Neutral Citation Number: [2026] EWHC 1555 (Admin)

Case No: AC-2024-LON-003318, AC-2024-LON-003499, AC-2024-LON-003464 and AC-2024-LON-003282

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/06/2026

Before :

MR JUSTICE DEXTER DIAS

- -

Between :

THE KING
-on the application of-

BARCLAYS BANK UK PLC
NATIONAL WESTMINISTER BANK PLC
VANQUIS BANK LIMITED
SANTANDER UK PLC — **Claimants**

- and -

FINANCIAL OMBUDSMAN SERVICE LIMITED — **Defendant**

- and –

AARON DOMER
ARNOLD GAJRAJ
DEBORAH CAMPBELL
JOJO BROWN — **Interested parties**

- and –

FINANCIAL CONDUCT AUTHORITY — **Intervenor**

- -
- -

Javan Herberg KC and Ajay Ratan (instructed by **Eversheds Sutherland (International) LLP**) for **Barclays Bank UK plc**

John Taylor KC (instructed by Pinsent Masons LLP) **for National Westminster Bank plc**
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Saima Hanif KC (instructed by Addleshaw Goddard LLP) for **Santander UK plc**
James Strachan KC and Adam Boukraa (instructed by the Financial Ombudsman Service Limited) **for the Defendant**
Monica Carss-Frisk KC and Celia Rooney (instructed by the Financial Conduct Authority) **for the Intervenor**

Hearing dates: 9-10 July 2025 and 25 March 2026
(*Judgment circulated in draft: 15 June 2026*)

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Approved Judgment

Remote hand-down: this judgment was handed down remotely at 11.00 am on 24 June 2026 by circulation to the parties or their representatives by e-mail and release to the National Archives.

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THE HON. MR JUSTICE DEXTER DIAS

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Abbreviations: DS, para X (defendant's skeleton argument, para X); DSS (defendant's supplementary skeleton argument). Claimants' skeleton arguments in the following order C1: Barclays; C2: NatWest; C3: Vanquis; C4: Santander; I: intervenor (FCA)).

Mr Justice Dexter Dias :

1. This is the judgment of the court.

2. To assist the parties and the public to follow the main lines of the court's reasoning, the text is divided into 14 sections, as set out in the table of contents above. The table is hyperlinked to aid swift navigation.

I. Introduction

3. This case concerns four claims for judicial review.

4. The case marks a novel legal departure. It is the first known instance of the Financial Conduct Authority ("FCA"), the statutory regulator that developed the rules that govern the conduct of the Financial Ombudsman Service ("the FOS" or "the ombudsman service"), intervening in a case to oppose the position taken by the FOS.

5. The FCA intervenes in each of four claims brought by banks against the Financial Ombudsman Service Ltd as the operator of the FOS. The banks extended credit facilities to members of the public. Four customers complain that their credit relationship with the bank is unfair largely due to extending unaffordable credit facilities, whether by way of overdraft or credit card. The parties agree that the relevant test of unfairness in these credit relationships is section 140A of the Consumer Credit Act 1974 ("section 140A" and "CCA 1974").

6. The four banks made the initial challenge to the FOS's new interpretation of its jurisdiction over consumer complaints in decisions which were all made in July 2024. The banks submit that the complaints, subject to limited exceptions that do not affect the fundamental legal analysis, were brought out of time. They failed to comply with the FOS's jurisdictional rules on complaint time limits, and the ombudsmen could not assert jurisdiction over the entire credit relationship, which would involve both investigation and, if appropriate, redress.

7. In its pre-action correspondence, the FOS acknowledged that it has adopted a new legal interpretation. It said this was following a "review [of] its approach to the legal question of the scope of its jurisdiction". The primary question for the court is whether the FOS's interpretation of the law about complaint time limits and scope of jurisdiction is right in law.

8. The FOS recognises that it is by no means "the master of the limits of its jurisdiction" (*R (Chancery (UK) LLP) v FOS* [2015] EWHC 407 (Admin) ("*Chancery (UK)*"), per Ouseley J, para 66) and informs the court that it has "no agenda about its jurisdiction".

Instead, it "simply attempts to interpret its jurisdiction under the law as recently stated by the Supreme Court". It cites the decision of the Supreme Court in October 2023 in *Smith v Royal Bank of Scotland plc* [2023] UKSC 34 ("*Smith*") that in turn drew on another Supreme Court decision, *Plevin v Paragon Personal Finance Limited* [2014] UKSC 61 ("*Plevin*"). Both *Smith* and *Plevin* will need careful consideration. They each examined section 140A for subtly different reasons.

9. Barclays Bank UK plc ("Barclays"), the first claimant, may be correct in its submission that the proper interpretation of the FOS's jurisdiction potentially "has huge consequences in thousands of cases". Santander UK plc ("Santander"), the fourth claimant, has filed evidence that since the new approach assumed by the FOS, the number of complaints against the bank has more than doubled, from 31,000 to 71,000 (Santander, Annual Report 2025). The FOS's own report for 2025 indicates that it received 305,000 new complaints, which gives an indication of the scale of the service it offers to the public, and how many consumer complaints may be affected by its jurisdictional stance.

10. The four claimant banks applying for judicial review are as follows. Barclays is represented by Mr Herberg KC and Mr Ratan. National Westminster Bank plc ("NatWest") is represented by Mr Taylor KC. Vanquis Bank Limited ("Vanquis") is also represented by Mr Taylor KC. Santander is represented by Ms Hanif KC. Permission was granted to the four claimants by Macdonald J on 5 and 6 February 2025. The parties consented to Barclays "going first" with the other claimants providing non-duplicative submissions after that.

11. The FOS, the defendant in each claim, is represented by Mr Strachan KC and Mr Boukraa.

12. The customers who originally complained to the FOS about the conduct of the banks are interested parties. They are Aaron Domer (Barclays), Arnold Gajraj (NatWest), Deborah Campbell (Vanquis) and Jojo Brown (Santander). The interested parties are not represented before me and filed no submissions.

13. On 1 May 2025, Bourne J granted the FCA permission to intervene. The FCA is represented by Ms Carss-Frisk KC and Ms Rooney. The court is grateful to all counsel for the quality of their submissions and continued assistance.

II. The dispute in outline

A. The FCA and the FOS

14. The FCA is a statutory body corporate, charged with regulating financial services and markets in the United Kingdom. The FCA's predecessor, the Financial Services Authority ("FSA"), operationally set up the FOS as an alternative dispute resolution ("ADR") scheme to offer consumers an alternative to court litigation where complaints arise in the provision of financial services. The FOS was established by primary legislation on 1 December 2001 under Part XVI of the Financial Services and Markets

Act 2000 ("FSMA 2000"). Section 225(1) of FSMA 2000 states that the relevant part of the statute:

> "provides for a scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person".

15. The FOS appoints ombudsmen as designated independent people. Another expression of the objective of the ombudsman scheme can be found in the FSA's statement of compatibility with its general duties in the joint response by the regulator and the FOS to the draft rules governing the FOS's jurisdiction (CP33: Consumer complaints and the new single ombudsman scheme, November 1999 ("CP33")). CP33 says at para 3.3:

> "**The consumer protection objective**
>
> 3.3 The new single ombudsman scheme will play a key and complementary part in helping the FSA to achieve the appropriate degree of protection for retail consumers, by providing them with a free, accessible and user-friendly alternative to the courts."

16. Both the FCA and the FOS share a consumer protection function (on the FOS's function, see *FCA v BlueCrest Capital Management (UK) LLP* [2024] EWCA Civ 1125, per Popplewell LJ, para 78). Although the defendant framed its criticism of the FCA more narrowly in this written submission (DS, para 12), at the oral hearing it submitted in terms to the court that in opposing the FOS's new interpretation of its jurisdiction, the FCA has failed to have regard to the consumer protection objective informing its general statutory duty as regulator. This is a serious criticism that I must examine. It is a criticism the FCA strongly refutes.

17. Given the dispute between the FCA and the FOS, it is noteworthy that in the process of formulating the draft rules for the ombudsman scheme's jurisdiction and procedures, the FOS worked closely with the FSA. Together they produced joint consultation papers and policy statements in 1999-2000, of which CP33 is but one example. All this makes it more striking that the FSA's successor, the FCA has taken the step of intervening to oppose the new interpretation of the law the FOS has adopted. The statutory regulator is "greatly concerned" that the ombudsman service has fundamentally erred in law in asserting a new, expanded and expansive jurisdiction to deal with customer complaints. The FCA says the new formulation is contrary to the time limit it created as statutory regulator under its rule-making powers conferred by Parliament. The FOS opposed the FCA's intervention in these proceedings.

B. The meaning of jurisdiction

18. The case concerns the limits of the FOS's jurisdiction.

19. The jurisdictional limit engaged may be posed in this way: when a complaint by a customer (a consumer of financial services) is made about the financial services received or not received, which acts or omissions (which "events complained of") are in or out of time? Put another way, which acts or omissions that consumers may wish to complain about are not time-barred and thus fall within the defendant's jurisdiction

for investigation and redress? The legally accurate determination of the scope of and limits to the FOS's jurisdiction is a question of hard-edged law, not discretion (*Chancery (UK)*, paras 66, 76).

20. Much rests on a clear understanding of what is meant by jurisdiction. In this case it means the power to investigate and, if appropriate, grant redress following a complaint. I have had cited to me the case of *Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette* (2002-03) 5 ITELR 311 ("*Symonette*"), and in particular the definition of jurisdiction at para 32. In this judgment, I will sometimes term this understanding of jurisdiction – investigation and redress – as jurisdiction in the *Symonette* sense.

21. I pause to note that the defendant disputed the relevance of *Symonette* (DSS, para 38). However, the only purpose the claimants rely on *Symonette* for is the proposition that the term jurisdiction includes a consideration not just of investigation but also of relief (whether it is "called for"). This was ultimately not controversial, and the defendant accepted that the granting of relief is part of the nature of jurisdiction as a concept. All the parties recognise that the extent that the ombudsman can investigate complaints and grant redress following a determination of a complaint in favour of the complainant is at the heart of the dispute in these claims.

22. To avoid confusion and imprecision, a sharp distinction must be drawn between this understanding of jurisdiction as the investigative and redress power over the entire credit relationship, and the consideration of the credit relationship as a whole to determine whether the credit relationship is fair. The latter is not an exercise of jurisdiction over the entire credit relationship, but uses the history of the relationship to assess its overall fairness at the point of determination. Under section 228 of FSMA 2000, the ombudsman must determine what is fair and reasonable in all the circumstances of the case, and this includes taking into account section 140A of the CCA 1974.

23. As will be seen, at times during submissions, this distinction became blurred. It should not be. It is a vital conceptual difference that lies at the heart of this case.

C. The complaints and sections 140A-B

24. In each of the four complaints in this case, the relevant bank either extended credit facilities on a credit card (Barclays/Vanquis) or extended borrowing facilities on a bank overdraft (NatWest/Santander). The relationship between the creditor-bank and debtor-consumer is alleged by each customer to be unfair for the purposes of section 140A or has been treated as such by the ombudsman.

25. By way of brief background, the preamble to the CCA 1974 explains that the statute's purpose is to establish a "new system" for the protection of consumers. Three decades later, sections 140A–140D were inserted into the CCA 1974 by section 20 of the Consumer Credit Act 2006. They replaced sections 137–140, which had allowed the court to reopen "extortionate credit bargains" in order "to do justice between the parties". The provisions were deemed overly technical and set too high a bar for court intervention (see Briggs LJ (as he then was) in *Plevin* v *Paragon Personal Finance Limited* [2013] EWCA Civ 1658, para 52). The new statutory provisions grant the court wider and more flexible powers and promote greater consumer protection through the

concept of an "unfair relationship" (*Scotland v British Credit Trust Ltd* [2014] EWCA Civ 790, per Kitchen LJ, para 25).

26. While the citation of blocks of statutory provision is rarely helpful, the content of sections 140A-B is so central to the dispute between the parties that I must set out its relevant aspects now. Section 140A provides:

> "**140A Unfair relationships between creditors and debtors**
>
> (1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following–
>
> (a) any of the terms of the agreement or of any related agreement;
>
> (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
>
> (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement)."

27. Section 140B provides, as relevant:

> "**140B Powers of court in relation to unfair relationships**
>
> (1) An order under this section in connection with a credit agreement may do one or more of the following–
>
> (a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);
>
> (b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;
>
> (c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;
>
> (d) direct the return to a surety of any property provided by him for the purposes of a security;
>
> (e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;

> (f) alter the terms of the agreement or of any related agreement;
>
> (g) direct accounts to be taken ...
>
> …
>
> …
>
> (9) If, in any such proceedings, the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary."

28. I have found it of great assistance in approaching sections 140A-B to use the two-stage rubric set out by Lord Leggatt in *Smith*. Lord Leggatt says at para 16:

> "**How the regime operates**
>
> 16. It can be seen that, in dealing with a claim by a debtor under these provisions, the court is required to follow a two-stage process. The first stage is to determine whether the relationship between the creditor and the debtor arising out of the credit agreement is unfair to the debtor because of one or more of the matters specified in section 140A(1). If the court finds that the relationship is unfair for that reason, the court must then proceed to the second stage and decide what, if any, order to make, selecting from the list of options in section 140B(1)."

29. I will occasionally use the shorthand Stage 1 and Stage 2. I understand the essential purpose of these distinct stages in this way:

> **Stage 1: classificatory**. Determining the status of the credit relationship: is it fair or unfair for section 140A purposes?
>
> **Stage 2: remedial**. Determining what discretionary remedial order, if any, to make under section 140B following a finding of unfairness under section 140A.

