, as your Lordship knows, the scheme was negotiated
 16 with the FCA, the parent, the company and then further
 17 developed with the investor committee, including the
 18 reduction of the reserve from 50 million to
 19 46.5 million.
 20 And my learned friend accepts that this isn't
 21 a freestanding point, but really his complaint is that
 22 his clients should have a better deal because they have
 23 brought claims.
 24 Now, none of these claims have been established. My
 25 learned friend's clients are, just like all the other

1 investors, unsecured creditors. And my learned friend,
2 I think, accepted that it was all right in the round for
3 the scheme creditors, as a collective, but his clients,
4 he said, would have a better, stronger negotiating
5 position for their disputed potential claims.

6 Now, I will just remind your Lordship of the voting
7 figures. A large majority of individual investors will
8 have the same claims, if they exist, as my learned
9 friend's clients. So all of these creditors have the
10 same rights. And if and insofar as they have different
11 interests, none of those interests was causative of the
12 vote. And there is nothing, apart from speculation, to
13 suggest that there would have been a better deal,
14 treating one group of creditors differently from
15 another, in circumstances where they were all unsecured
16 creditors.

17 MR JUSTICE RICHARDS: And just help me to navigate where
18 this point needs to be addressed, because I mean, if it
19 were the case that all of the Harcus Parker litigants
20 are getting a raw deal, under the scheme, as
21 a consequence of, for example, their stronger
22 negotiating position not being recognised or their legal
23 costs not being paid, where does that matter? Because
24 the fact that they are in the same class has already
25 been determined. That ship has sailed. So if they are

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1 in the same class, but perceived to be getting a raw
2 deal, where does that enter the balancing exercise?

3 MS TOUBE: Well, it could, if there were a question of
4 someone in the same class having an adverse interest.
5 So in other words: oh, I would like you to get less,
6 because if — in the relevant alternative you would get
7 more, so I want to exercise my right to vote to stop you
8 having a claim.

9 MR JUSTICE RICHARDS: I see.

10 MS TOUBE: But you would have to show that those adverse
11 interests were causative of the vote, which isn't the
12 case.

13 So it could go to that. But of course, what would
14 be said by anybody who had those notionally adverse
15 interests would be: well, you chose to issue
16 proceedings. Your claims are not any better than mine,
17 just because you have issued litigation. You don't have
18 a judgment in your hand. You have just got the same
19 disputed claims as me. So actually, you don't have any
20 better interest.

21 MR JUSTICE RICHARDS: So what you are canvassing is the
22 proposition that the people in the single class, some of
23 it, when exercising their vote, are motivated not by
24 their own self interest, which is fine, but by a wish to
25 do down Harcus Parker litigants, by causing them to have

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1 to wear their own legal costs and not have their
2 stronger negotiating position recognised. Is that the
3 adverse interest point?

4 MS TOUBE: Yes, yes.

5 MR JUSTICE RICHARDS: And your answer, I think, to the
6 adverse interest point is that people in the majority,
7 there is no evidence to suggest that they are trying to
8 do down Harcus Parker litigants, as distinct from
9 advancing their own interests of getting jam today, if
10 I can use a shorthand.

11 MS TOUBE: Absolutely.

12 MR JUSTICE RICHARDS: Have I got the submission right?

13 MS TOUBE: You have, yes.

14 MR JUSTICE RICHARDS: Okay, thank you.

15 MS TOUBE: So again, what this really boils down to is the
16 better deal argument, and that's, as we know, not a good
17 argument.

18 So that, I think, is all there is on the first part
19 of it, which is that: there wasn't proper consultation
20 or negotiation and therefore one can't rely on the vote
21 because it's not properly representative. So none of
22 those points, we say, land.

23 Then there were a series of points which were made
24 about fairness. So when we look at fairness, the only
25 question that's left now, once we have said: okay,

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1 everybody has been properly consulted, is: is this
2 a scheme that an intelligent and honest person, acting
3 in respect of their own interests, might reasonably
4 approve? So that is the question that we're asking, and
5 it's pretty hard to say, on the present deal, that it's
6 anything other than that.

7 But what is said by my learned friends are: first of
8 all, it's not the result of negotiations. Well, I've
9 dealt with that. It's not required to have been the
10 result of negotiations, and anyhow it was.

11 Then there are various points along the lines
12 of: not distinguishing between people who have brought
13 claims or disputed claims, etc, which is the same
14 discussion we have just been having, and there is
15 nothing in those points either.

16 Then the points are made again about denying the
17 right to proceed against third parties in practical
18 terms, and the same points apply in relation to those.

19 So once you get to the freestanding fairness points,
20 all of them fall, for the same reason as all the earlier
21 points fall. So this is a scheme that an honest and
22 intelligent person, acting in respect of their own
23 interests, could reasonably have approved — might
24 reasonably have approved.

25 Then there are a small — well, I say small —

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1 a handful of other points which were made by other
 2 parties which I haven't dealt with already. I'm just
 3 going to run through those, if I may.
 4 The first was the, if I can call it, the scheme
 5 should give a return of 298 million point. Mr Weight
 6 made these points. He put it in two ways, I think;
 7 either that the scheme should be rejected, because the
 8 settlement should have been 298 million, or that the
 9 scheme should be sanctioned but the FCA forced to seek
 10 the 298 million return.
 11 The answer to the first point is: the court can't
 12 force a settlement on the parties. So the scheme --
 13 your Lordship knows the settlement that was done. This
 14 is the scheme. It was put to creditors. It was voted
 15 on. The fact that others might have wanted more, not
 16 that there's any evidence there could possibly have been
 17 more, is irrelevant.
 18 So the first point falls, because of that.
 19 The second point is: could you force the FCA to seek
 20 the 298 million return? The answer is: no, the court
 21 has no jurisdiction to do that; and anyhow, the claims
 22 are being released. All the underlying claims are being
 23 released.
 24 MR JUSTICE RICHARDS: Sorry, I thought the second point was
 25 slightly different. I thought point 1 was, it was

1 suggested that I should refuse the scheme, because 298
 2 wasn't enough. I mean, I clearly have got jurisdiction
 3 to refuse to sanction the scheme. I thought the second
 4 point made was that I could sanction the scheme, but on
 5 condition that the FCA issue some sort of contribution
 6 notice or something against the investment manager.
 7 Have I -- I thought that was the way it was put. And
 8 I think you have kind of dealt with them --
 9 MS TOUBE: I had misunderstood. I thought that was against
 10 the company. So that is against someone else. Again,
 11 the court has no jurisdiction to do that. The point is
 12 simply that.
 13 MR JUSTICE RICHARDS: Yes.
 14 MS TOUBE: So there's nothing in either of those points.
 15 The next point was a series of points which were
 16 made by Mr Weight, Mr Pyatt, Mr Dickenson and also the
 17 TTF; that the real loss is higher than what the
 18 settlement is based on.
 19 MR JUSTICE RICHARDS: Yes.
 20 MS TOUBE: Now, we deal with this in paragraphs 177 to 178
 21 of our skeleton.
 22 The first point is the point I have made before,
 23 which is that these are asserted losses, not proved
 24 losses. Mr Dickenson fairly accepted that these were
 25 the losses, as he perceived them to be. And in this