30. Of importance are the rules on time limits for making complaints issued by the FCA. They can be found in what is commonly referred to as "the Handbook", and that part of the Handbook formally entitled "Dispute Resolution: Complaints" (often abbreviated to "DISP"). The proper interpretation of its rule on time limits (DISP 2.8.2 R) has featured prominently in the dispute between the parties. The FCA (when FSA) authored DISP 2.8.2 R. I come to this in more detail shortly.

D. *Plevin* and *Smith*: the genesis of corrective responsibility

31. Following the Supreme Court handing down its decision in *Smith* in October 2023, and drawing on both *Smith* and *Plevin*, the defendant took its new position on how to interpret the scope of its jurisdiction. The defendant derives from *Plevin* what it calls a "corrective responsibility". Of the numerous concepts discussed in this case, this is the most important and controversial.

32. Corrective responsibility is said by the FOS to be the responsibility on a creditor in a creditor-debtor relationship to correct unfairness that the creditor has produced. The defendant derives from *Smith* (especially para 66) "an emphatic new construction of section 140A" that it was "bound to take into account". In *Smith*, a creditor-bank failed to correct unfairness by the time the credit relationship between it and the two claimant consumers ended. The claims in *Smith* seeking redress for that section 140A unfairness were held by the Supreme Court to be "brought in time" (para 69). This is because although the claims were brought many years after the unfair payments ended, the unfairness had not been corrected by the time the credit relationship ended. Time only started to run when the unfair and uncorrected relationships ended, because at that point nothing more would change and an assessment of fairness could be made at that fixed and identifiable point. As the Supreme Court points out in *Smith*, the statute is phrased in the present tense: whether the relationship "is" unfair (Lord Leggatt, paras 16, 19; Lord Hodge, para 87).

33. Accordingly, at the heart of the dispute between the parties in the instant case is the defendant's submission that "*Smith* makes clear that banks cannot invoke a limitation defence where the credit relationship subsists". This is certainly true, and not disputed by any party, for court claims involving legal questions about accrual of causes of action (see Section VIII(c) below and the discussion of *Smith*). Furthermore, it is not disputed that the credit relationships with all the consumers/customers in these four claims continued at the point that the ombudsmen determined their complaints against the banks. This has a vital implication on the defendant's case. The defendant submits that if the fairness remains uncorrected, the creditor's failure to correct is a relevant omission and amounts to a fresh "event complained of" for the time limits test in DISP 2.8.2 R. This test is found in Chapter 2.8 of DISP which is entitled "Was the complaint referred to the Financial Ombudsman Service in time?". DISP 2.8.2 R, as relevant for immediate purposes, states:

> "The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:
>
> …
>
> …
>
> (2) more than:
>
> (a) **six years after the event complained of.**"

34. The defendant's case is that uncorrected unfairness results in none of the four complaints being out of time for DISP 2.8.2 R purposes; thus, none of the complaints is beyond the defendant's jurisdiction as there are continuing acts/omissions being complained of (the ongoing failures to correct unfairness).

35. The defendant advances two routes (my term) to such jurisdiction. Route 1: corrective responsibility; Route 2: "acts" in time that open up jurisdiction for the whole credit relationship. Noting the definition of jurisdiction in the *Symonette* sense, each route asserts the power to investigate and grant redress for the entirety of the credit relationship.

36. The claimants and the intervenor submit that this analysis is wrong in law. They apply to quash the four jurisdiction decisions reliant on it. Put shortly, they submit that no ongoing corrective responsibility can be gleaned from *Plevin* (nor *Smith*). There is no basis in law deducible from *Plevin* that a failure to correct or mitigate unfairness in a credit relationship amounts to a fresh "event" for DISP 2.8.2 R. They submit that *Smith* decides when a cause of action accrues under section 140Aand not when a complaint is out of time under DISP 2.82. R. *Smith* concerned a civil claim in the county court and does not assist with the interpretation of the defendant's incomparable complaints jurisdiction.

37. This is necessarily a thumbnail sketch, offered at the outset to give context to the diverse arguments that I now examine.

III. Grounds

38. Permission has been granted on two grounds (set out here as framed by Barclays):

- **Ground 1**: error of law in concluding that the FOS has jurisdiction over the entire complaint.

- **Ground 2 (Barclays only)**: incompatibility of the ombudsman's construction with Article 1 of Protocol 1 to the European Convention on Human Rights ("A1P1" and "ECHR").

39. Barclays helpfully subdivides Ground 1 into the following five sub-grounds:

- **Ground 1(a)**: the ombudsman wrongly applied the case law on limitation in respect of section 140A claims when purporting to identify the "events complained of" for the purposes of the jurisdictional test in DISP 2.8.2 R;

- **Ground 1(b)**: further or alternatively, the ombudsman wrongly treated a "relationship" under section 140A of the CCA 1974 as an "event" within the meaning of DISP 2.8.2 R;

- **Ground 1(c)**: further and in any event, the ombudsman misunderstood the law under section 140A of the CCA 1974 and drew an erroneous conclusion from it when applying DISP 2.8.2 R;

- **Ground 1(d)**: still further and in any event, the ombudsman wrongly concluded without explanation or justification that "the event complained of" had a continuing character and that, if any single part of that event was within time, the entire complaint would be in time; and

- **Ground 1(e)**: the ombudsman's characterisation of Mr Domer's complaint was vitiated by each and all of the errors of law identified in grounds 1(a)-(d) above.

40. Some initial observations will focus the issues further. Ground 1(e) is a catch-all and adds nothing of substance. As to Ground 1(b), whether the defendant ever claimed an unfair relationship is itself a relevant "event" for time limits purposes is disputed by the parties: the defendant disavowing any such claim; the opposing parties alleging that the defendant has resiled. I need not rule on that dispute because at trial no one suggested that a relationship is a qualifying event for DISP 2.8.2 R. I will need to say something about the question nonetheless, albeit more briefly.

41. At the heart of the key dispute is a simple question. Rather, it is a question that can be simply posed. While the case is based on complaints by members of the public about credit-related financial services provided by banks, such examples do not delimit the scope of the jurisdiction claimed by the FOS, and it extends to complaints about financial services in insurance and investment. Therefore, the question may be posed in this way:

> When can an ombudsman investigate and grant redress for the entire credit relationship?

42. At trial, the parties supplied the court with a list of agreed issues for the court's determination. Agreed Issue 1 is whether the defendant's:

> "conclusion in the relevant final decision that it had jurisdiction over the entirety of the complaint referred to it [is] wrong as a matter of law by virtue of its interpretation and application of the time limit in DISP 2.8.2 R(2)."

43. So there can be no misunderstanding, vital to this agreed question is the *Symonette* sense of jurisdiction: the power to investigate and, if appropriate, grant redress, not just consideration of the entire history of the credit relationship to determine unfairness.

IV. Judgment scheme

44. Following these broad introductory remarks, the scheme of the judgment from here is to identify the common ground between the parties in Section V and then in Section VI outline the relevant legal framework that underpins the FOS's jurisdiction. In Section VII, I set out the most relevant aspects of the four impugned decisions, before turning to the two grounds relied on.

45. Ground 1 challenges the defendant's interpretation of the law governing its jurisdiction. It is divided into the two prime bases (routes) the defendant advances to defend the lawfulness of the decisions. Therefore, in Section VIII I examine Route 1. This is the claim by the defendant that the existence of a "corrective responsibility" enables the defendant to have jurisdiction over the entirety of the credit relationship. To examine this question, I analyse *Plevin* and *Smith*, before exploring three ancillary arguments submitted by the parties. In Section IX, I examine Route 2: the defendant's claim to jurisdiction based on acts within the time limit. I provide the court's overall conclusion on Ground 1 in Section X.

46. Ground 2 concerning A1P1 is dealt with more briefly in Section XI. I consider the defendant's section 31(2A) defence in Section XII, before turning to the question of relief in Section XIII and summarising the overall disposal in Section XIV.

V. The common ground

47. Despite the intensity of dispute between the defendant and the other parties, there is a measure of common ground. It repays identifying it at the outset. The following 13 propositions are agreed by the parties, subject to the observations that immediately follow below:

   i) Jurisdiction over a complaint means the power to investigate and if appropriate grant redress in accordance with section 229 of FSMA 2000.

   ii) These claims exclusively concern the FOS's compulsory jurisdiction.

   iii) In each of the four complaints, the credit relationship was continuing at the point the ombudsman determined jurisdiction.

   iv) It is for the ombudsman to determine what a complaint is about (subject to public law considerations).

   v) There is no rationality or procedural fairness challenge to any of the characterisations of the complaints by the individual ombudsmen. (But see below).

   vi) When an ombudsman entertains a complaint that a credit relationship is unfair, the ombudsman will have regard to the relevant law, which includes section 140A.

   vii) In assessing whether the credit relationship is fair, the ombudsman may consider the whole of the credit relationship to assess fairness.

   viii) The ombudsman's jurisdiction to entertain a complaint requires an in-time event. (This is subject to exceptions under DISP 2.8.2(2)(b) and 2.8.2(3)-(5) that do not arise in these claims.)

   ix) An event means an act or omission.

   x) No party submits that an unfair relationship is an "event" for DISP 2.8.2 R purposes.

   xi) Each ombudsman has concluded as a matter of law the concept of a corrective responsibility arises from *Plevin* and *Smith*.

   xii) In each complaint, the ombudsman has determined that the complaint is about the continuing participation in and perpetuation of an unfair relationship for the purposes of section 140A, including because of uncorrected unfairness.

   xiii) Each ombudsman concluded that the time limit in DISP 2.8.2 R does not start until the credit relationship ends.

48. Some observations about the propositions arise. In respect of proposition 5, there are two points. First, in respect of Route 2 ("acts"), the claimants, joined by the FCA, submit that the acts basis for claiming jurisdiction is irrational and procedurally unfair. Second, in the NatWest claim, the FOS has admitted an error when it said that NatWest had consented to FOS looking into Mr Gajraj's complaint about services provided since 31 August 2017.

49. In respect of proposition 10, the FOS submits that it has not advanced a case that an unfair relationship is an event. This suggestion that the defendant has advanced an event-as-relationship position is disputed by the other parties. However, in oral submissions before me, the FOS did not submit that a relationship is an event. The defendant informs the court that it "reserves" its position about the concept.

VI. Legal framework

50. The relevant provisions are now set out, with emphasis provided when helpful.

The FOS's jurisdictions

51. Section 225(2) of FSMA 2000 provides that the statutory dispute resolution scheme is to be administered by a body corporate. The scheme operator is Financial Ombudsman Service Limited. FOS appoints a panel of persons who appear to have appropriate qualifications and experience. The FOS has two jurisdictions: compulsory and voluntary, and the case exclusively concerns its compulsory jurisdiction. Authorised persons or firms providing services ("activities") that are regulated services are obliged to be subject to the FOS's compulsory jurisdiction. The consumer credit service provided in the four claims here, whether by credit card or overdraft facility, is one such regulated activity.

52. Complaints about regulated activities are governed by statutory provision under FSMA 2000 and rules in the FCA's Handbook. The rules governing the compulsory jurisdiction are found in a chapter entitled "Dispute resolution: Complaints" ("DISP"). The suffix "R" indicates a rule; "G" guidance.

53. At DISP 3.1.1 G, guidance is provided about the purpose of Chapter 3, that part of the Handbook concerned with the FOS's complaints handling procedures:

> "Purpose...
> The purpose of this chapter is to set out:
> (1) the procedures of the Financial Ombudsman Service for investigating and determining complaints;
>
> (2) the basis on which the Ombudsman makes decisions; and
>
> (3) the awards which the Ombudsman can make."

54. It will be noted that there is a resonance between this guidance and what jurisdiction means in the *Symonette* sense of the limits and bases of powers, with procedures for the

investigation of complaints, the bases of their determination and the redress the ombudsman has power to award as a result of a determination in favour of a complainant. As will be explained in more detail shortly, section 229 of FSMA 2000 grants the ombudsman power to grant redress including a variety of awards and remedial directions.

What is a complaint (and about what)?

55. A complaint is a defined term in the Handbook glossary. As material here, the definition of complaint includes:

> "any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service, (…) or a redress determination, which:
>
> (a) alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience."

56. Section 226(1) of FSMA 2000 explains what a complaint relates to - what it is about

> "A complaint which relates to **an act or omission** of a person ("the respondent") in carrying on an activity to which compulsory jurisdiction rules apply is to be dealt with under the ombudsman scheme if the conditions mentioned in subsection (2) are satisfied."

57. It should therefore be noted that the statutory language specifically uses the words "act or omission". It is important to observe the difference between the complaint – the "expression of dissatisfaction" – or making of a complaint and the act or omission, which is what the consumers complain about.

58. The conditions under section 226(2) include that (1) the complainant is eligible and wishes to have the complaint dealt with under the scheme; (2) the respondent was an authorised person at the time of the act or omission to which the complaint relates; and (3) the act or omission to which the complaint relates occurred at a time when the compulsory jurisdiction rules were in force in relation to the activity in question. There is no dispute that each of these conditions is met in the instant complaints.

59. Section 226(3) defines "compulsory jurisdiction rules" as meaning the rules "made by the FCA for the purpose of this section" and which specify the activities to which they apply. The rules made pursuant to that provision represent binding rules of subordinate legislation that define the FOS's jurisdiction (*R (Bankole) v Financial Ombudsman Service* [2012] EWHC 3555 (Admin) ("*Bankole*"), per Sales J (as he then was), para 13). The rules are contained in the FCA's Handbook. The rules are delegated legislation made under FSMA 2000.

What is the FOS's complaints jurisdiction?

60. The part of the Handbook devoted to complaints ("DISP") forms a statutory scheme.

61. Chapter 2 of DISP is headed "Dispute resolution: Complaints". It has a general title "Jurisdiction of the Financial Ombudsman Service". DISP 2.1 is concerned with "Purpose, interpretation and application". DISP 2.1.1G explains that the purpose of the chapter is to set out rules and guidance "on the scope of the Compulsory Jurisdiction". DISP 2.3 is entitled "To which activities does the Compulsory Jurisdiction apply?". DISP 2.3.1R provides:

> "The Ombudsman can consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on one or more of the following activities."

62. It will be noted that the Handbook rule exactly replicates the statutory language in section 226(1) about what is the subject-matter of the complaint: an "act or omission". Parliament has mandated that the FOS's compulsory jurisdiction must be subject to a time limit prescribed by its regulator. This is made clear by paragraph 13(1)(a) of schedule 17 of FSMA 2000:

> "The FCA must make rules providing that **a complaint is not to be entertained** unless […] the complainant has referred it under the ombudsman scheme **before the applicable time limit (determined in accordance with the rules) has expired.**"

63. The FCA (as FSA) acted on its statutory duty under FSMA 2000 and prescribed the necessary time limits in DISP 2.8.2 R. Accordingly, and now more fully following the earlier extracted citation, DISP 2.8.2 R provides as follows:

> "The Ombudsman **cannot consider a complaint** if the complainant refers it to the Financial Ombudsman Service
>
> […]
>
> (2) **more than:**
>
> **(a) six years after the event complained of**; or (if later)
>
> (b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;
>
> unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received; […]."

FOS's standard for complaint determination

64. The standard the FOS must apply to determine complaints is set by statute. Section 228 of FSMA 2000 provides that the determination of a complaint under the FOS's compulsory jurisdiction

> "is to be determined by what is in the opinion of the ombudsman, **fair and reasonable** in all the circumstances of the case."

65. Consistent with this statutory language, DISP 3.6 provides:

> "Fair and reasonable
>
> 3.6.1 R The Ombudsman will determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case.
>
> 3.6.2 G Section 228 of the Act sets the 'fair and reasonable' test for the Compulsory Jurisdiction
>
> (…)
>
> 3.6.4 R In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman **will take into account:**
>
> **(1) relevant:**
>
> **(a) law and regulations**;
>
> (b) regulators' rules, guidance and standards;
>
> (c) codes of practice; and
>
> (2) (where appropriate) what he considers to have been good industry practice at the relevant time."

66. To take relevant law into account, the FOS must direct itself correctly as to what the relevant law is. Failure to do so renders the ombudsman susceptible to judicial review (*R (Shawbrook Bank) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ("*Shawbrook"*), para 13). Further, DISP 3.2.6 requires the ombudsman to give reasons for its decision on jurisdiction.

What redress can the FOS grant?

67. Under section 229 of FSMA 2000, the FOS has a wide range of redress options.

> **"229 Awards.**
>
> (1) This section applies only in relation to the compulsory jurisdiction ....
>
> (2) If a complaint which has been dealt with under the scheme is determined in favour of the complainant, the determination may include—
>
> (a) an award against the respondent of such amount as the ombudsman considers fair compensation for loss or damage

> (of a kind falling within subsection (3)) suffered by the complainant ("a money award");
>
> (b) **a direction that the respondent take such steps in relation to the complainant as the ombudsman considers just and appropriate (whether or not a court could order those steps to be taken)**.
> (3) A money award may compensate for—
>
> (a) financial loss; or
>
> (b) any other loss, or any damage, of a specified kind."

68. Chapter 3.7 of the Handbook takes up the theme, and is entitled "Awards by the Ombudsman".

> "3.7.1 R
>
> Where a complaint is determined in favour of the complainant, the Ombudsman's determination may include one or more of the following:
>
> (1) a money award against the respondent; or
>
> (2) an interest award against the respondent; or
>
> (3) a costs award against the respondent; or
>
> (4) a direction to the respondent.
>
> 3.7.2 R
>
> Except in relation to a "relevant complaint" within the meaning of section 404B(3) of the Act [consumer redress schemes]
>
> … **a money award** may be such amount as the Ombudsman considers to be fair compensation for one or more of the following:
>
> (1) financial loss (including consequential or prospective loss); or
>
> (2) pain and suffering; or
>
> (3) damage to reputation; or
>
> (4) distress or inconvenience;
>
> **whether or not a court would award compensation**.
>
> Directions
>
> 3.7.11

> Except in relation to a "relevant complaint" within the meaning of section 404B(3) of the Act [redress schemes], **a direction may require the respondent to take such steps in relation to the complainant as the Ombudsman considers just and appropriate (whether or not a court could order those steps to be taken).**"

69. It is clear, therefore, that after the ombudsman determines a complaint in favour of the complainant (consumer of financial services), the award or redress granted by the ombudsman is discretionary. It may extend beyond what the court could order.

VII. The four impugned decisions

70. I now set out the four impugned decisions. All the decisions on jurisdiction were taken in July 2024. I first examine the decision in the Barclays claim (Mr Domer), consistent with this court's direction that Barclays "goes first". I provide it in more detail as it is representative of the common approach by the ombudsmen to jurisdiction. I recognise it is not identical on the facts to the other complaints, but sufficiently similar to identify common thematic issues. The decisions in the other claims can be summarised more swiftly. After Barclays comes the NatWest (Mr Gajraj) decision, then Vanquis (Ms Campbell), before Santander (Mr Brown).

A. Formulations of corrective responsibility

71. As noted in the common ground section, all four of the ombudsmen decisions rely on corrective responsibility. Before setting out the decisions in more detail below, I provide the relevant corrective responsibility passages side-by-side in one place:

    Decision 1: Barclays (Mr Domer). Ombudsman: Sophie Wilkinson (25 July 2024). "There is Supreme Court authority that, where an unfair credit relationship is on foot, the creditor is under a responsibility to take corrective steps to remove or mitigate its unfairness to the debtor. … The origin the lender's corrective responsibility lies in *Plevin v Paragon Finance.*"

    Decision 2: NatWest (Mr Gajraj). Ombudsman: Richard Hale (10 July 2024). "It is also clear from a number of Supreme Court decisions going back to *Plevin v Paragon Finance* [2014] UKSC 61, that there normally exists an expectation on the lender which is party to an unfair relationship, to correct any unfairness or take steps to mitigate it. This responsibility lasts right up to the end of the relationship. … So, any such corrective responsibility on NatWest may still be live at today's date."

    Decision 3: Vanquis (Ms Campbell). Ombudsman: Sophie Wilkinson (24 July 2024). "There is Supreme Court authority that, where an unfair credit relationship is on foot, the creditor is under a responsibility to take corrective steps to remove or mitigate its unfairness to the debtor. … The origin the lender's corrective responsibility lies in *Plevin v Paragon Finance.*"

Decision 4: Santander (Mr Brown). Ombudsman: Richard Hale (5 July 2024). "It is also clear from a number of Supreme Court decisions going back to *Plevin v Paragon Finance* [2014] UKSC 61, that there normally exists an expectation on the lender which is party to an unfair relationship, to correct any unfairness or take steps to mitigate it. This responsibility lasts right up to the end of the relationship. … So, any such corrective responsibility on Santander may still be live at today's date.*"*

B. Decision 1: Barclays (Mr Domer)

72. On 25 July 2024 the ombudsman Ms Sophie Wilkinson issued her jurisdiction decision in the complaint by Aaron Domer (whom she called "Mr D") against Barclays. Mr Domer applied for and obtained a credit card from Barclays in October 2013 with a credit limit of £400. After that, Barclays made a series of decisions about the card's credit limit, with the limit ultimately increased to £14,000. The decisions were:

- In January 2016, Barclays on its own motion reduced the credit limit;
- In June 2017 and November 2018, Barclays rejected Mr Domer's request to increase the credit limit;
- In seven instances (January, April, August and October 2014; January and April 2015; and August 2018), Barclays acceded to Mr Domer's request to increase the credit limit.

73. Mr Domer complained to Barclays in October 2023. His complaint was that Barclays failed to carry out sufficient checks before agreeing to increase the card limit following his various requests in 2014, 2015 and 2018. Barclays responded on 2 November 2023. It did not uphold the complaint. It considered the 2014 and 2015 decisions to be out of time and rejected the complaint about the 2018 increase (which was in time) on the merits. Mr Domer was not satisfied. He referred his complaint to the FOS on 12 December 2023.

74. The ombudsman's decision contained the following (emphasis provided in bold where helpful; subtitles already emboldened):

> **"The complaint**
> Mr D complains that Barclays Bank UK plc trading as Barclaycard ("Barclaycard") didn't carry out sufficient checks before agreeing to increase the credit limit on his credit card account. He complains that the unaffordable lending forced him to borrow more to keep up with the monthly repayments Barclaycard required from him.
>
> Mr D has asked that Barclaycard refund all of the interest he has paid since opening the account. And he would like further interest stopped.
>
> **What happened**
> In October 2013, Mr D took out a credit card account with Barclaycard – he was provided with an initial credit limit of £400. Mr D's credit limit was then increased four times in

2014, twice in 2015 and once in 2018; with the final credit limit being £14,000.

Mr D alleges that Barclaycard didn't carry out the appropriate checks before increasing his credit limit – he says if it had done this it would have seen he already had a high level of debt elsewhere that he was struggling to maintain. Mr D complains that the alleged unaffordable lending led to him getting into further financial difficulties that he's still experiencing today.

Mr D complained to Barclaycard about all of this in October 2023.

Barclaycard responded to Mr D on 2 November 2023. It didn't uphold his complaint about the lending decision it made in 2018. It also thought Mr D's complaint about its decision to increase his credit limit between 2014 and 2015 was made too late under the Financial Conduct Authority's (the 'FCA') "six and three" year time limit set out in rule 2.8.2 (2) of its Dispute Resolution Rules ('DISP'). That is, more than six years from the events Mr D has complained about, and more than three years from the date on which Mr D became aware, or ought reasonably to have become aware, of a cause to complain.

Why I can look into this complaint

Mr D's complaint can and indeed should be characterised in my view as not only being about the credit limit increases, but also about the overall unfairness of the relationship that he had with Barclaycard. It seems clear to me that it is this relationship and Barclaycard's role in it over the years that is at the very heart of his complaint.

Mr D complains not only about the credit limit increases, but about how those lending decisions played out and what happened when he became indebted to Barclaycard. He complains about the difficulty he had in repaying the debt, stating that "*I have been forced to borrow from Peter to pay Paul, as they say. I keep having to borrow more money to make the payments for the debts I already have outstanding. I'm still in this position today".* His credit card debts spiralled and he states "*I have gotten myself into a proper whole [sic] regarding debt".* Mr D also asked Barclaycard to refund him the interest and charges he incurred since the account opened, but it hasn't done so.

To me, these points clearly include complaints about the ongoing relationship that he has had with Barclaycard – in other words, that it wasn't and isn't fair – and Barclaycard's failure to correct that alleged unfairness, given that it didn't do

anything (like refunding interest or other charges) to correct that.

It is for these reasons that I find that Mr D's complaint can and should be characterised as a complaint about Barclaycard's participation in and perpetuation of an unfair debtor-creditor relationship. And the events complained of here include not only Barclaycard's acts as creditor in requiring the allegedly unaffordable repayments and imposing fees and charges on his account **but also its omissions to correct the unfairness of the relationship.**

I've next considered Barclaycard's submissions that, in effect, a relationship between a debtor and creditor, is not an "event", "act", or "omission". So, it cannot be the subject-matter of a complaint for the purpose of this service's jurisdiction. Rather, the allegedly unfair relationship must arise from prior acts or omissions of the creditor; idist [sic] is these alone that can be complained about – and then only if they occurred within six years of the complaint.

I have thought about this carefully. However, once again, I don't agree with what Barclaycard has said.

… if a complaint relies upon both the pre-contractual and post contractual conduct of the lender in saying an unfair relationship exists and is being perpetuated by the lender, **there seems no reason why our service should not treat the post contractual participation and perpetuation of the relationship as a complaint in its own right**. And that applies as much to variations of the contract, such as changes to the debtor's credit limit, as it does to the parties' initial entry into credit agreement.

… it is [a] feature of Mr D's dissatisfaction with Barclaycard as I understand it that he is concerned about its conduct throughout the course of the credit relationship. In those circumstances it would be wrong to say he's only complaining about decisions to increase his credit limit. He is concerned about those and the situation they created but also about Barclaycard's unfair conduct of the relationship thereafter and its continuing failure to rectify the unfairness of the situation to his satisfaction.

As I have said, I understand Mr D's complaint to include his dissatisfaction with both Barclaycard's acts and its omissions.

As regards to omissions, I consider that the complaint includes dissatisfaction that Barclaycard failed to take steps (i.e. refunding interest and charges, as Mr D has

requested Barclaycard to do) to correct the unfairness that has arisen in their relationship and that, by those omissions, Barclaycard perpetuated the unfairness. Barclaycard says that there is no general rule that an omission to remedy unfairness is a relevant omission under s.140A or an "event" under DISP 2.8.2 R. It says the responsibility to correct the unfairness only arises if the unfair relationship was caused by the lender's omissions, as opposed to its positive acts, and shouldn't be regarded as something a complainant has invoked in their complaint. However, I don't agree with these points.

There is Supreme Court authority that, where an unfair credit relationship is on foot, the creditor is under a responsibility to take corrective steps to remove or mitigate its unfairness to the debtor. The significance of this for present purposes is that the responsibility lasts as long as the credit relationship and a failure to fulfil it can be seen as an omission of the lender that lasts right up until that point.

The origin the lender's corrective responsibility lies in *Plevin v Paragon Finance*, where there had been a non-disclosure of high commission on a PPI policy. Lord Sumption said that the creditor should normally be regarded as responsible for an omission making its relationship with the debtor unfair if it fails to take such steps as would be reasonable to expect in the interests of fairness and would remove the unfairness or mitigate its consequences.