1 context, again, of course, the TTF sought to rely on
 2 decided FOS cases, but they are decided FOS cases
 3 against different entities.
 4 So "the real loss is higher" point is an assertion.
 5 And even in relation to the outcome of the FCA
 6 investigation, the FCA make it clear, rightly, that it's
 7 not possible to rely on that figure as an established
 8 figure, because it's open to dispute; and that's
 9 Mr Walsh's witness statement, paragraphs 39 to 42, at
 10 page 337 of the bundle.
 11 So although it is no doubt the case that the parties
 12 who addressed the court yesterday feel certain that they
 13 know what their losses were, that is not a basis on
 14 which the court can proceed. The losses might be zero
 15 or they might be 298 or they might be something
 16 different.
 17 MR JUSTICE RICHARDS: And a lot -- I mean, I think some
 18 reliance in this connection is placed on the FCA saying
 19 that the scheme is fair. Can I just test what that is
 20 based on? Because one of the points we heard from
 21 investors and their counsel yesterday was this idea that
 22 the FCA has focused on compensation for liquidity
 23 breaches, and that's how that's driven to this
 24 calculation of the first mover advantage, because the
 25 regulatory breaches of the FCAC's principles are based

1 on liquidity failings, failure to manage liquidity.
 2 But what was said yesterday was that the underlying
 3 claims by investors against the company, not just
 4 limited to liquidity failings; it is also said that the
 5 investments were bad, or shouldn't have been made; which
 6 goes potentially to loss of capital, loss of investment
 7 return.
 8 So when the FCA comes up with their 298 figure, is
 9 there any evidence that they focused on liquidity
 10 failings, having considered other possible failings as
 11 well, such as making bad investments. If so, obviously
 12 that would tend to suggest -- that would perhaps
 13 increase the amount of comfort one derives from the
 14 FCA's assertion that 298 is the right figure.
 15 If the FCA hasn't looked at poor investments at all,
 16 then it might be said to decrease the weight that comes
 17 from the FCA figure, because they have only looked at
 18 a narrow part of the picture.
 19 Sorry, do you see the point I'm making?
 20 MS TOUBE: I do. The FCA tells us what their investigation
 21 was, at page 1194.
 22 MR JUSTICE RICHARDS: Thank you. This is what I was looking
 23 for. 1194?
 24 MS TOUBE: So it's tab 39.
 25 MR JUSTICE RICHARDS: Yes. Yes.

1 MS TOUBE: Can I just invite your Lordship to read those
 2 three pages, because they say that's what they did.
 3 MR JUSTICE RICHARDS: Yes, thank you. Let's have a look at
 4 what ...
 5 (Pause).
 6 Oh, I see. Right, okay.
 7 (Pause).
 8 Yes.
 9 MS TOUBE: So this is what they did. So that's the answer
 10 to your first question, which is: is there evidence
 11 about what they looked at?
 12 MR JUSTICE RICHARDS: Yes. Now, that -- when I was very
 13 quickly reading paragraph 3 there, that didn't
 14 necessarily suggest to me that they were looking at poor
 15 investments.
 16 MS TOUBE: And that's my second point.
 17 MR JUSTICE RICHARDS: Yes.
 18 MS TOUBE: So imagine -- let's just take some figures. So
 19 imagine the investor claims, let's call them that, that
 20 might exist; remembering that they might be zero; but
 21 say that might exist. The FCA say they are £100; but
 22 they might be £200.
 23 MR JUSTICE RICHARDS: Mm--hm, yes.
 24 MS TOUBE: And what you have got in the alternative is,
 25 everything is disputed, all the assets of the company

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1 are used up.
 2 MR JUSTICE RICHARDS: Yes.
 3 MS TOUBE: It may or may not be proved and if it is proved,
 4 then you would go to the FSCS, somewhere down the line,
 5 etc. So you have got the relevant alternative, which is
 6 uncertainty, delay and possibly zero.
 7 It doesn't actually matter whether the claims are
 8 £100 or £200.
 9 MR JUSTICE RICHARDS: Yes.
 10 MS TOUBE: So it doesn't matter, even if they're right, that
 11 the claims were more.
 12 MR JUSTICE RICHARDS: Yes.
 13 MS TOUBE: Because when somebody is voting on it, what
 14 they're saying is: I'm being offered this deal; this is
 15 the only deal that's on the table. I'm being told, in
 16 the absence of this deal, I get uncertainty, possibly
 17 more, possibly less, some time in the future.
 18 Is that something that an intelligent and honest
 19 person, acting in respect of their own interests, might
 20 reasonably approve? Answer: yes.
 21 MR JUSTICE RICHARDS: Yes, I see. I mean, I see that.
 22 I mean, I see that argument. But if investors are
 23 shown -- and I'm not at all saying this is the case.
 24 But suppose investors are presented with a proposal and
 25 it is said: oh, and by the way, the FCA thinks this

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1 proposal is fair, which is a statement that is made in
 2 the explanatory memorandum, I think. Maybe -- does it
 3 come afterwards? Maybe. But the FCA have looked only
 4 at part of the piece, liquidity, and not something else.
 5 Does that undermine the weight to be given to the FCA's
 6 assurance by an investor?
 7 MS TOUBE: So there are two points there.
 8 The first is that when you're voting on the scheme,
 9 the explanatory statement tells you exactly what you
 10 have just seen, about what the FCA did. So you can look
 11 at that and say: what does their figure come from? How
 12 do they get to it and what were they looking at? So you
 13 know -- you can look at it and say: well, I don't agree
 14 with that. I actually think they should have been
 15 paying for more, because you know exactly what they were
 16 doing, because they have said so.
 17 MR JUSTICE RICHARDS: Yes, yes.
 18 MS TOUBE: So that's the first point.
 19 The second point is: can you rely on the FCA? Well,
 20 the FCA are the regulator who are acting in the
 21 interests of the creditors as a whole.
 22 MR JUSTICE RICHARDS: Yes.
 23 MS TOUBE: So you can disagree with the FCA, and it's clear
 24 that a lot of people on that side of the courtroom do.
 25 But it is also entirely reasonable to say: I agree with

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1 them.
 2 MR JUSTICE RICHARDS: Yes. And of course, the FCA --
 3 I mean, it is appearing via counsel today to say that
 4 they support the scheme. I mean, it might be
 5 a question -- it might be something that I explore with
 6 Mr Haywood when he makes his submissions. But if they
 7 are appearing by counsel today to support the scheme, in
 8 full knowledge that it is a compromise of claims, not
 9 just for liquidity breaches, but for breaches said to
 10 have involved the making of bad investments, it might be
 11 said that they wouldn't say that, if they thought that
 12 there was a big piece of the puzzle that wasn't being
 13 explored.
 14 MS TOUBE: Well, and also, there's only a limited pot. What
 15 is happening under the scheme is not -- I could
 16 understand -- I'm not shutting myself out from any
 17 future case, but I could understand more in argument if
 18 what you were doing was, under the scheme, you were
 19 looking at claims and the only claims -- and you were
 20 valuing claims; and only the claims that you were
 21 valuing were claims in relation to liquidity, and you
 22 were shutting people out from valuing their claim in any
 23 other way, with any other thing. But that's not what's
 24 happening here. People are purely being valued in
 25 relation to what shares they had.

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1 MR JUSTICE RICHARDS: Yes.
 2 MS TOUBE: So there's nothing under the scheme which even
 3 attempts to value those claims. It just says: this is
 4 the pot we have got, we're going to divide it up, and
 5 this is how we're going to do it.
 6 MR JUSTICE RICHARDS: Yes.
 7 (Pause).
 8 MS TOUBE: Mr Al-Attar reminds me, of course; it, in
 9 a way — it might matter to a creditor what the FCA
 10 thinks, but the FCA is not voting on the scheme. So why
 11 the FCA thinks, and what conclusion the FCA has come to,
 12 is not the question that the court is asking itself. It
 13 is asking itself: could a creditor, the hypothetical
 14 creditor, come to this conclusion?
 15 MR JUSTICE RICHARDS: Yes.
 16 MS TOUBE: Your Lordship will also recall, the investor
 17 committee discussed matters with the FCA, and took great
 18 comfort from what they had done.
 19 MR JUSTICE RICHARDS: Yes, yes.
 20 MS TOUBE: So that is evidence, if one needs it, that honest
 21 and reasonable people can take comfort from what the FCA
 22 has done, understanding what they have done.
 23 MR JUSTICE RICHARDS: Yes; and, I mean, of course,
 24 supposing — of course I'm not saying this is the case.
 25 I just want to canvas a possibility. Suppose, in giving

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1 its confirmation that the scheme is fair, the FCA has
 2 overlooked a cadre of possible claims involving
 3 defective investment performance. They have focused on
 4 liquidity, lost sight of the fact that there is also
 5 a question of bad investment making here. Of course I'm
 6 not saying that is the case, but let's run with the
 7 thought experiment.
 8 Then, the FCA's reassurance that the scheme is fair
 9 becomes, it might be said, less secure.
 10 MS TOUBE: If one of two things were happening.
 11 (1): that the scheme was trying to value claims and
 12 was limited to certain claims.
 13 Or, if there was a bigger pot that could have been
 14 got, if there had been more claims.
 15 So imagine again, putting some figures on it, the
 16 FCA had come to the conclusion, wrongly, that the claims
 17 were just £100 and so £100 gets put in the pot and that
 18 is the deal. But actually, if the FCA had thought about
 19 it rightly, they would have realised that it was £200
 20 and then there would have been £200 in the pot.
 21 MR JUSTICE RICHARDS: Yes, yes. No, I — but I suppose —
 22 but I was going to take my example 1. Because there
 23 might be more in the pot, in the world, that we are
 24 discussing, where the FCA have overlooked something,
 25 coming from the FSCS; at least for, quote, "retail"

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1 investors. I suppose what I'm just seeking your views
 2 on is: if the FCA have overlooked some claims, or the
 3 possibility of a certain cadre of claims being made,
 4 might that mean that a retail investor has therefore
 5 potentially undervalued the benefit of rejecting the
 6 claim and fighting on and getting, not just compensation
 7 for liquidity, but compensation for defective
 8 investments covered by the FCA? Does this line of
 9 questioning make any sense?
 10 MS TOUBE: I understand the point. But again, the FSCS
 11 compensation point is equally uncertain, no matter what
 12 the underlying claims are.
 13 MR JUSTICE RICHARDS: Yes.
 14 MS TOUBE: So ...
 15 (Pause).
 16 So even if you thought that you had just liquidity
 17 claims, and you thought that only because the FCA said
 18 you had liquidity claims, so this is assuming for
 19 a start that investors don't know what claims they have.
 20 So let's assume that I have got an investor who relies
 21 entirely on the FCA saying: this is your only claim. It
 22 still has a binary choice. Here is my limited pot of
 23 what is on the table, compared to an uncertain choice of
 24 something, which is between zero and X, whatever X is.
 25 And your Lordship is saying: well, what if it's between

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1 zero and Y? And the answer is: well, we have to assume
 2 that at least some of these creditors do know what
 3 claims they have and they are not entirely relying on
 4 the FCA to tell them what they are and they haven't
 5 looked at the summary and said: oh well, that is my only
 6 claim.
 7 MR JUSTICE RICHARDS: Yes. Thank you for going with my
 8 thought experiment. I think overall what you are saying
 9 is that it remains the kind of thing that an intelligent
 10 investor could sanction, because ultimately the
 11 recurring theme going through the explanatory statement
 12 is that you get money today, as the price, and you give
 13 up the prospect of perhaps more tomorrow.
 14 MS TOUBE: Yes.
 15 MR JUSTICE RICHARDS: But you also are insulated from the
 16 risk of uncertainty tomorrow.
 17 MS TOUBE: Yes.
 18 MR JUSTICE RICHARDS: And whatever the — investors can be
 19 expected to know what their claims are, and it is not
 20 obviously irrational for an investor to decide to take
 21 money today and avoid the uncertainty that is
 22 highlighted in the explanatory statement.
 23 MS TOUBE: Exactly, my Lord. That is exactly our case.
 24 MR JUSTICE RICHARDS: Thank you, yes.
 25 MS TOUBE: So my Lord, that's the point on quantum of

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1 losses .
 2 Then there are a few small points left .
 3 The first is that the documents were too
 4 complicated.
 5 MR JUSTICE RICHARDS: Mm—hm.
 6 MS TOUBE: And really, what I would say is that — and this
 7 is a point, I should say, made by Mr Weight, Ms Baldwin
 8 and Mr Pyatt. There were a lot of people involved in
 9 drafting these documents, from all sides of the
 10 spectrum; and significant efforts were made by the
 11 company to respond to comments and, where they could, to
 12 simplify .
 13 For example, there were FAQs, there were videos.
 14 And just to remind your Lordship that the investor
 15 advocate takes the view that these were reasonably
 16 clear , in the circumstances.
 17 MR JUSTICE RICHARDS: Yes.
 18 MS TOUBE: So the documents were detailed, but we would say
 19 not too complicated. And in relation to the complaints
 20 about the voting forms, people did vote. Lots of people
 21 voted. And in fact, Mr Weight accepted that lots of
 22 people had no problem voting. So — and also I should
 23 remind your Lordship that there was a helpline to phone,
 24 if people had problems.
 25 Then there are the assertions that relate to: the

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1 documents were one—sided. Now, there is no problem that
 2 the documents made it clear that they were inviting
 3 investors to approve the scheme. But they also set out
 4 the negatives. And again, the investor advocate has no
 5 complaints and there was no misrepresentation, reading
 6 these documents as a whole.
 7 Then there was an assertion made by Mr Pyatt that
 8 those who invested through investment managers didn't
 9 have the right to vote.
 10 MR JUSTICE RICHARDS: Yes.
 11 MS TOUBE: Now, that's, of course, not right. The
 12 investor — the investment managers voted, because they
 13 are contractually entitled to, under their contractual
 14 agreements with the underlying investors. I think
 15 Mr Pyatt wanted there to be some change, so that that
 16 could be overridden in scheme voting, but that's not
 17 a matter for this court. If you have a contract with
 18 your investor manager which states investment manager
 19 that they vote, then that's what they do.
 20 MR JUSTICE RICHARDS: Yes.
 21 MS TOUBE: What's interesting is that you can actually see
 22 that seven of them actually voted against. You can see
 23 that from page 1131. So even in this case, the
 24 investment managers didn't vote everything as a yes.
 25 Then there was a point about there not being enough

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1 publicity for the scheme, so there were assertions that
 2 were made that it was difficult to find out about the
 3 scheme and maybe lots of people didn't know. We have
 4 dealt with that in our skeleton and your Lordship will
 5 also have seen paragraphs 38 to 42 of Mr Reid's second
 6 witness statement. That is at page 261. And I said to
 7 your Lordship yesterday that the company has actually
 8 gone above and beyond, to ensure that people should
 9 know.