Then, in *Smith v RBS* [2023] UKSC 34, the Supreme Court held that, where a bank had received PPI premiums and commissions which it wouldn't have received if the commission had been properly disclosed, its corrective responsibility extended to repaying the sums it had received from the borrower many years earlier.

Lord Leggatt referred to the corrective principle in *Plevin* when rejecting the Bank's argument, which had succeeded in the Court of Appeal, that Ms Smith's relationship with the Bank ceased to be unfair when her PPI policy terminated and she ceased to make premium payments. And he applied the principle in finding that it would have been reasonable for the Bank both to disclose to Ms Smith its undisclosed commission and repay to her sums she had paid for the PPI cover …

In summary then, for the reasons set out here, it is my decision that this service has jurisdiction to consider the entirety of the relationship between Barclaycard and Mr D, because Mr D's complaint includes a complaint that

> **Barclaycard has participated in and perpetuated an unfair relationship with him. That complaint involves continuing acts and omissions by Barclaycard, and has been made within six years of the events complained of for the purposes of DISP 2.8.2 R**.
>
> **My decision**
> "For all the reasons set out above, it is my decision that the Financial Ombudsman Service has jurisdiction to consider the merits of Mr D's complaint about Barclaycard's **participation in, and perpetuation of an unfair relationship.**"

C. Decision 2: NatWest (Mr Gajraj)

75. The NatWest decision was made by Mr Richard Hale as ombudsman on 10 July 2024. The brief facts of the complaint by Mr Gajraj (called "Mr G" by the ombudsman) are:

> "On 3 December 1998, Mr G applied for – and received – an overdraft limit of £150. Over the years the limit was increased until July 2007 when it reached £3,000. Mr G says he has remained at the upper limit of the overdraft for a prolonged period, causing the interest charges he's referred to.
>
> On 31 August 2023, Mr G raised a complaint with National Westminster Bank Plc (NatWest) using a representative. Mr G says that NatWest has behaved in a way that has caused an unfair relationship to exist between himself and NatWest by allowing the prolonged and continued use of an overdraft facility."

76. As to jurisdiction, the ombudsman said:

> "**It is also clear from a number of Supreme Court decisions going back to *Plevin v Paragon Finance* [2014] UKSC 61, that there normally exists an expectation on the lender which is party to an unfair relationship, to correct any unfairness or take steps to mitigate it. This responsibility lasts right up to the end of the relationship.**
>
> In this case, Mr G complains about an unfair relationship with NatWest relating to his overdraft. The unfairness arose, he says, from a series of failings of NatWest in granting him an unaffordable overdraft and failing to monitor its use. He has asked NatWest to refund its interest charges, which he says arose during the course of that unfair relationship, and complains to this service because it has refused to do so.
>
> I consider this to be a complaint about NatWest's conduct of the relationship with Mr G right up to the point in time when it ends or we decide his complaint. Our service is entitled to take into account the history of the relationship from its start in deciding its fairness or unfairness as at that point in time, because the

> allegation that the bank is party to and has perpetuated an unfair relationship necessarily involves looking at that material in order to decide whether the relationship was (when it ended) or is (when the assessment is made) unfair. **A central issue is whether NatWest ought to have taken steps to correct or mitigate any unfairness by making the refunds Mr G has asked of it and, if so, whether that was a responsibility it should have fulfilled up to the end of the relationship or date of assessment.**
>
> As I noted in my provisional decision, the credit agreement between Mr G and NatWest is still in place. So, any such corrective responsibility on NatWest may still be live at today's date.
>
> In these circumstances, Mr G's complaint about NatWest's participation in and perpetuation of an unfair relationship concerns its current, ongoing acts and omissions and I'm not prevented from considering any aspect of it by DISP 2.8.2 R."

D. Decision 3: Vanquis (Ms Campbell)

77. On 24 July 2024, the ombudsman Ms Wilkinson made her decision about Ms Campbell's (called "Miss C") complaint. Ms Wilkinson's legal analysis of *Plevin* and *Smith* and her conclusion on corrective responsibility are in the same terms as in her decision about Mr Domer, which would be made the next day. The ombudsman summarised the facts in this way:

> "Miss C complains that Vanquis Bank Limited ("Vanquis") increased her credit limit when it ought to have been clear that she was already struggling with her finances, which made her financial position worse. She complains that Vanquis didn't freeze the interest on her account. And that she was charged overlimit fees as a result of the unaffordable lending. Miss C says she struggled to make the minimum repayment each month and eventually had to take out a loan to repay the outstanding balance.
>
> On 11 October 2014, Miss C took out a credit card account with Vanquis – she was provided with an initial credit limit of £1,000. Miss C's credit limit was then increased in May 2015, October 2015, June 2016, and January 2017, with the final credit limit being £4,000. Miss C alleges that Vanquis didn't carry out the appropriate checks on any of the occasions it increased her credit limit. She says that if it had done this, it would have seen she already had other credit cards that were close to their limits. She says that her debt with Vanquis was unaffordable for her and that this led to her incurring overlimit charges, which made her financial position even worse."

78. Unhappy with Vanquis' actions, Miss C complained on 22 August 2023. As to jurisdiction, the ombudsman said:

> "For the avoidance of doubt, I accept that *if* Miss C's complaint was to be interpreted strictly in the way Vanquis suggests then that would be a complaint that we could not consider.
>
> That's because those events took place more than six years prior to Miss C making her complaint to Vanquis and more than three years from when she either was aware, or ought reasonably to have been aware of a cause to complain.
>
> … I find that Miss C's complaint can and should be characterised as a complaint about Vanquis' participation in and perpetuation of an unfair debtor-creditor relationship. And the events complained of here include not only Vanquis' acts as creditor in requiring the allegedly unaffordable repayments and imposing fees and charges on her account but also its omissions to correct the unfairness of the relationship by showing forbearance and taking other steps.
>
> As regards to omissions, I consider that the complaint includes dissatisfaction that Vanquis failed to take steps (i.e. forbearing on interest and charges and refunding her the same) to correct the unfairness that has arisen in their relationship and that, by those omissions, Vanquis perpetuated the unfairness. Vanquis says that there is no general rule that an omission to remedy unfairness is a relevant omission under s.140A or an "event" under DISP 2.8.2 R. It refers to the fact that creditor's corrective responsibility has been found in cases involving the non-disclosure of commission, rather than unaffordable lending.
>
> **The origin the lender's corrective responsibility lies in *Plevin v Paragon Finance*,** where there had indeed been a non-disclosure of high commission on a PPI policy. Lord Sumption said that the creditor should normally be regarded as responsible for an omission making its relationship with the debtor unfair if it fails to take such steps as would be reasonable to expect in the interests of fairness and would remove the unfairness or mitigate its consequences.
>
> Then, in *Smith v RBS* [2023] UKSC 34, the Supreme Court held that, where a bank had received PPI premiums and commissions which it wouldn't have received if the commission had been properly disclosed, its corrective responsibility extended to repaying the sums it had received from the borrower many years earlier.
>
> Lord Leggatt referred to the corrective principle in *Plevin* when rejecting the Bank's argument, which had succeeded in the Court of Appeal, that Ms Smith's relationship with the Bank ceased to

> be unfair when her PPI policy terminated and she ceased to make premium payments. And he applied the principle in finding that it would have been reasonable for the Bank both to disclose to Ms Smith its undisclosed commission and repay to her sums she had paid for the PPI cover …
>
> … it is my decision that this service has jurisdiction to consider the relationship between Vanquis and Miss C to the extent it's relevant to the question of whether Vanquis has participated in and perpetuated an unfair relationship with her. That complaint involves continuing acts and omissions by Vanquis, and has been made within six years of the events complained of for the purposes of DISP 2.8.2 R.
>
> My decision
>
> For the reasons set out above, it is my decision that this service has jurisdiction to consider Miss C's complaint about Vanquis' participation in and perpetuation of an unfair debtor- creditor relationship."

E. Decision 4: Santander (Mr Brown)

79. On 5 July 2024, Richard Hale as ombudsman made the decision about Mr Brown's (called "Mr B") complaint. The brief facts are:

> "Mr B has had a current account including an overdraft facility with Santander for several years. By November 2017, his overdraft facility was £1,800. Mr B says he has remained at the upper limit of the overdraft for a prolonged period, causing the interest charges he's referred to.
>
> On 27 November 2023, Mr B raised a complaint with Santander UK Plc using a representative. Mr B says that Santander has behaved in a way that has caused an unfair relationship to exist between himself and Santander by allowing the prolonged and continued use of an overdraft facility."

80. As to jurisdiction, the ombudsman said:

> "I consider this to be a complaint about Santander's conduct of the relationship with Mr B right up to the point in time when it ends or we decide his complaint. Our service is entitled to take into account the history of the relationship from its start in deciding its fairness or unfairness as at that point in time, because the allegation that the bank is party to and has perpetuated an unfair relationship necessarily involves looking at that material in order to decide whether the relationship was (when it ended) or is (when the assessment is made) unfair. A central issue is whether Santander ought to have taken steps to correct or mitigate any unfairness by making the refunds Mr B has asked

> of it and, if so, whether that was a responsibility it should have fulfilled up to the end of the relationship or date of assessment.
>
> As I noted in my provisional decision, the credit agreement between Mr B and Santander is still in place. **So, any such corrective responsibility on Santander may still be live at today's date.**
>
> In these circumstances, Mr B's complaint about Santander's participation in and perpetuation of an unfair relationship concerns its current, ongoing acts and omissions and I'm not prevented from considering any aspect of it by DISP 2.8.2 R."

VIII. GROUND 1: ROUTE 1 (CORRECTIVE RESPONSIBILITY)

A. Route 1: Introduction

Corrective responsibility and time limits

81. The claimant banks submit that each complaint is time-barred and the ombudsman should have refused jurisdiction (excluding for now complaints such as Mr Domer's 2018 increase). Indeed, in some cases jurisdiction for the complaint was initially refused, for example, in the investigator's jurisdiction decision in the Barclays complaint. However, ultimately the ombudsman accepted jurisdiction in all four complaints. This is characterised by the claimants as a "change of legal tack". This followed the decision of the Supreme Court in *Smith*, which in turn drew on the earlier judgment in *Plevin*. It is put by the defendant in this way in its skeleton argument (para 18(e)):

> " … the Supreme Court's judgment in *Smith v RBS* – which overturned the contrary decision of the Court of Appeal – fundamentally changed the understanding of the law relating to s.140A of the CCA 1974 in significant ways. Having done so, the D's Ombudsmen were required to review their approach to complaints requiring consideration of s.140A in light of *Smith.*"

82. In short, where a creditor-debtor relationship is unfair, the defendant submits that a corrective responsibility arises that requires the creditor to address the unfairness as a matter of reasonable conduct and in the interests of fairness rather than legal duty. If such a corrective responsibility exists, the failure to correct is a relevant omission for the ombudsman's rules. The significance is that such omission is an "event" for the DISP 2.8.2 R rule on the timely referral of complaints. If the unfairness remains uncorrected, there are further continuing omissions and events and time does not begin to run, let alone run out for jurisdictional purposes. The ombudsmen's decisions state that in relationships with uncorrected unfairness, time only begins to run at the end of the credit relationship. Further, the ombudsman will have jurisdiction (in what I have

called the *Symonette* sense) over the whole of the credit relationship: see the dispute about Agreed Issue 1.

The defendant's case

83. In its original skeleton argument, the defendant framed its case in this way (DS, paras 6-8):

> "the relevant omission will be in the failure to take action to remedy the unfairness which is subsisting. That is a continuing responsibility and necessarily a continuing omission if no such action is taken.
>
> … the Ombudsmen correctly and unsurprisingly concluded that they had jurisdiction to consider the entirety of these creditor-debtor relationships, rather than being limited to acts or omissions in the six years preceding the complaints.
>
> … the Interested Parties are complaining about the Claimant banks' participation in, and perpetuation of, alleged unfair debtor-creditor relationships within the meaning of s.140A of the CCA 1974."

84. The defendant submits that the ombudsman's jurisdiction is not governed by the Limitation Act 1980. Instead, the words "event", "act" and "omission" for the purpose of the time limits in DISP 2.8.2 R must be applied to the analysis of an existing unfair relationship established in *Plevin* and *Smith*. The defendant submits that the correct interpretation of "event" for DISP 2.8.2 R is that an event can be a one-off event or a continuing event or a thing done or not done (an act or omission). Further, an event can be something done or not done on a single occasion, or over a continuing period of time. An omission can necessarily include a continuing failure to take required action which someone has a responsibility to take (such as remedying the existence of an unfair relationship). To take one example, the defendant states (DS, para 57) about the Barclays case that where the event complained about is the participation and perpetuation of an existing unfair relationship, "it is clear that the complaint has been made in time for the purposes of DISP 2.8.2 R". The participation/perpetuation is the failure to correct the unfairness (DS, para 69):

> "The language of "perpetuation of" that relationship simply describes the fact that Barclays is continuing in that alleged unfair relationship, **without having taken the type of corrective action Mr Domer is alleging should be taken**."
>
> (emphasis provided)

85. The defendant adds that a corrective responsibility only "subsists as long as the [credit] relationship lasts" (DS, para 73). Accordingly, it is submitted that the findings of the various ombudsmen that the complaints concerned alleged participation in, and perpetuation of, unfair relationships (where there was an alleged failure to take corrective action), "fall squarely" within the meaning of the terms "event", "act" and "omission" for the purposes of DISP 2.8.2 R, both as a matter of natural language and

the correct meaning of those terms. Given that the relationships were subsisting, the failure (omission) to address the alleged unfairness is a continuing omission. It means that time has not yet begun to run for the purpose of DISP 2.8.2 R and the four complaints come within the ombudsman's jurisdiction.

B. Plevin

86. At the outset of its oral submissions, the defendant submitted that "the responsibility to correct unfairness comes from *Plevin*." Following a direct question about the origins of corrective responsibility, the defendant submitted that "it is clear that Lord Sumption identifies a corrective responsibility if unfairness exists." A prime question therefore is whether it is possible to derive a relevant corrective responsibility from the judgment of Lord Sumption, giving the sole judgment of the Supreme Court, in *Plevin*. The defendant does not identify any other source of the corrective responsibility aside from *Plevin*. Since *Plevin* lies at the heart of the defendant's submissions on this issue, careful consideration is necessary to understand what *Plevin* decides and does not.

Facts

87. Mrs Plevin was aged 61 and a retired college lecturer, when in 2006 she responded to an offer in an unsolicited leaflet posted through her door. The offer was from LLP Processing UK Limited ("LLP"), an independent finance broker. LLP offered to act as intermediary to consolidate ("wrap up") her existing debt. LLP proposed Paragon Personal Finance Limited ("Paragon"), one of the several lenders on its books, as lender. LLP also proposed that Mrs Plevin take out payment protection insurance ("PPI") through Paragon's underwriter, Norwich Union. The point of PPI, as Lord Sumption puts it (para 1), is "to cover the repayment of specified borrowings upon the occurrence of an insured event, generally sickness, accidental injury, or unemployment".

88. Mrs Plevin took out a loan of £34,000, secured by a charge over her house to pay off some existing debts and fund home improvements. The PPI premium of £5,780 was added as a lump sum at the beginning of the loan period and added to the amount borrowed. Mrs Plevin knew that there would be commission, but did not know that the commission amounted to 71.8 per cent of the premium, nor the identity of the recipients. Of the premium, Paragon as the lender took £2280 in commission, more than LLP as intermediary (£1870). As the Supreme Court noted (para 1), a large proportion of the profits of loan brokers was derived from selling PPI policies. Mrs Plevin did not know that her lender had received a commission greater than that received by her broker, nor that more than two thirds of the gross premium went on the two commissions. As the Court of Appeal noted ([2013] EWCA Civ 1638, para 38(b)), Paragon and LLP both received commissions "substantially in excess of the real cost of the PPI".

Procedural history

89. Mrs Plevin brought proceedings against LLP and Paragon. The claim against LLP was on the basis of an undisclosed secret profit as her fiduciary agent. The claim was compromised in February 2010 on the basis of a £3000 payment in full and final settlement. LLP was insolvent by that stage and dropped out of the proceedings. Mrs Plevin's proceedings against Paragon continued. The relevant allegation was that an

unfair relationship existed between her as debtor and Paragon as creditor under section 140A.

As the Supreme Court emphasised, sections 140A to 140D of the CCA 1974 confer on the court wide powers to reopen unfair credit transactions. A credit agreement may be unfair because of any of the terms of the agreement or a related agreement, the way in which the creditor has exercised or enforced its rights, or "any other thing done (or not done) by, or on behalf of, the creditor" (section 140A(1)(c)).

90. Section 140A introduces a broader test of fairness than, for example, the Insurance Conduct of Business Rules ("ICOB") imposed by the regulatory authorities. As such, section 140A enables the court to consider a wider range of factors as a matter of general law. For example, ICOB 4.6.1 requires the disclosure by an insurance intermediary, which is not itself an insurer, of commissions receivable by it or its associates, but only to commercial customers and then only if the customer asks for the information. Such ICOB disclosure duty did not apply to Mrs Plevin's case as she was a non-commercial customer. The Supreme Court held in *Plevin* that this was not the end of the matter. This is because of the broad approach to fairness for consumers under section 140A, where a creditor can be responsible for conduct that is not reasonable if it produces unfairness, even in the absence of a specified legal duty. Once a finding of unfairness is made, Section 140B grants the court wide powers to reopen credit or related agreements. Therefore, by virtue of section 140B, following an unfairness finding under section 140A, the court may order the creditor to make repayments, or to refrain from enforcing the agreement in whole or in part. The court has power to require the terms of the agreement to be altered.

91. Both the Recorder at Manchester County Court and then the Court of Appeal, rejected Mrs Plevin's submission that the relationship with her creditor Paragon was unfair because of non-disclosure of the commissions. The Court of Appeal relied on *Harrison v Black Horse Ltd* [2012] Lloyd's Rep IR 521 ("*Harrison*"). It held that the presence or absence of a regulatory duty (note: duty as opposed to responsibility) under the ICOB Rules was conclusive. The relationship was not unfair for section 140A purposes through non-disclosure of the commission arrangements in the absence of a duty. The Supreme Court disagreed. It found that *Harrison*, which both the Recorder at first instance and the Court of Appeal (with expressed "dismay") felt bound by, was wrongly decided (para 16).

Supreme Court

92. The Supreme Court considered two issues: non-disclosure of commission and suitability of PPI to needs. The second issue is irrelevant to the instant case. As to non-disclosure, Lord Sumption said at para 18:

> "I turn therefore to the question whether the non-disclosure of the commissions payable out of Mrs Plevin's PPI premium made her relationship with Paragon unfair. In my opinion, it did. A sufficiently extreme inequality of knowledge and understanding is a classic source of unfairness in any relationship between a creditor and a non-commercial debtor. It is a question of degree. Mrs Plevin must be taken to have known that some commission would be payable to intermediaries out of the premium before it

> reached the insurer. The fact was stated in the FISA borrowers' guide and, given that she was not paying LLP for their services, there was no other way that they could have been remunerated. But at some point commissions may become so large that the relationship cannot be regarded as fair if the customer is kept in ignorance. At what point is difficult to say, but wherever the tipping point may lie the commissions paid in this case are a long way beyond it. Mrs Plevin's evidence, as recorded by the Recorder, was that if she had known that 71.8% of the premium would be paid out in commissions, she would have "certainly questioned this." I do not find that evidence surprising. The information was of critical relevance. Of course, had she shopped around, she would not necessarily have got better terms. As the Competition Commission's report suggests, this was not a competitive market. But Mrs Plevin did not have to take PPI at all. Any reasonable person in her position who was told that more than two thirds of the premium was going to intermediaries, would be bound to question whether the insurance represented value for money, and whether it was a sensible transaction to enter into. The fact that she was left in ignorance in my opinion made the relationship unfair."

93. Although there was no legal duty to disclose the commissions, the Supreme Court held that the non-disclosure created unfairness in the relationship between Mrs Plevin and Paragon as her creditor for which Paragon was "responsible". Lord Sumption moved on to consider whether the failure to disclose resulted in unfairness because of anything done or not done to fall under section 140A(1)(c). The question of omission arose because the creditor had done nothing positively (no overt act) to cause the unfairness. Lord Sumption said at para 19:

> "… Paragon owed no legal duty to Mrs Plevin under the ICOB rules to disclose the commissions and, not being her agent or adviser, they owed no such duty under the general law either. However, as I have already pointed out, the question which arises under section 140A(1)(c) is not whether there was a legal duty to disclose the commissions. It is whether the unfairness arising from their non-disclosure was due to something done or not done by Paragon. **Where the creditor has done a positive act which makes the relationship unfair, this gives rise to no particular conceptual difficulty. But the concept of causing a relationship to be unfair by not doing something is more problematical.** It necessarily implies that the Act treats the creditor as being responsible for the unfairness which results from his inaction, even if that responsibility falls short of a legal duty. What is it that engages that responsibility? Bearing in mind the breadth of section 140A and the incidence of the burden of proof according to section 140B(9), **the creditor must normally be regarded as responsible for an omission making his relationship with the debtor unfair if he fails to take such steps as (i) it would be reasonable to expect the creditor or**

> **someone acting on his behalf to take in the interests of fairness, and (ii) would have removed the source of that unfairness or mitigated its consequences so that the relationship as a whole can no longer be regarded as unfair.**" (emphasis provided)

94. Lord Sumption continued at para 20:

> "On that footing, I think it clear that the unfairness which arose from the non-disclosure of the amount of the commissions was the responsibility of Paragon. Paragon were the only party who must necessarily have known the size of both commissions. They could have disclosed them to Mrs Plevin. Given its significance for her decision, I consider that in the interests of fairness it would have been reasonable to expect them to do so. **Had they done so this particular source of unfairness would have been removed** because Mrs Plevin would then have been able to make a properly informed judgment about the value of the PPI policy. This is sufficiently demonstrated by her evidence that she would have questioned the commissions if she had known about them, even if the evidence does not establish what decision she would ultimately have made."

95. For my part, this is the essence of what the Supreme Court decided in *Plevin* on the non-disclosure question. In Mrs Plevin's case, despite the absence of a duty, the relationship between debtor (Mrs Plevin) and creditor (Paragon) contained a source of unfairness because of a material non-disclosure (an omission or "inaction"). The creditor was responsible for the unfairness since it failed to take the step of disclosing the commission arrangements when it was "reasonable to expect" that a creditor would so disclose "in the interests of fairness". This is because the "step" (disclosure) would have removed "this particular source of unfairness": it would have prevented the debtor having made an important decision in ignorance of the true nature of the commission arrangements, and thus being deprived of the ability to assess in an informed way whether the PPI represented value for money.

96. In passing, I note that Lord Sumption's analysis in *Plevin* has been more recently cited by the Supreme Court in *Potter v Canada Square Operations Limited* [2024] AC 679 ("*Potter*"), per Lord Reed, paras 33-34 (a case concerning deliberate concealment of PPI commission and section 32 of the Limitation Act 1980; see Lord Leggatt's helpful factual summary in *Smith*, para 35, albeit before the Supreme Court handed down its judgment in *Potter*).

Conclusion: *Plevin*

97. It seems to me that the legal validity of the defendant's corrective responsibility concept rests on two limbs:

> **Limb 1**: *Plevin* establishes an ongoing responsibility to correct unfairness (a "corrective responsibility");

> **Limb 2**: each failure to correct unfairness is an event for DISP 2.8.2 R purposes.

Limb 1

98. It is clear to me that *Plevin*, properly understood, is classificatory, to use the shorthand I proposed about *Smith*. The Supreme Court faced what Lord Sumption called the "more problematic" case of responsibility through omission rather than overt action. *Plevin* explains how a credit relationship may be described (classified) as unfair through omission (there a failure to disclose) rather than a "positive act". *Plevin* holds at para 19 that responsibility for unfairness can properly be attributed to a party that omits to act (fails to take steps) that are "reasonable to expect".

99. However, being classificatory (a *Smith* Stage 1 exercise) is not the same as being prescriptive. I do not understand *Plevin* as establishing a corrective responsibility on creditors to correct an unfair situation. Indeed, in *Plevin* (para 41) the Supreme Court remitted the case to the Manchester County Court for the court to determine what relief, if any, should be granted under a section 140B order and said nothing about a corrective responsibility. It is noteworthy that in Smith (para 29), Lord Leggatt made a similar observation:

> "29. Applying this test, Lord Sumption considered that, given the size of the commissions paid and their potential significance for the claimant's decision whether to purchase PPI cover, it would have been reasonable to expect the lender in the interests of fairness to have disclosed to her the amount of the commissions. Had this been done, this source of unfairness would have been removed because the claimant would then have been able to make a properly informed judgment about the value of the PPI policy (para 20). The Supreme Court concluded that this was a sufficient reason to justify reopening the transaction and remitted the case to the county court to decide what, if any, remedial order to make under section 140B."

100. Therefore, I return to the defendant's primary submission on *Plevin*, that "it is clear that Lord Sumption identifies a corrective responsibility if unfairness exists". I judge this to be a misreading of *Plevin*. Instead of identifying a corrective responsibility, Lord Sumption identifies how a credit relationship can become unfair through omissions for which the creditor is responsible. Such classification is a different matter. Returning to Lord Leggatt's rubric of a two-stage approach to sections 140A-B, in Stage 1, omission may lead to the conclusion that the credit relationship can be classified as unfair (section 140A: "is" unfair). In Stage 2 under section 140B, the court then considers the appropriate discretionary remedial order. Certainly, as Lord Leggatt says, the purpose of the remedial order "in principle" (*Smith*, para 25) is to remove causes of unfairness and/or reverse any damaging consequences of the relationship so it can no longer be regarded as unfair. However, as Lord Leggatt observes at para 29, the court will decide what remedial order "if any" should be granted. That, it seems to me, is different to the concept that the creditor has a corrective responsibility to correct the unfairness, with a failure to correct amounting to an event (even a "daily" event) for DISP 2.8.2 R purposes.

101. *Plevin* states in terms that a creditor must "normally" be held responsible for omissions that make the credit relationship unfair, a classificatory act. Accordingly, *Plevin* attributes responsibility through omission and adds to the jurisprudence in that important way through such classification. When asked how the corrective responsibility is derived from *Plevin*, the defendant submitted that "the relationship will remain unfair if the unfairness is not corrected". This is correct. However, it is in the next critical step, where the defendant submits that therefore *Plevin* establishes a corrective responsibility, that the defendant's analysis overreaches and errs.

102. Of significance, to my mind, is what Lord Sumption says about the nature of section 140A at para 10. He describes it as being deliberately framed "in wide terms with very little in the way of guidance about the criteria for its application" as found in other provisions of the CCA 1974 that confer discretionary powers on the courts. Indeed, no "precise or universal test for its application" can be expressed. Thus, everything must depend on the court's judgment of all the relevant facts. These observations are supplemented by what Lord Sumption says at para 17, contrasting the obligations under the ICOB rules with the obligation under section 140A:

> "The fundamental difference is that the ICOB rules impose obligations on insurers and insurance intermediaries. **Section 140A, by comparison, does not impose any obligation** and is not concerned with the question whether the creditor or anyone else is in breach of a duty. **It is concerned with the question whether the creditor's relationship with the debtor was unfair.** It may be unfair for a variety of reasons, which do not have to involve a breach of duty." (emphasis provided)

103. I find this significant. Lord Sumption explains that section 140A is concerned with whether a relationship is unfair. This is the status-descriptive (classificatory) aspect I noted above. Lord Sumption states that section 140A "does not impose any obligation". The defendant's case is that *Plevin* creates a responsibility to correct unfairness and is the sole source of it. It may be said that "obligation" here is a reference to a legal duty. But if *Plevin* in fact establishes or identifies a positive responsibility to correct unfairness short of a legal duty, here was the place to say it. No such thing is said in any of the key paragraphs of the judgment. This conclusion is supported by Lord Sumption's further observations in para 17:

> "the standard of fairness in a debtor-creditor relationship is a matter for the court, on which it must make its own assessment. … the question of fairness involves a large element of forensic judgment. … An altogether wider range of considerations may be relevant to the fairness of the relationship, most of which would not be relevant to the application of the [ICOB] rules."