10 And I won't take your Lordship to it now, but if you
 11 look at page 262, your Lordship can see the social
 12 media, TV and online campaigns, including the millions
 13 of people that it reached.

14 The final point —
 15 MR JUSTICE RICHARDS: So the investment manager point.
 16 I mean, reading the papers, there are some difficult
 17 questions that can arise as to who the scheme creditors
 18 actually are, which some hold as just bare nominee where
 19 I think the view is taken that it is the beneficiary who
 20 is the scheme creditor. Some hold a bit as bare nominee
 21 and a bit for themselves, where that seems to be
 22 a difficult question. The fact that some investment
 23 managers or intermediaries voted in their own name is
 24 just a function of who the scheme creditor is; is that
 25 correct?

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1 MS TOUBE: That is correct. And there was a vote validation
 2 exercise that took place, as your Lordship will have
 3 seen from the PwC report. There was quite a lot of care
 4 taken to identify whether people were actually creditors
 5 and how they were voting.
 6 MR JUSTICE RICHARDS: Yes. Yes, thank you.
 7 MS TOUBE: I think the final point is one that wasn't made
 8 orally, but was made in one of the notices of
 9 opposition, which is that the scheme creditors — there
 10 is a jurisdictional objection, because scheme creditors
 11 aren't creditors because they are disputed.
 12 MR JUSTICE RICHARDS: Yes, I was looking at that yesterday
 13 evening.
 14 MS TOUBE: That is paragraph 191 of our skeleton. It is
 15 just wrong, as a matter of law. Creditors are
 16 creditors, actual, future, contingent and so if you have
 17 a disputed claim, you are a contingent creditor.
 18 MR JUSTICE RICHARDS: And I get that. It seemed to me,
 19 I looked in vein for a definition of "Creditor" in the
 20 part 26, a statutory definition and I did not find one.
 21 We get this entirely from common law, I think, do we?
 22 MS TOUBE: Yes, yes. The cases make it clear that
 23 a creditor includes all .
 24 MR JUSTICE RICHARDS: Yes.
 25 MS TOUBE: So my Lord, unless you had any further questions

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1 for me, those are the end of my closing reply
 2 submissions.
 3 MR JUSTICE RICHARDS: Yes.
 4 MS TOUBE: And we would invite your Lordship to sanction the
 5 scheme. I think Mr Smith is looking for the —
 6 MR JUSTICE RICHARDS: Yes. As you might have had gathered,
 7 I have made a list of questions to ask you, which I have
 8 been slotting into your submissions. Let me make sure
 9 I have got all of them.
 10 (Pause).
 11 Right.
 12 Oh, yes. There was a reference to some
 13 pre-suspension claims being, quote, "carved out" from
 14 the scheme. Is that correct, and ...
 15 I think this was a point that one of the objecting
 16 investors made. Is it correct? It seemed to me that it
 17 was correct as a matter of drafting, and it is
 18 significant, I suppose.
 19 MS TOUBE: It is, and no, it isn't.
 20 MR JUSTICE RICHARDS: Yes.
 21 MS TOUBE: So we deal with this in our skeleton, I think,
 22 under the — thank you, paragraph 106. Yes, my Lord.
 23 104 to 108, but the key points are at 106.
 24 So the fact is that one can scheme whoever one wants
 25 to and leave out whoever one wants to, as long as there

1 is a genuine commercial reason for it. The only
 2 question is: would anyone who is left outside complain,
 3 because effectively there is going to be nothing for
 4 them? And the answer to this is: no. And these might
 5 get FSCS coverage, and the FSCS knows that if it tries
 6 to subrogate into an empty company, it is not going to
 7 get very much, and you will have seen they do refer to
 8 that in their letter.
 9 MR JUSTICE RICHARDS: I see.
 10 MS TOUBE: So yes, it is correct. But no, it isn't
 11 relevant.
 12 MR JUSTICE RICHARDS: Thank you.
 13 (Pause).
 14 Yes. You have dealt with all my questions as you
 15 have gone along. Thank you very much.
 16 MS TOUBE: Thank you, my Lord.
 17 MR JUSTICE RICHARDS: Yes. Mr Hayward.
 18 MR SMITH: I'm Smith, actually.
 19 MR JUSTICE RICHARDS: Mr Smith, is it? I'm so sorry. I can
 20 see you all right. I was thinking of repositioning my
 21 screen, but I think I can see you.
 22 Submissions by MR SMITH
 23 MR SMITH: Thank you, my Lord. My Lord, as you know, the
 24 FCA supports the position of the scheme company and
 25 thinks the court should sanction the scheme and we

1 support the submissions that were made by my learned
 2 friend.
 3 There are four topics I was going to address your
 4 Lordship on, relatively briefly, from the FCA's
 5 perspective, if I may.
 6 The first was the topic, in fact, she was just
 7 having an exchange with my learned friend about; what we
 8 call the subset argument. It is the argument that the
 9 298 million is not enough, or that it is just a subset
 10 of the overall losses which investors have suffered.
 11 My Lord, it is obviously necessary to have in mind
 12 that for present purposes, we are concerned with claims
 13 against LFSL; that legal entity.
 14 Now, LFSL, as your Lordship knows, was the
 15 authorised corporate director. It wasn't the investment
 16 manager of the fund. The investment manager was WIM,
 17 Woodford Investment Management, meaning that Woodford
 18 Investment Management took the decisions on which
 19 investments the Woodford Equity Investment Fund should
 20 make.
 21 Now, my Lord, the FCA's view, as a result of its
 22 investigations, is that so far as LFSL is concerned, the
 23 fault lies in relation to its oversight of the
 24 management of the liquidity of the fund, and not the
 25 investment performance of the assets within it.

1 Now, the FCA doesn't consider that LFSL was at fault
 2 in relation to the operation of the fund's investment
 3 mandate, or — except possibly to a limited extent, that
 4 it impacts on the issue of liquidity, the choice of
 5 investments.
 6 Now, just to deal with the point that was the
 7 subject of an exchange between your Lordship and my
 8 learned friend earlier. The FCA obviously did consider
 9 other forms of misconduct by LFSL. It is not the case
 10 at all that the FCA approaches an investigation like
 11 this, thinking: well, let me investigate liquidity
 12 issues in relation to the authorised corporate director.
 13 The FCA approached an investigation like this with
 14 a much broader mandate and indeed LFSL is not the only
 15 party that is the subject of the investigations and
 16 indeed the investigations remain ongoing and there are
 17 other parties that are the subject of the
 18 investigations; as the FCA press release made clear.
 19 But our position is that having looked at the
 20 position of LFSL, the fault, so far as LFSL is
 21 concerned, relates to liquidity.
 22 MR JUSTICE RICHARDS: And is that because, just as a matter
 23 of regulatory obligation, LFSL has no responsibility for
 24 the choice of investments or investment mandates; or is
 25 it acknowledged that they do have some responsibility,