104. The logic of the defendant's case must be that in *every* case where there is an unfair relationship under section 140A, a corrective responsibility arises. I cannot think this is consistent with the Supreme Court's judgment in *Plevin*. *Plevin* does not convert the attribution of responsibility for creating an unfair relationship by omission into a positive responsibility to correct it. The first is the attribution of the cause of unfairness and the classification of the status of the credit relationship; the second is a quite

different concept: the prescription that the responsible party has a positive and enduring responsibility to correct it.

105. Therefore, I judge that the defendant's analysis fails on Limb 1.

Limb 2

106. I find nothing in *Plevin* to support the proposition that an ongoing failure to correct unfairness amounts to a continuing series of distinct and discrete "events" for DISP 2.8.2 R purposes. The nature of an "event" under DISP 2.8.2 R was never considered in *Plevin* in which there was no complaint to the ombudsman, the case being a county court claim ultimately appealed to the Supreme Court.

107. The defendant was invited to clarify how frequently the fresh ongoing omissions/events occurred, whether every month, week, hour or minute. The defendant submitted that "an omission occurs every day". The court was referred to Lord Leggatt's judgment sitting as a Deputy Judge at first instance in *Patel v Patel* [2009] EWHC 3264 QB ("*Patel*"). However, *Patel* was not about a complaint to the ombudsman, nor a decision on the FOS's jurisdiction. It was an action in the Queen's Bench Division about a dispute arising from a personal loan (or loans after consolidation) between very closely linked people, akin to family members. It had nothing to do with the ombudsman jurisdiction. In *Patel* the relationship was continuing. The court had to consider whether the relationship was unfair for section 140A at the time of trial. The court held that relief under section 140B was not time-barred. The Deputy Judge said at paras 64-65:

> "[64] … As I construe s 140A, the question whether the relationship between the creditor and the debtor is unfair to the debtor, upon the answer to which the power to make an order under s 140B depends, is a single question which admits of a 'Yes' or 'No' answer that has to be determined as at a particular point in time. However, in determining whether, at the relevant date, the relationship is or is not unfair, the court is required to have regard to certain matters specified in s140A(1) and to all other matters it thinks relevant, whenever those matters occurred. There is no possibility, therefore, if the court is entitled to make the determination of fairness at all and is not barred by limitation from doing so, of restricting the temporal scope of the inquiry.
>
> [65] Hence the critical question is: what is the relevant date at which the fairness or otherwise of the relationship has to be determined? In principle, it seems to me that the determination should be made having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination. This means that if the relationship between the creditor and the debtor has ended, the determination should be made as at the date when the relationship ended; and if the relationship is still ongoing, the determination should be made as at the time of the trial."

108. I do not derive from *Patel* the proposition that every daily failure to act is a further "event" for DISP 2.8.2 R purposes. It is true that the court considered the effect of an ongoing relationship, but this was to consider when a cause of action "accrues". A cause of action is notably explained by Diplock LJ (as he then was) in *Letang v Cooper* [1965] 1 QB 232 at 242G-243A:

> "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."

109. Diplock LJ's much-cited formulation may be thought of as placing emphasis on the "cause" in the cause of action, that is, the coming into existence of the set of foundational facts that entitles the pursuit of a court remedy. Once complete, the legal action may follow. As the Deputy Judge said at para 66 of Patel:

> "If I am right in my analysis of the date at which the fairness of the relationship between the creditor and the debtor falls to be assessed, the result is that the debtor's cause of action is a continuing one which accrues from day to day until the relevant relationship ends."

110. In *Smith*, Lord Leggatt said at para 38:

> "To identify when a cause of action has accrued, it is thus necessary to identify, first, the remedy sought by the claimant and, second, the material facts which, if proved, would as a matter of law entitle the claimant (subject to any positive defences) to obtain that remedy. The cause of action accrues on the date when all those material facts are first capable of being pleaded."

111. During oral argument, the defendant made two points about these questions. First, the FOS drew on para 66 of *Patel* as support for its continuing acts as events through uncorrected unfairness submission. However, the defendant also acknowledged that there was a reason for the choice of the word "event" in DISP 2.8.2 R. It was to convey that the ombudsman's jurisdiction "is not intended to be confined to cause of action" and to "encompass the full range of matters the ombudsman may consider beyond a cause of action". This has force. But if the limitation rule for complaints to the ombudsman under DISP 2.8.2 R has content to distinguish it from questions of accrual under legal causes of action, the *Patel* analysis is of limited assistance on the question of fresh daily events through ongoing omissions. A cause of action may continue to accrue for a court claim under section 140A (where a remedy under section 140B is sought) because the test is whether the relationship "is" unfair. As Birss LJ said in *Smith* in the Court of Appeal at para 54, "that a relationship was unfair yesterday is not the same fact as the relationship being unfair today" ([2021] EWCA Civ 1832). This can be additionally understood from Lord Guest's observation in *Central Electricity Board v Halifax Corporation* [1963] AC 785, where he said at 806 that the date of accrual is:

> "the date on which the plaintiff would be able to issue a statement of claim capable of stating every existing fact which,

> if traversed, it would be necessary for the plaintiff to prove in order to support his right to judgment."

112. One sees how such technical considerations of accrual are far removed from the ombudsman's jurisdiction, created to be a straightforward ADR mechanism unstifled by legal doctrine. There is a danger of drawing what may on the surface appear to be comparisons between causes of action and the section 140A and B regime. Lord Leggatt pointed this out in *Smith* at para 47 when observing that "a claim for relief under section 140B of the 1974 Act is not based on any breach of a legal duty and cannot be analysed in the same way." I am not persuaded that the continuing accrual concept in a legal cause of action supports the defendant's uncorrected unfairness as events submission in the ombudsman's jurisdiction.

113. I judge that the defendant's analysis fails on Limb 2.

C. *Smith*

114. I have already touched on *Smith* in my consideration of *Plevin*. *Smith* is the second prime authority relied on by the defendant. It is a more recent authority, in which the lead judgment was delivered by Lord Leggatt, as he had by then become. The question in *Smith* is whether the claims in which orders were sought under the sections 140A and 140B of the CCA 1974 to remedy unfairness in credit relationships were brought in time.

Facts

115. Ms Smith and another claimant (Mr Burrell) had a credit card issued by the Royal Bank of Scotland plc ("RBS") and were sold PPI by RBS. However, RBS did not disclose that most of the money paid by them for PPI was retained by RBS as commission. Even up to appeal in the Supreme Court, RBS failed to reveal the precise size of its commission. It was in excess of 50 per cent of the payments made. RBS only informed the claimants that it had received commission when it offered them redress under a scheme for PPI mis-selling established by the FCA. By that time Ms Smith had already ended her PPI agreement (in 2006). Her credit card agreement with RBS ended in 2015, and that was the end of the credit relationship. In August 2019 – therefore within six years from the end of the credit relationship - Ms Smith brought a claim in the county court, seeking a remedial order under section 140B of the CCA 1974 that RBS repay all the money paid for PPI (less the redress already paid), plus interest. Ms Smith's claim succeeded before the district judge at Bodmin County Court, a decision upheld on appeal by the county court judge. On second appeal, however, the Court of Appeal ruled in favour of RBS, holding that the relevant time limit for bringing a claim had expired before the claim was brought. The Court of Appeal deemed the date of the last PPI payment (2006) as the relevant date for time to run. Thus, the timing of the 2019 complaint was beyond the statutory time limit.

In the Supreme Court

116. On appeal to the Supreme Court, Lord Leggatt returned to the question of accrual he had considered as a Deputy Judge in *Patel*. RBS's argument before the Supreme Court was (in relevant part) based on a "completed cause of action". Lord Leggatt rejected it, saying at para 42:

> "The central flaw in the completed cause of action argument is that, **for as long as the credit relationship is continuing, the debtor cannot have a completed cause of action before the time at which a determination of unfairness is made**. Proof of facts which made the relationship unfair to the debtor at some earlier point in time is never sufficient to give the debtor an entitlement to a remedy. That is because, as noted at paras 19-21 above, unless the relationship has ended, section 140A makes the power of the court to make an order under section 140B conditional on a determination that the relationship "is" (i.e. at the time when the determination is made) unfair to the debtor. Necessarily, a right to obtain a remedy for unfairness existing on that day cannot arise before that day comes."

117. Therefore, in Ms Smith's case the accrual of the cause of action was at the point the credit relationship ended in 2015. That was the point to assess the fairness of the credit relationship "arising out of the credit agreement" since a relationship, by its nature, extends over a period of time "and may continue for as long as there is any sum payable or which will or may become payable under the credit agreement" (para 18). The fairness would not change after the relationship ended. As Lord Leggatt said at para 19:

> "… the question to be determined under section 140A(1) is not whether the relationship between the creditor and the debtor *was* unfair to the debtor when the credit agreement was made or at some other time in the past. It is whether the relationship *is* unfair to the debtor, i.e. at the time when the determination is made. This is reinforced by section 140B(9), quoted at para 14 above, which is likewise framed in the present tense."

118. The notion that a terminated relationship would preclude the court from determining unfairness is answered by section 140(4), as explained at para 20 of *Smith*:

> "If nothing further had been said, it might have been thought impossible to make a determination of unfairness under section 140A if the relationship between the creditor and the debtor has ended before the hearing takes place. But this contingency is catered for by subsection (4). That provides that a determination may be made under section 140A in relation to a relationship "notwithstanding that the relationship may have ended". The logical implication is that, in a case where the relationship has ended, although the court cannot decide whether the relationship is (currently) unfair to the debtor, it must do the closest thing and determine whether the relationship was unfair to the debtor at the time when it ended."

119. Thus, if the relationship had ended, the relationship should be assessed for section 140A purposes at that endpoint. This was 2015 when Ms Smith ended her credit relationship with RBS. If the relationship is ongoing, the court assesses the fairness at the date of "trial". In the claims before me, the FOS particularly relies on para 66 of the *Smith* judgment. There Lord Leggatt says:

> "66. I cannot accept, however, that the relationship between the bank and Ms Smith ceased to be unfair to her in April 2006. Indeed, I think it plain that it did not. It is true that no more payments for PPI cover were made by her after April 2006 out of which the bank received further commission. But the bank did not at any time before the relationship ended in 2015 repay any of the sums which Ms Smith had paid for PPI cover, nor did it disclose to her the existence let alone the amount of the commission that it had received out of those payments. Applying the test articulated in *Plevin* (see para 27 above), those are both steps which it would be reasonable to expect the creditor to take in the interests of fairness **and which were necessary to reverse the consequences of the unfairness so that the relationship as a whole could no longer be regarded as unfair.**"

120. The defendant's submission is that "the relevant omission will be the failure to take action to remedy the unfairness which is subsisting" (DS, para 6). Such omissions constitute DISP 2.8.2 R events on the defendant's analysis. However, I do not understand the Supreme Court in *Smith* as establishing or even confirming a corrective responsibility in the positive sense the defendant argues for. Lord Leggatt identifies, along *Plevin* lines, steps that would stop the credit relationship being unfair in section 140A terms ("necessary to reverse"). The Supreme Court is not stipulating that the creditor has a positive corrective responsibility, nor that the failure to correct would constitute relevant DISP 2.8.2 R events. It is instructive that Lord Leggatt, in similar terms to Lord Sumption, notes the breadth of relevant considerations for the section 140A fairness determination. He says that "it would be hard to cast the possible cause of unfairness more broadly than this" (para 22). Lord Leggatt references the wide range of examples of potentially relevant factors given by Hamblen J (as he then was) in *Deutsche Bank (Suisse) SA v Khan* [2013] EWHC 482 (Comm) at para 346. I judge that this is what I have called a Stage 1 classificatory question. The analysis here is about the diverse matters that may speak to the question of the unfairness of a credit relationship. Such classification does not prescribe a positive corrective responsibility on the creditor in situations of unfairness. As in *Plevin*, a creditor that fails to correct unfairness (whether originally caused through act or omission) is at peril of an adverse finding (classification) under section 140A (Step 1). The fair compensation or just and appropriate direction under section 140B is then a separate Step 2 matter.

121. Moreover, what Lord Leggatt says about the continuation of a relationship does not assist the FOS's analysis. The defendant has not submitted that a relationship is an event. It accepts that there must be an in-time act or omission (event) for jurisdiction (see common ground, proposition 8 (Section V above)). I judge that one cannot derive an event from a failure to correct from the judgment in *Smith*. The "very broad and holistic" (Smith, para 25) assessment of the credit relationship the court is required to undertake under section 140A, is not the same as prescribing a corrective responsibility.

Conclusion: Smith

122. I judge that *Smith* provides no support for the defendant's submission that (a) a corrective responsibility exists; (b) each failure to correct is a fresh event for DISP 2.8.2 R.

D. Route 1: ancillary arguments

123. The parties submitted on three ancillary arguments on Ground 1, which I examine in turn:

i) Purpose

ii) Consequence(s)

iii) *Mazarona*

i) Purpose

124. I accept Barclays' submission, supported by other parties, that DISP 2.8.2 R should be interpreted in terms of its purpose. As the FCA points out, the FCA Handbook includes in its "General Provisions" rule GEN 2.2.1 R that every provision of the Handbook "must be interpreted in light of its purpose". GEN 2.2.2 G set outs that the purpose of any provision is to be gathered "first and foremost from the text of the provision and its context among other relevant provisions". Further, any guidance provided may assist, but should "not be taken as a complete or definitive explanation of a provision's purpose".

125. In *Shop Direct Finance Co Ltd v Official Receiver* [2023] Bus LR 1425 ("*Shop Direct*"), Singh LJ stated at para 156 that the purpose of DISP 2.8.2 R is to "prevent stale claims from being litigated". This aligns with Nugee LJ's observation in *Shop Direct* at para 155 about the purpose of time limits under the Limitation Act 1980:

> "The purpose of an ordinary limitation period is to prevent stale claims from being litigated, the period of 6 years being fixed as a generally reasonable period to bring a claim."

126. Singh LJ identified four key propositions at para 46:

> "(1) Ultimately it is the actual wording of a provision that must govern any decision as to its effect.
>
> (2) The Handbook should be read as a whole, taking an holistic and iterative approach, so that a preliminary view on one provision can be tested by reference to the rest of the relevant provisions.
>
> (3) The provision should be construed in the light of its overall purpose.
>
> (4) It should be construed on the basis that it is intended to produce a practical and commercially sensible result. The rules should be taken to be grounded in reality. The court should keep in proportion any drafting infelicities."

127. There was argument before me about the origins of DISP 2.8.2 R and the citation of consultation papers. The first point to consider is whether the materials are admissible. In *Shop Direct*, such documentation was regarded by Nugee LJ as being of "doubtful

admissibility" (para 155). Singh LJ stated in *Shop Direct* (para 78) that such materials are "only admissible for the limited purpose of identifying what the mischief may have been which was the subject of the legislation." I follow Singh LJ in looking at the materials to understand the mischief the provision is directed at. The relevant documents include the policy document CP33 mentioned at the outset of this judgment. CP33 says at para 6.26:

> "For the purposes of the new Scheme, we propose to apply the time limits enshrined in English law relating to the limitation of actions. In other words, the Ombudsman would be entitled to refuse to investigate a complaint which was brought to the Scheme more than 6 years after the event or more than 3 years after the date when the complainant became aware or ought reasonably to have become aware of the cause of complaint, if this was longer."

128. In May 2000, the FSA and the FOS produced CP49, a joint paper about the feedback to the CP33 consultation on the draft scheme rules. CP49 states:

> "alignment with the English law of limitations in respect of the time limit for making a complaint to the Scheme after the act or omission giving rise to the matter in question." (para 1.73)
>
> "[the consultation's] "proposal to mirror the English law relating to the limitation of actions" met with "general approval" and was "reflected in the draft rules." (para 1.80)

129. In December 2000, the FSA and the FOS produced PS32, a joint policy statement. The purpose of the paper was identified at para 2.2:

> "2.2 The purpose of this paper (which is also a joint FSA/FOS paper) is to provide the response of the FSA and the FOS to the comments which we received on CP49 and to set out the final rules which we propose to make."

130. I pause to note the closeness of the joint position between the regulator and the FOS. PS32 notes on limitation period that:

> "As envisaged in CP49, the time limits for bringing a complaint to the FOS broadly mirror the law of limitation in respect of bringing actions in court". (para 1.13)

131. I take from this material that the alignment intended was with the length of time limits under the Limitation Act 1980, and the six-year general limitation period can be understood as what Nugee LJ called a reasonable one to bring a complaint. It was certainly not envisaged that there should be imported into the interpretation of "event" under DISP 2.8.2 R the jurisprudence under the LA 1980 on accrual of cause of action. As was succinctly stated by Collins Rice J in *Shawbrook* at para 12, the ombudsman is not dealing with legal causes of action, but complaints and the role of FOS is to provide "an efficient, cost-effective and relatively informal type of alternative dispute resolution". What the two provisions do have in common, however, is that both section

2 of the Limitation Act 1980 and DISP 2.8.2 R aim to prevent claims or complaints that are stale being pursued. The question is what is meant by stale, and the trigger for the running of time in each forum is different.

Conclusion: purpose

132. I judge the proper approach to the ombudsman's jurisdiction to be straightforward: decide whether there is an event within the six years preceding the complaint. If this is done, the clear terms of DISP 2.8.2 R are met and questions of staleness that the rule is designed to prevent do not arise. It is important not to conflate examination of the historic credit relationship to determine the relationship's fairness as a whole, with the question of the necessary trigger event for jurisdiction (power) to investigate and grant redress.

ii). Consequences

133. As to consequences, Barclays submits that the new post-*Smith* approach to jurisdiction claimed by the defendant is "exorbitant" and opens the door to otherwise stale claims, with "huge consequences in thousands of cases". This problem is said to be compounded by the fact that complaints involving a consideration of the whole relationship are "complex" and "fact-heavy" and better dealt with in the county court. The ombudsman service "cannot deal with these complex stale cases". Indeed, it is submitted that Parliament created the county court "to do justice" in such cases, and equipped it to do so. There is no appeal from the ombudsman's decision. Against this, there is force in the defendant's submission that in the Small Claims Court where many of these claims would be heard, there is no standard disclosure and no costs regime (other than for unreasonable conduct). Beyond the "upsurge" in the number of complaints being received by the defendant following its change of position on jurisdiction, Barclays submits that the "logic" of the defendant's new stance could be applied to other types of claims and not just section 140A situations.

134. Arguments about consequences require reliable information to trace causation. Counsel for Barclays was unable to say how reliably the increase in complaints could be attributed to the defendant's new stance following the Supreme Court's decision in *Smith*, recognising it was "very difficult" to determine the causative effect given the existence of confounding factors. Therefore, the first claimant was not "pushing the court to reach a strong conclusion". The relationship was correlational at best. As the parties proceeded to file more and more metrics extracted from annual reports, it seemed to me that the court was not in a position to draw safe conclusions. However, to my mind there is a more fundamental point. If the corrective responsibility analysis advanced by the defendant were soundly based in law, the court would be slow to eschew it on the basis that it would result in a greater number of complaints for the ombudsman to determine. This seems to me more a policy and resources question that the court is not best placed to assess.

135. As to wider application, if the defendant's analysis were right for section 140A, it may or may not be more broadly applicable. That is not a matter I have to decide and heard no argument about it. The present situation is that the ombudsman does at times deal with complicated and what the intervenor terms "longer-ranging complaints". No one disputes this, nor disputes the defendant's assertion (DS, para 125) that the ombudsman does so "regularly". The objection is based on the "introduction of more" such complex

complaints. Again, this is primarily a resources question. While the FCA as regulator is entitled to voice its concerns, I am not persuaded that this amounts to a genuine basis for doubting the defendant's legal construction.

136. On behalf of Vanquis and NatWest, it was submitted that there will be "an increase in unmeritorious claims". The witness statement of Mr Fielder on behalf of Vanquis maintained, unchallenged, that 87 per cent of the complaints escalated to the FOS by claims management companies against the bank about irresponsible lending were rejected. It was submitted that there are "potentially thousands of such complaints" with very significant cost implications for banks and providers of financial services. Claims management companies "do not go to the county court", but instead "their forum of choice is the ombudsman". There is a cost disincentive of opting for the county court since initial fees amount to £800 and there are costs risks that are absent with the ombudsman service. These are also matters of operational arrangements and policy that seem to me to have very limited bearing on the correct legal interpretation of jurisdiction the parties invite the court to determine.

137. Similar submissions, also supported by detailed filed evidence, were made on behalf of Santander. Karen Frazer on behalf of the bank pointed out that approximately 5.7 million of the bank's customers are potentially "subject to" (able to make) section 140A complaints and therefore the consequences of the defendant's "position being wrong are substantial". It is submitted that the "practical consequences are very real and very live". While this may or may not be true, I cannot see that the inherent validity of the legal arguments is materially altered by the significance of these consequences.

Conclusion: consequences

138. Overall, I do not dismiss the concerns expressed by various banks about the real-world implications of the new stance taken by the defendant. The generation of thousands of new complaints will materially increase demands on the ombudsman service. However, I derived little assistance from these operational and administrative matters on the cardinal question. It continues to rest on the legal validity of the defendant's corrective responsibility submission.

iii). *Mazarona*

139. The claimants rely on *R (Mazarona Properties Ltd) v FOS* [2017] EWHC 1135 (Admin) ("*Mazarona"*) to support the submission that acts of "redress" under a corrective responsibility, should it exist, would be outside the jurisdiction of the ombudsman. The argument rests in part on the definition of a complaint as the granting of redress being different from the provision of a financial service (as per the FCA Handbook).

140. *Mazarona* was a decision at first instance by Mitting J. It involved complaints by corporate customers who loaned money from AIB with an interest swap. When interest rates "fell sharply" (para 3), this arrangement became disadvantageous to the consumers. They sought redress from the bank. An internal redress scheme was established. When the bank withdrew its offer of redress under the scheme, the customers complained to the ombudsman who ultimately declined jurisdiction in the complaint. Mitting J dismissed the judicial review claim. He identified the sole ground to be decided as being whether the ombudsman was right to conclude that she could

not consider what had happened in AIB's review in her determination (para 17). That was because the review process conducted by AIB was found by the ombudsman not to be provision of "a regulated activity or an ancillary activity connected with a regulatory activity." Mitting J set out his conclusion at paras 31-32:

> "31. It follows therefore that as a matter of ordinary language the complaint made by the claimants to the FOS about the handling of their complaint by AIB was not a complaint about the provision or failure to provide a financial service. Further, on the facts, which again I emphasise will apply widely, the review by AIB of the redress, if any, which it should offer in respect of the swaps made with the claimants did not fall within the compulsory jurisdiction rules both for the reasons I have given and also because the activity of dispute resolution was not itself an activity specified in the 2001 Order. It was therefore, by dint of subsection (4) of section 266, outside the remit of the FOS.
>
> 32. For those reasons, I have concluded that the Ombudsman's conclusion that she was not entitled to investigate or reach a determination upon the conduct of the review was right. It follows that the single ground upon which permission to apply for judicial review has been granted fails and I dismiss this claim."

141. The claimants submit that similar logic must apply to redress under any corrective responsibility that may exist (while not conceding that it does). The defendant submits that the comparison with *Mazarona* "is a bad one". *Mazarona* involved unregulated activity. In the instant case, provision of credit to a consumer under a credit agreement is a regulated activity. If as the defendant maintains there is a corrective responsibility, that would be part and parcel of the regulated activity and thus within scope for the ombudsman.

Conclusion: Mazarona

142. As Mitting J said, the complaint in *Mazarona* was not about provision of a financial service, but AIB's internal redress scheme. Barclays points to the irony that in *Mazarona* the FOS successfully argued that the ombudsman was correct in determining that she had no jurisdiction over an internal redress scheme (see para 28 of *Mazarona*). It questions the opposite stance now being taken by the defendant when it argues that the failure to correct unfairness (failure to reverse unfairness and thus provide redress) is within scope (C1S, para 53.3).

143. As Barclays recognises, if it succeeds on the central corrective responsibility argument, it "does not need *Mazarona*". I turn to this larger question next. I emphasise that for reasons that will become apparent shortly, the claimant does not need to rely on its *Mazarona* argument. If it had been necessary to do so, I would have decided that *Mazarona* provides additional support for Barclays' doubting of the defendant's corrective responsibility conception. In this I find support in Mitting J's judgment at paras 27-29:

> "27. The rival propositions are relatively easy to state but their resolution depends upon a careful analysis of the statutory scheme and that part of the scheme which although not statutory has the force of statute.
>
> 28. The key to the conundrum is the statutory definition of "compulsory jurisdiction rules" in subsection 226(3) and the proviso to that in subsection (4). The Ombudsman can only consider a complaint as defined in the Glossary. The complaint must be about "the provision of or failure to provide a financial service or a redress determination" within the meaning of that latter phrase as defined in the Glossary. The claimant's complaint about the withdrawal of the offer was not a complaint about a redress determination because it was not about a redress determination conducted under section 404 of the Act. It can therefore only succeed if it is about "the provision of or failure to provide a financial service". "Financial service" is not defined in the 2000 Act. Mr Catsambis and Mr Temple submit that dispute resolution is not on any view "a financial service". What happened on the facts, they submit, as will have happened in many other cases, is that a bank has determined pursuant to an agreement with the FSA/FCA what redress, if any, it should provide to a customer to whom it has sold a relevant product.
>
> 29. Mr McIlroy's answer to that is that dispute resolution, because it forms part and parcel of a bank's activity in selling a swap, necessarily amounts to "a financial service". I do not accept that argument. It is something which may arise as a result of the provision of a financial service. In ordinary speech it may relate to it, but it is not itself a financial service."

144. I would draw the same distinction. The redress of the unfairness created by the provision of a financial service (credit facilities) is related to the financial service provided, but is not itself a financial service. This was presented very much as a subsidiary or byway argument by the claimants. I treat it as such. I turn back to the main track of Route 1.

E. Conclusion: Route 1

145. The corrective responsibility dispute is so fundamental to the outcome of the claims, and the submissions advanced have been so wide-ranging, that I draw my reasoning together in one place. I summarise my conclusions under five heads, examining (1) general matters, (2) questions of interpretation, (3) the effect of *Plevin/Smith*, before (4) addressing the defendant's criticism of the FCA. I end (5) with the court's overall conclusion on Route 1.

1. General

146. **First**, the nature of the question. The proper legal interpretation of the FOS's jurisdiction is a hard-edged question of law, not a matter of discretion. Thus, the

defendant's claim of jurisdiction through corrective responsibility is either right or wrong. It is a binary question.