1 but they, at least, LFSL, were thought not to have come
 2 up short?
 3 MR SMITH: Well, there are the two elements to it. I think
 4 it is fair to say that both elements come into play.
 5 I mean, the first is because LFSL had, in effect,
 6 engaged a proper investment management to carry out the
 7 investment management function.
 8 MR JUSTICE RICHARDS: I see.
 9 MR SMITH: Prima facie, it was entitled to rely on what the
 10 investment manager did.
 11 Now, there is also a second leg to the argument and
 12 I don't want to say too much about this, because
 13 obviously there are investigations ongoing. But there
 14 are other issues, then, about the scope and breadth of
 15 the investment mandate and the discretion, in fact, the
 16 investment manager had; its ability to choose what might
 17 actually be thought on the basis of the prospectus to be
 18 a wide range of investments. So there are the two
 19 layers, I think.
 20 But so far as LFSL is concerned, I think the
 21 position to make clear to your Lordship is that the
 22 investigation was approached with an open mind, but the
 23 conclusion as in relation to LFSL is that the failings
 24 lay in relation to liquidity, and didn't lie in relation
 25 to investment performance or compliance with the

1 investment mandate.
 2 MR JUSTICE RICHARDS: Yes. Sorry, is that something that --
 3 I mean, it's helpful to hear that.
 4 MR SMITH: Yes.
 5 MR JUSTICE RICHARDS: Is that something that is now being
 6 said on instructions or can I find this in the existing
 7 witness evidence of the FCA? Because when the subset
 8 argument was developed orally yesterday, I looked for it
 9 at the FCA's evidence and I myself couldn't see it.
 10 MR SMITH: No, you are correct. I'm making these
 11 submissions on instructions, and we are very happy to
 12 just confirm them, by way of witness statement. What we
 13 have not put in evidence is the point about the original
 14 scope of the investigation and the fact that
 15 specifically, other forms of misconduct in relation to
 16 LFSL were considered. But on instructions, that is the
 17 position.
 18 MR JUSTICE RICHARDS: I think, for my part, I think I would
 19 quite welcome that being confirmed in the witness
 20 evidence.
 21 MR SMITH: Yes. Well, we would be very happy to do that,
 22 my Lord. There is no difficulty with that.
 23 Now, the consequence of that is that, in the FCA's
 24 view, any compensation payable by LFSL, upon a claim in
 25 any process, is likely to be calculated by reference to

1 the losses arising, as a result of failures in liquidity
 2 management; rather than losses incurred by poor
 3 investment performance.
 4 Now, as we have said, conceptually, it's not
 5 actually entirely straightforward to calculate losses,
 6 resulting from a failure to manage liquidity.
 7 Conceptually, it's not a particularly easy task.
 8 But we think that the FCA total amount is probably
 9 the best way of doing that; and indeed, we haven't seen
 10 a better methodology put forward anywhere for
 11 calculating losses resulting from the liquidity
 12 mismanagement failings.
 13 Now, it is undoubtedly the case that in its latter
 14 years, investment performance of the Woodford Equity
 15 Investment Fund was poor, and it is undoubtedly the case
 16 that investors suffered losses as a result. But as
 17 I have explained, for its part, the FCA doesn't think
 18 that LFSL is likely to be liable for those particular
 19 losses.
 20 And so we don't really accept the premise of the
 21 subset argument, which is that the potential claims
 22 against LFSL, and I stress LFSL, for losses above
 23 298 million have validity. In our view, 298 million
 24 represents an accurate assessment of the full, valid,
 25 potentially valid claims against LFSL.

1 So if I can put it another way. We accept, I think,
 2 that the 298 million is a subset of the total losses
 3 that investors have suffered. That's undoubtedly right.
 4 But it is not, in our view, a subset of the losses
 5 recoverable against LFSL, and it is the latter which is
 6 the key question for present purposes, in our view.
 7 MR JUSTICE RICHARDS: Yes.
 8 MR SMITH: So that is the first point, and we will -- we are
 9 very happy to provide that further witness statement,
 10 which I don't imagine will take very much time at all.
 11 The second point was then just in relation to the
 12 jurisdiction, in relation to the claims concerning the
 13 FSCS and FOS. My learned friend touched on this and, in
 14 short, we agree with her submissions. It is obviously
 15 a point of some general importance as well, and I did
 16 just want to say something very briefly about it.
 17 In our submission, it is obviously very important to
 18 distinguish between the question of jurisdiction to
 19 compromise rights to a claim against the FSCS or under
 20 the FOS and the question of discretion, as to whether
 21 it's fair to sanction a scheme which does that. In the
 22 submissions, I think we have detected an elision perhaps
 23 to some extent of those two questions, but we
 24 respectfully submit that it's quite important that they
 25 are approached as distinct issues.

1 So far as jurisdiction is concerned, we submit there
 2 is no doubt that the scheme can remove such rights.
 3 As your Lordship suggested, it does seem to us that
 4 one needs to look at the FSCS and FOS differently, as
 5 they are slightly different, in terms of the legal
 6 analysis.
 7 So far as the FSCS is concerned, the ability to
 8 claim through the FSCS is simply derivative on the
 9 scheme creditor's ability to claim against the company.
 10 So if the scheme creditor's claim against the company,
 11 whether directly against the company or through the FOS,
 12 has been compromised by the scheme, and there simply
 13 isn't a subsisting claim to which the FSCS could apply.
 14 My Lord, just to make that good, I am sure your
 15 Lordship was taken to this, but you might find it
 16 helpful just to see the relevant provision of the COMP
 17 rules, which deal with this. It is in the authorities
 18 bundle, divider 42. Divider 42 is the compensation
 19 rules which form part of the FCA source book. And if
 20 you go to page 969, you should find Rule 8.2.3, headed
 21 "Limitation periods and claims extinguished by operation
 22 of law". What that provides is:
 23 "The FSCS must reject an application for
 24 compensation if ..."
 25 And then the relevant subparagraph is (2):

1 "The liability of the relevant person (or, where
 2 applicable, a successor) to the claimant has been
 3 extinguished by the operation of law ..."
 4 Then there is an exception in 8.2.5, but that's
 5 "Dissolved companies" and is not relevant here.
 6 But the basic principle is that if the underlying
 7 claim against the firm, in this case the scheme company,
 8 has been extinguished, then the ability to claim against
 9 FOS — the ability to claim against the FSCS is
 10 automatically excluded.
 11 So, as my learned friend submitted, it is not
 12 actually a case of removing rights to claim against the
 13 FSCS at all. All that is happening is that the right to
 14 claim against the scheme company is being removed, and
 15 that has the consequence, as a matter of the FSCS's own
 16 rules, of precluding the ability then to claim against
 17 the FSCS.
 18 Now, so far as FOS is concerned, the position is
 19 that it is ultimately essentially the same, in our
 20 submission. As your Lordship will appreciate, the FOS
 21 itself is not a person or an entity against which
 22 a scheme creditor can claim. It is not a source of
 23 funds, it is not a person that has liability towards
 24 a scheme creditor. It is simply a forum for determining
 25 claims against the company, in the same way that a court

1 is. The analogy, we submit, is with the court;
 2 essentially the FOS is just a different forum or medium
 3 for determining claims.
 4 Now, the short point again is that if the underlying
 5 claim has been compromised by the scheme, then there is
 6 no extant liability that could properly form the subject
 7 of an award by FOS. So if the scheme compromises the
 8 underlying claim, you can't then go to a court and
 9 say: nonetheless, give me a judgment. I mean, the court
 10 would say: well, no, your claim has been extinguished by
 11 the scheme. And in our submission, the position is the
 12 same in relation to FOS.
 13 In support of that, your Lordship has seen, I think,
 14 the FOS letter. It might be worth just bringing it back
 15 up. It is page 453 of the bundle.
 16 (Pause).
 17 I think your Lordship looked at this before, but it
 18 is really the penultimate, antepenultimate paragraphs on
 19 that page, beginning "However". So understandably, the
 20 FOS don't commit themselves, one way or another, but you
 21 can see what they say in the second paragraph, the last
 22 paragraph there:
 23 "We consider that if the Scheme is sanctioned by the
 24 Court, this is likely to engage the discretion in
 25 DISP 3.3.4AR(5) ... And, our general expectation is

1 that it would be appropriate for an ombudsman to
 2 consider dismissing a complaint ..."
 3 MR JUSTICE RICHARDS: But I think you go further, don't you,
 4 you say that they have to? Because the underlying —
 5 here we are talking about a world where the sanction is
 6 sanctioned.
 7 MR SMITH: Sanctioned, exactly.
 8 MR JUSTICE RICHARDS: You are saying that it is not a matter
 9 of discretion; it is a matter of obligation, because of
 10 the extract from the rules you have just shown me.
 11 MR SMITH: No, we are dealing with the FOS now. I was
 12 showing you the FSCS before.
 13 MR JUSTICE RICHARDS: Oh, it was the FSCS, right. That was
 14 the FSCS. Right, sorry. We are now on FOS, okay.
 15 MR SMITH: Right. We are now on FOS. So I mean, ultimately
 16 I submit that the position is the same. I think
 17 formally FOS would retain a discretion, but in our
 18 submission, where the underlying liability has been
 19 extinguished by the scheme, it is very difficult to see
 20 how that discretion could ever be exercised, other than
 21 in one direction.
 22 And as I say, I mean, although FOS doesn't — don't
 23 commit themselves, and one can understand why they
 24 wouldn't want to tie their hands in advance, the sense
 25 from that letter, in my submission, is that that is what

1 one could reasonably expect them to do.
 2 So the only additional point in relation to the FOS
 3 is that it's true that the scheme also specifically
 4 removes the ability to make a complaint to FOS, and my
 5 learned friend referred you to this, in relation to the
 6 definition of "proceedings", and clauses 6.1 and 6.2 of
 7 the scheme, which include the ability to make
 8 a complaint to FOS. So it includes that additional
 9 covenant or restriction on the ability to make a claim.
 10 But in our submission, that is nothing more than
 11 being ancillary on the underlying release of the scheme
 12 claim. If you release the underlying scheme claim, it
 13 would be entirely usual, and, in our submission,
 14 perfectly proper, to include a covenant preventing the
 15 scheme creditor from suing in a court on that released
 16 claim.
 17 MR JUSTICE RICHARDS: Yes, because otherwise it might slip
 18 through or costs might be incurred and --
 19 MR SMITH: Exactly. And all that is doing is exactly the
 20 same, in relation to the position -- in relation to FOS.
 21 So in our submission, we don't see that there is any
 22 difficulty with that.
 23 And ultimately, on analysis, these releases don't
 24 actually raise any issues about releasing claims against
 25 third parties at all, because in substance, all that's

1 happening here is that one is releasing the claim
 2 between the scheme creditor and the company and that is
 3 then having certain consequences in relation to the FSCS
 4 and the FOS, but it is all driven and derivative on the
 5 release of the claims between the scheme creditor and
 6 the company.
 7 So that is jurisdiction.
 8 So far as discretion is concerned, my learned friend
 9 has made all the points, I think. I mean, I was going
 10 to just make these submissions, if I may, by reference
 11 to the open letter from the academics, which was
 12 provided to your Lordship.
 13 MR JUSTICE RICHARDS: Yes.
 14 MR SMITH: You may recall, the reason for doing that is
 15 obviously that open letter engages some -- or what are
 16 said to be some wider points of policy and concern which
 17 would engage the position of the FCA.
 18 As a general point, what we will say is that the
 19 open letter really ignores the fact that the compromise
 20 of the ability of the scheme creditors to claim through
 21 the FOS and to make claims under the FSCS is part and
 22 parcel of a commercial settlement. It is simply a quid
 23 pro quo; it is part of a commercial settlement,
 24 representing a choice which is given to the scheme
 25 creditors, essentially as to whether to have the

1 certainty of payment now or to take the uncertainty and
 2 the prospect of getting something different, maybe more,
 3 maybe less in the future. And the release of the
 4 claims, the ability to claim against FSCS and FOS; it is
 5 simply part of that choice and it is a commercial choice
 6 ultimately.
 7 And so far as the FCA is concerned, it does seem to
 8 us to be perfectly rational for scheme creditors to
 9 prefer the certainty of a payment today, rather than
 10 an uncertain return -- an uncertain return tomorrow, and
 11 that seems to us a perfectly rational position for the
 12 scheme creditors to take.
 13 The wider concerns expressed in the open letter,
 14 about the consequences, as it's said, of compromising
 15 the ability to claim through FOS and the consequent
 16 ability to claim under the FSCS are, in our view, with
 17 respect to those authors, exaggerated and unrealistic.
 18 It is not right, in the present case, to say that the
 19 right to claim under the FOS is being stripped away for
 20 no consideration. Those rights have been compromised as
 21 part of a deal, under which the investors will receive
 22 the certainty of significant payouts now.
 23 And we would disagree with the suggestion that this
 24 sort of arrangement gives rise to any systemic or
 25 broader implications at all and, in particular, the idea

1 that this would affect the financial stability of the UK
 2 or the integrity of the UK financial system; in our
 3 submission, is wrong; and that is overblown.
 4 The compromise in this case is simply part of
 5 a commercial practical arrangement which would result in
 6 benefits going to the scheme creditors and it is
 7 essentially a choice for them to make as to whether they
 8 would prefer receiving that certain benefit now or
 9 whether they would prefer the alternative route of
 10 uncertainty, potentially receiving more, potentially
 11 receiving less, at some uncertain time in the future.
 12 So we don't agree that there are really any sort of
 13 wider systemic or policy issues; it is simply an issue
 14 as to whether this compromise on the facts of this case
 15 is one which a rational scheme creditor could approve.
 16 So my Lord, that is discretion.
 17 And the final topic I will deal with very briefly is
 18 the idea that a condition ought to be attached to the
 19 sanction of the scheme, requiring us, I think, to issue
 20 some sort of action or claim against, I think, Woodford
 21 Investment Management; it wasn't entirely clear.
 22 In our submission -- well, we would oppose that. In
 23 our submission, the court does not have jurisdiction to
 24 do that. In any case, it wouldn't be appropriate for
 25 the court to do that, in the context of ongoing

1 investigations . And as I say, and as the FCA press
2 release made clear, the work is ongoing in that respect
3 and the investigations are continuing. Even if there
4 was jurisdiction , it clearly wouldn't be appropriate for
5 the court to, in effect , prejudge the outcome of those
6 investigations , by requiring some sort of claim to be
7 issued there.

8 So, my Lord, unless I can assist you further, those
9 are the topics we wanted to address, which we thought
10 were relevant.

11 MR JUSTICE RICHARDS: Thank you very much, Mr Smith.
12 I don't have any questions.

13 What I was going to do is, I was going to give
14 Mr Falkowski a brief right of reply on that, because
15 I am conscious that some things were said in relation to
16 the subset points that weren't in the evidence that
17 Mr Falkowski could have read when making his
18 submissions. So unless anyone thinks differently ,
19 I think I would like to hear from Mr Falkowski, in
20 relation to -- just a right of reply on what was said in
21 response to your subset point.

22 Submissions by MR FALKOWSKI

23 MR FALKOWSKI: Well, my Lord, it is a very unsatisfactory
24 position . You will have seen from the letter that
25 I wrote before I was even instructed, inviting the

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1 investor advocate to answer the points that
2 I anticipated I would be raising, I didn't even -- I had
3 an acknowledgement. I had no substantive reply to any
4 of those points. The question I asked was: had this
5 point been considered at all? And if --

6 MR JUSTICE RICHARDS: Well, no. The question -- sorry.
7 I might be we might slightly be -- the question
8 you asked was: had the question of taking statutory
9 rights away been considered?

10 MR FALKOWSKI: Yes.

11 MR JUSTICE RICHARDS: What I'm canvassing is: I had
12 a discussion, I think it was with Ms Toube and Mr Smith
13 on this concern that was expressed in some of the
14 submissions on behalf of TTF, that the recoverable
15 claim, the recoverable loss of investors might be more
16 than the amount that the FCA took into account.

17 MR FALKOWSKI: Yes.

18 MR JUSTICE RICHARDS: And Mr Smith has now said on
19 instructions, broadly: no, it isn't; as he explained in
20 his submissions.

21 It was really that point that I wanted to --

22 MR FALKOWSKI: Yes, my Lord; sorry. The 77% point.

23 MR JUSTICE RICHARDS: Well, the "Is the FCA compen -- is the
24 298 million enough", I guess. That --

25 MR FALKOWSKI: My Lord, it is not satisfactory, in my

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1 submission, for this just to be made at this stage,
2 after this length of time and to be expected to deal
3 with this on the hoof is, in my submission, not fair to
4 those who oppose this scheme.

5 MR JUSTICE RICHARDS: Yes.

6 MR FALKOWSKI: There are many, many people who are affected
7 by this and on whose behalf, in a way, I speak.

8 So it is unsatisfactory and, in my submission, the
9 court has to proceed on the basis of the evidence that
10 has been filed to date.

11 I appreciate that my Lord has been very flexible in
12 the way that evidence has come in, and some of it has
13 been coming in late and after time.

14 But this is a situation where it is a very well
15 resourced party, where the point has been made and known
16 in advance, and the very well resourced party of the FCA
17 could and should have addressed it in the wider way that
18 my learned friend does now in his speech.

19 MR JUSTICE RICHARDS: Yes. What should I do about this?

20 MR SMITH: Sorry, this point wasn't raised in advance. It
21 wasn't raised in advance.

22 MR JUSTICE RICHARDS: Well, I think that was much -- my
23 initial reaction; the point was raised in response to
24 the way, I think, you and -- and in fairness, members of
25 individual Woodford investors made the point. So I'm

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1 not myself sure that anyone is at fault in not including
2 it in the witness evidence. The subset point kind of
3 emerged during the course of submissions, quite
4 properly, and then I think Mr Smith addressed it in his
5 response, quite properly.

6 I'm not sure that there has been a failing by the
7 FCA in this regard.

8 MR FALKOWSKI: Well, if that's not a criticism that is
9 fairly put, then I would withdraw that as a criticism.

10 But I would agree, respectfully , my Lord, that it should
11 be confirmed in evidence.

12 MR JUSTICE RICHARDS: Yes, okay. Thank you.

13 MR FALKOWSKI: My Lord, there was just one point, and
14 I appreciate the point about the right of reply and the
15 absence of it, etc. But could I just make one point in
16 respect of the Payward case?

17 MR JUSTICE RICHARDS: Yes.

18 MR FALKOWSKI: Obviously, the --

19 MR JUSTICE RICHARDS: Well, probably. I mean, you are
20 probably straining, you are probably getting a right of
21 reply that you don't necessarily have, but --

22 MR FALKOWSKI: Well, my Lord, the trouble was that it wasn't
23 addressed, when we put it --

24 MR JUSTICE RICHARDS: Yes, why don't you say it, and --

25 MR FALKOWSKI: If I could just say, it is not a case --

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1 first of all, it is not an UCTA case; it is an unfair
2 terms and consumer contracts regulations case, pursuant
3 to the EC directive.

4 Secondly, Payward was not confined just to the
5 points in that particular case. It was — it actually
6 states, if my Lord looks at paragraph 120, I think it
7 is, and then at paragraph 153, it refers to FSMA being
8 an expression of UK national policy.

9 That is the only point that I wanted to add there.

10 And thank you for the indulgence, and to my learned
11 friend for the same.

12 MR JUSTICE RICHARDS: Thank you. Thank you.

13 Right. In that case, I'm not going to give judgment
14 now. I would like to reserve judgment on this. There
15 has been a lot of material that I would like to reflect
16 on.

17 What I would just like to canvas with the parties is
18 the timetable. Often these things — I get the sense
19 that this isn't — no one will say their case isn't
20 urgent, but I get the sense that this isn't as urgent as
21 those schemes where there is a restructuring hanging,
22 dependent on the outcome and all sorts of things. That
23 is not a coded message to say that I'm going to keep you
24 waiting for a long time, but it does seem to me that
25 a judgment in a matter of days is not needed. I was

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1 thinking of delivering judgment, trying to get
2 a reserved judgment to you in the next couple of weeks,
3 but tell me what you need and I will try to accommodate
4 it.

5 MS TOUBE: My Lord, we are obviously conscious of wanting to
6 get on with it as soon as we can, but we absolutely
7 cannot say that it is a matter of urgency.

8 I should say that a lot of us involved in this court
9 are involved in a trial that starts in about two and
10 a half weeks.

11 MR JUSTICE RICHARDS: Right.

12 MS TOUBE: On a contested restructuring; I think most of us,
13 one way or another. So it may be that we are slower to
14 respond to a draft judgment, if I can put it that way.

15 MR JUSTICE RICHARDS: Yes.

16 MS TOUBE: I'm speaking on behalf of, however many of us
17 there are involved in McDermott.

18 MR JUSTICE RICHARDS: Yes. It seems to me that a separate
19 form of order hearing isn't likely to be needed, because
20 I'm either going to sanction the scheme or I'm not and
21 if I sanction the scheme, your order is quite short
22 saying: please sanction the scheme in the schedule
23 attached. So it seems to me that the order at least
24 could be dealt with by email.

25 MS TOUBE: Yes.

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1 MR JUSTICE RICHARDS: It may be that someone, probably not
2 all parties, but someone might be dissatisfied with my
3 judgment and might want to seek permission to appeal.

4 Again, what I was thinking of doing on that — what
5 I was thinking of doing on that is to try to get a draft
6 embargoed judgment out within the two weeks that
7 I mentioned; give the parties a week or so, given the
8 point that you have made on other trials, to provide
9 typos and the kind of things that are said on embargoed
10 judgments; and also maybe to make a written application
11 for permission to appeal within, say, a week of the
12 embargoed judgment being sent.

13 Because that's what I was thinking.

14 Mr Crossley?

15 MR CROSSLEY: The only other point, judge, that might need
16 to be dealt with as a consequential matter is the costs,
17 both the convening hearing that has been reserved and of
18 this hearing.

19 MR JUSTICE RICHARDS: Right.

20 MR CROSSLEY: Now, I don't know whether that would require
21 another hearing. One hopes not. But that just is
22 another matter in the air that may need to be dealt
23 with, in addition to an appeal.

24 MR JUSTICE RICHARDS: Okay. Is there not a standard
25 position on costs?

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1 MS TOUBE: Not quite.

2 MR JUSTICE RICHARDS: No, not quite.

3 MS TOUBE: No. So there is a general discretion in the
4 court, spelled out in Virgin Active, as to what to do in
5 relation to the costs of those opposing; and
6 effectively, the court will take into account whether
7 the points that were raised were helpful, even if wrong.
8 So in other words, the points that the court properly
9 had to consider, even if they ultimately decided against
10 the creditor, or whether they were hopeless points.

11 MR JUSTICE RICHARDS: Oh right, okay.

12 MS TOUBE: And so there is some discussion to be had, both
13 in relation to the convening hearing and in relation to
14 the sanction hearing.

15 In relation to any application for permission, again
16 I'm sort of slightly conscious of what people might be
17 doing at the same time as your Lordship's judgment comes
18 out.

19 Can I put it this way. If, when it comes out, we
20 all find ourselves in a terrible time bind, perhaps we
21 can write to your Lordship saying: would you mind
22 awfully if we took a little bit longer?

23 MR JUSTICE RICHARDS: Yes, yes, yes, yes.

24 MS TOUBE: What I wouldn't like to do particularly would be
25 to slow down the judgment itself coming out, but it

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1 might be that you would extend time for permissions for
 2 applications — for appeal, permission to appeal, or
 3 costs or whatever else —
 4 MR JUSTICE RICHARDS: Yes.
 5 MS TOUBE: — for a little bit longer, for those who are
 6 tied up in other things, to be able to get their heads
 7 around the judgment, if I can put it that way.
 8 MR JUSTICE RICHARDS: Yes. I suppose what I had in mind was
 9 that if I do decide to sanction the scheme, so the
 10 application for permission is that I shouldn't have
 11 done, then it might be — that might need to be dealt
 12 with quite quickly, before the order is sealed, because
 13 otherwise — once the order is sealed, the scheme can be
 14 taken off to Cardiff and given effect to; unless you're
 15 prepared to say that ...
 16 MS TOUBE: Yes. There is a three-week delay, effectively,
 17 between the sanction order and registration and
 18 everything else.
 19 MR JUSTICE RICHARDS: I didn't know that; right.
 20 MS TOUBE: And this also isn't one of those schemes where
 21 things immediately disappear and things happen.
 22 MR JUSTICE RICHARDS: I see.
 23 MS TOUBE: So it is not quite as much of a worry as it might
 24 otherwise be.
 25 MR JUSTICE RICHARDS: Okay. Well, shall we leave it this

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1 way. I will try to get you a reserved judgment, a draft
 2 embargoed reserved judgment within the next couple of
 3 weeks.
 4 I will give the parties seven days from receipt of
 5 that embargoed judgment to provide comments,
 6 typographical comments, and apply for permission to
 7 appeal in writing.
 8 If any party thinks that the deadline for applying
 9 for permission to appeal is too tight, of course I will
 10 consider extending it by a few days, here and there.
 11 I probably won't extend it for three weeks, but
 12 I probably will extend it by a few days.
 13 But I think — I don't want the embargoed judgment
 14 to be out — embargoed for too long.
 15 MS TOUBE: I — absolutely, my lord.
 16 MR JUSTICE RICHARDS: So I think it is going to be —
 17 seven days would be a hard deadline for comments.
 18 I might even ask for typographical comments.
 19 Seven days. We will say seven days for comments on the
 20 embargoed judgment.
 21 The next question I have got; the embargoed
 22 judgments. We take them very seriously and we take the
 23 embargo very seriously and people will have seen
 24 judgments of the Court of Appeal where people have
 25 received very stern tellings — off for breaching the

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1 requirements of an embargo.
 2 What I would propose to do is to send the embargoed
 3 judgment to the counsel from whom I'm hearing. I think
 4 it should be — the company, should be entitled to see
 5 it as well. But what I don't think I am content, or
 6 I would need some persuading, is that the embargoed
 7 judgment could be seen, for example, by all 7,000 of
 8 Marcus Parker's clients and indeed, I wouldn't propose
 9 to send it to objecting — to the individuals who have
 10 made submissions, because they are not really parties;
 11 they are people who have turned up and been very
 12 generous with their time to explain their perspective,
 13 but they are not parties.
 14 So I would propose that the embargo — I'm going to
 15 send it to counsel who have appeared — can be shared
 16 with the company, can be shared with relevant personnel
 17 at the FCA, can be shared with Marcus Parker, I suppose
 18 can be shared with the two or three named individuals at
 19 the Transparency Task Force.
 20 But what I don't want is the embargoed judgment
 21 going out to the world at large.
 22 MS TOUBE: My Lord, we understand that. It is really not
 23 a matter for us, who sees it on that side, but we would
 24 share your Lordship's concerns about: the wider it goes,
 25 the more difficult it is to enforce the embargo.

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1 May I just mention, we also would need to show it to
 2 the scheme supervisors.
 3 MR JUSTICE RICHARDS: Yes. Well, can I suggest — sorry.
 4 I will hear from those most affected by what I'm saying,
 5 and then let's circle back.
 6 Mr Crossley?
 7 MR CROSSLEY: My Lord, we are content with the embargo just
 8 to be to — in our case, to me and Marcus Parker.
 9 MR JUSTICE RICHARDS: Yes, thank you.
 10 MR FALKOWSKI: I can only speak for the entity that
 11 instructs me, and I'm happy with the proposal that
 12 my Lord makes.
 13 MR JUSTICE RICHARDS: Yes, okay. Thank you. Can
 14 I therefore suggest that — please can everyone who has
 15 appeared today, can they just send my clerk a list of
 16 named individuals to whom they would like to be able to
 17 share the embargoed judgment? And then the embargo will
 18 be applicable to those individuals.
 19 MS TOUBE: Can we suggest, in order for your clerk not to
 20 have a lot of separate emails, that people send it to my
 21 solicitors and then it comes from us in one list.
 22 MR JUSTICE RICHARDS: That would be so appreciated. Thank
 23 you. Yes, please. That is not a — I shouldn't be
 24 ordering that. I should be thanking you for the
 25 suggestion. Yes, thank you very much. Let's do it that

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1 way. Is there anything more that I need to deal with
 2 today?
 3 Well, in that case, I am going to close by thanking
 4 everyone for their very clear submissions. I look out
 5 and I see a very, very full courtroom, and we have
 6 experienced a very hot courtroom. Lots of people have
 7 put lots of work into this. I am grateful to the teams
 8 from whom I have heard.
 9 I am also grateful to the individual investors, who
 10 have taken their time to come here and indeed, to attend
 11 by Teams. There is benefit in hearing the dissenting
 12 perspective, and people who gave up their time to share
 13 the objective -- the dissenting perspective; their time
 14 and effort in doing that is appreciated as well.
 15 So I'm going to reserve judgment and you will hear
 16 from me further in due course.

17 (12.54 pm)
 18 (The hearing adjourned until a further date)

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I N D E X

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 5 Submissions by MR SMITH87
 6 Submissions by102
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