147. **Second**, the proper approach. The place to start is to consider the legislation and rules as a whole and in light of the policy underpinning them. The statutory and regulatory scheme must be viewed cohesively and holistically to ascertain how Parliament intended complaints about regulated financial services to be dealt with under the ombudsman's compulsory jurisdiction.

148. **Third**, the purpose of the FOS. The FOS was created as an ADR scheme to stand separately from the courts. There is no reason why the ombudsman cannot, as the defendant submits, have jurisdiction to determine complaints in "lower value consumer credit claims". It can also consider section 140A complaints, and no one has submitted to the contrary. Further, the ombudsman can consider complex complaints, and does, such as holiday timeshare disputes (*Shawbrook*), motor vehicle disputes recently before the Supreme Court, and disputes about equity release mortgages, particularly when the borrower has died and the complaint is referred by bereaved family members. As Ms Lathbury, the solicitor with conduct of the defendant's case, says in her witness statement (13 June 2025):

> "25. … The Ombudsman Service *does* frequently and routinely consider all sorts of complaints involving matters that happened more than six years ago. There are numerous decisions, published on the Ombudsman Service's website, that reflect this.
>
> 26. By way of example only, complaints about pension transfers and investment advice often involve events that took place more than six years ago, because the complainant may not have been aware that they had cause for complaint until the product matured and/or they changed adviser."

149. **Fourth**, the general nature of DISP. The Handbook and the rules about complaints within it are not conventional legislation, but to borrow from Mitting J in *Mazarona* (para 27), this is secondary legislation with "the force of statute". The drafting style is markedly different and intended to create a relatively informal, user-friendly and simple scheme for and on behalf of consumers (*Shop Direct*). Nevertheless, the rules made under section 226(3) of FSMA 2000, such as DISP 2.8.2 R, form binding rules of subordinate legislation (*Bankole*, per Sales J, para 13). Consequently, an ombudsman has no discretion to disapply the jurisdictional rules.

150. **Fifth**, determining the substance of a complaint. I agree with the defendant that it is for the ombudsman, subject to rationality challenge, to determine what a complaint is about. As such, it is open to an ombudsman to conclude that the essence of a complaint is about an unfair relationship, even if an individual customer has not expressly voiced the complaint in such a way. There is no difficulty with this. But such a conclusion about the substance of the complaint does not remove the need for the complaint to comply with the jurisdictional rules in the binding subordinate legislation on time limits. This requires that there is an event (act or omission) within the stipulated time limit.

2. Interpretation

151. **First**, the nature of a complaint. A complaint is not a claim. Broadly, I accept the defendant's submission that the ombudsman's jurisdiction, while at times overlapping with legal causes of action, also extends more widely than that (*Clark v In Focus Asset Management & Tax Solutions Limited* [2014] 1 WLR 2502, per Arden LJ at para 74, citing *Letang v Cooper* as authority for the meaning of cause of action).

152. **Second**, the choice of language. I find merit in the FCA's submission about DISP 2.8.2 R that the rule's choice of language of "event" rather than "accrual of complaint" or "cause of complaint" is not a matter of careless drafting or inadvertence. It strongly indicates a deliberate choice distinguishing the scheme's approach to time limits from court-based limitation provisions (although the six-year period may be "aligned"). The defendant accepts that the choice of the word event is because the ombudsman's jurisdiction is "not intended to be confined to a cause of action."

3. Plevin/Smith

153. **First**, the FOS's change of approach. As I observed during the oral hearing, there can surely be nothing wrong with a public body reflecting on a decision (or decisions) of our highest court and adjusting its practice accordingly, as the FOS clearly tried to do. The question is whether that realignment is legally correct.

154. **Second**, taking account of *Plevin/Smith*. The ombudsman must take into account relevant law and regulations (DISP 3.6.4 R: "will" take into account). I accept that *Smith* did effect legal change and reversed the Court of Appeal's decision. The Supreme Court held that time begins to run when the credit relationship comes to an end. The question is the relevance *Smith* has for the ombudsman's jurisdiction.

155. **Third**, the origins of corrective responsibility. The Supreme Court did not mention "corrective responsibility" in either *Plevin* or *Smith*. The term appears to have been coined by the ombudsman, perhaps having received legal advice following the Supreme Court's decision in *Smith*. There is nothing wrong in this. *Smith* was delivered in October 2023; the four impugned decisions in July 2024. The pivotal effect of *Smith* to the FOS's change of legal approach is evident from the ombudsman decision in the Santander claim, where the ombudsman states (5/7):

> "The Supreme Court decision *Smith v RBS* was handed down in October 2023. It reversed the decision of the Court of Appeal and provided important new guidance on the assessment of when a relationship will be regarded as "unfair" within the context of the CCA and the responsibilities of a creditor within an unfair relationship. Mr B's complaint to Santander was made in November 2023 and referred to this service in March 2024. So, it is right that my decision should reflect the implications of the Supreme Court's decision for our jurisdiction, which was plainly impossible for decisions made by our service before October 2023."

156. **Fourth**, the significance of the label. It is surprising that if there has been the identification of a corrective responsibility by the Supreme Court that in two of its

substantial decisions it has not named it. But I do not regard lack of such a label as fatal. I judge substance to be more important than labels (cf. *R (Assurant) v FOS* [2023] EWCA Civ 1049, para 66, citing *Garnac Grain Co Inc v HMF Faure & Fairclough* [1967] 2 All ER 353 on the substance rather than label of agency relationships). Thus, if there were in *Plevin* and/or *Smith* the identification of what materially and in substance amounts to a corrective responsibility, despite the label not being attached, to my mind that would suffice. However, I judge that at para 19 of *Plevin,* Lord Sumption explains a different legal question: how a relationship may come to be unfair through omission in a non-duty situation, rather than establishing or identifying a positive responsibility to correct unfairness thereafter. *Plevin* is classificatory. It explains how a credit relationship may be classified as unfair in the problematic cases where there is omission rather than overt acts. In *Smith* terms, *Plevin* is most vitally about Stage 1. The fact that a relationship may remain unfair if not corrected is not the same as the court creating (discovering) a rule whereby a creditor has a positive responsibility to correct with the consequence that each failure to correct resets the running of the limitation period.

157. **Fifth**, non-correcting as an event. The defendant submitted that "not correcting the unfairness is an 'event'" and it is "very difficult to characterise the failure to correct in any other way than an event." I cannot accept that submission. The term "event", a critical term for the defendant's jurisdiction, cannot bear such a strained interpretation. That the term "event" cannot withstand the weight the defendant claims for it, is revealed by the implications for the interpretation, as explored at the substantive hearing. The defendant's central submission is that each failure or omission to correct unfairness is a separate daily "event" for limitation/jurisdictional purposes under DISP 2.8.2 R. I judge that the proposition is not rational. This claim is (a) not supported by *Plevin*, where the court determined a separate question entirely; (b) a misreading of *Smith*, that said nothing on the point. If reliance is placed on *Patel*, that was about accrual of a cause of action. The defendant's concept of corrective responsibility cuts across the statutory purpose of the subordinate legislation delimiting the jurisdiction of the ombudsman scheme and the ambition to prevent stale complaints.

158. **Sixth**, ordinary meaning. More broadly, the novel construction that the requirement for an event under DISP 2.8.2 R can be met by a series of daily failures to correct unfairness linguistically offends against the natural and ordinary meaning of the term "event". At trial, no one suggested that a relationship is an event. However, the "failure-to-correct-as-event" fares no better than the "relationship-as-event" formulation. The commonly understood (natural) meaning of "event" is a one-off occurrence, even if that event stretches over time (such as a football match, conceivably a five-day cricket Test Match). The choice of that language points strongly to the mischief DISP 2.8.2 R addresses: the exclusion of claims that are stale (*Shop Direct*). This is achieved in a simple way: requiring that time begins to run from an identified and readily identifiable act or omission - an event.

159. **Seventh**, the implications for certainty/predictability. The defendant's corrective responsibility/daily event notion inhibits the ability of financial service providers to predict their liability. It runs contrary to the precept of Sales J in *Bankole* (para 24) that "clarity is required for the benefit of all parties: complainants, respondents and the FOS as well, as to the operation of the time limit rules." It cuts across the desired objectives of clarity, certainty and predictability, all matters promoting the public interest.

160. **Eighth**, I judge that the corrective responsibility construct and the associated fresh daily event interpretation create a stifling effect on the ombudsman's ADR process due to the imposition of legal doctrine, as warned against by Rix LJ in *R (Heather Moor & Edgecomb) v Financial Ombudsman Service* [2008] EWCA Civ 642 ("*Heather Moor*"). At para 89, he said that:

> "An efficient and cost-effective and relatively informal type of alternative dispute resolution should not be stifled by the imposition of legal doctrine."

161. This legal suffocation runs sharply contrary to the speed, informality and user-friendliness vital to and characteristic of the operation of the ombudsman scheme. The notion that each day creates a new "event" as opposed to each week or each hour appears arbitrary and lacking rational foundation. This is materially different from the cause of action in *Patel* not accruing because the unfairness must be judged when the relationship ends.

162. **Ninth**, while there is no dispute between the parties but that the ombudsman can entertain a section 140A complaint, the error in the defendant's approach is to equate the fact that both the county court and the ombudsman can entertain (consider) disputes with an identity of approach. The pathways are different and the governing requirements also different. In a cause of action, time runs from accrual, when the unfair relationship ends (*Smith*, paras 38, 44-45, 66-67)). At para 45, Lord Leggatt says in terms:

> "45. Once the credit relationship ends, the position changes. A determination that the relationship was unfair to the debtor on the date when it ended can be made on that date or any later date. All the facts relevant to the determination are fixed when the relationships ends and nothing that occurs subsequently can affect the assessment of fairness. It can therefore be said that a cause of action has accrued so that the period of limitation starts to run."

163. By contrast, a complaint is administratively determined in a swift and informal process with a time limit contained in a binding rule of subordinate legislation (DISP 2.8.2 R) requiring a complaint within six years of the event complained of. I judge these differences to be important. They explain why the approach to a cause of action in the county court and a complaint to the ombudsman differ. The foundational purpose of the FOS, as noted by Singh LJ in *Shop Direct* at para 67, which is to provide a redress process alternative to the court that is "consumer-facing, user-friendly [and] free-of-charge". In rejecting the corrective responsibility concept proposed by the defendant, I draw on other key passages from *Shop Direct*. At para 46, Singh LJ said that DISP 2.8.2 R should be construed "on the basis that it is intended to produce a practical and commercially sensible result." Further, the interpretation of the rule should be "taken to be grounded in reality." I cannot think that the concept of a continuing series of fresh "events" is one grounded in reality. Singh LJ further noted at para 66:

> "the general nature of DISP … is not like conventional legislation. Its drafting style is very different and it is intended to create a relatively informal and simple scheme for and on

> behalf of consumers. It is also not intended for respondents to have to deal with highly complicated legal concepts."

164. The defendant's fresh daily "event" interpretation is complicated as a legal concept, far from the simplicity and lack of complexity that lies at the heart of the originating purpose of the ombudsman scheme.

165. **Tenth**, to the defendant's core submission that there is "no logic" to the suggestion that the county court "can consider the full section 140A jurisdiction but the ombudsman cannot" is the straightforward answer: a complaint and a cause of action belong to different regimes with different rules. To take one example, the ombudsman schemes rules state at DISP 3.5.1 R that its dispute resolution mechanism includes mediation:

> "The Ombudsman will attempt to resolve complaints at the earliest possible stage and by whatever means appear to him to be most appropriate, including mediation or investigation."

166. Thus, the ombudsman scheme offers dispute resolution that is alternative, not a different forum for exactly the same dispute resolution mechanisms. Indeed, the ombudsman's jurisdiction is inquisitorial not adversarial and ombudsmen can depart from the common law if they deem it justified (*R (Williams) v The Financial Ombudsman Service Ltd* [2008] EWHC 2142 (Admin), per Irwin J (as he then was), para 26). The forum is different; the jurisdiction is different; the rules are different, and deliberately so to promote speed and informality. To resolve a dispute (section 225 of FSMA 2000) is not always the same as to determine a legal claim. There are advantages and disadvantages to each process. The public has a choice. Alternative dispute resolution does not mean identical resolution of the dispute.

4. Criticism of the FCA

167. Despite the FOS's earlier narrower written criticism of the FCA, in oral submissions before the court, the defendant criticised the FCA as regulator for having "not considered" its statutory operational objective of consumer protection under section 1C of FSMA 2000. It is necessary to set out this specific statutory framework to understand the basis for the defendant's criticism. The FCA's general duties are found in Section 1B of FSMA 2000, which provides:

> "**1B The FCA's general duties**
>
> (1) In discharging its general functions the FCA must, so far as is reasonably possible, act in a way which—
>
> (a) is compatible with its strategic objective, and
>
> (b) advances one or more of its operational objectives.
>
> (2) The FCA's strategic objective is: ensuring that the relevant markets (see section 1F) function well.
>
> (3) The FCA's operational objectives are—
>
> (a) the consumer protection objective (see section 1C);

> (b) the integrity objective (see section 1D);
>
> (c) the competition objective (see section 1E).
>
> (4) The FCA must, so far as is compatible with acting in a way which advances the consumer protection objective or the integrity objective, discharge its general functions in a way which promotes effective competition in the interests of consumers."

168. The consumer protection objective is set out at section 1C, and states:

> "1C The consumer protection objective
>
> (1) The consumer protection objective is: securing an appropriate degree of protection for consumers.
>
> (2) In considering what degree of protection for consumers may be appropriate, the FCA must have regard to—
>
> (a) the differing degrees of risk involved in different kinds of investment or other transaction;
>
> (b) the differing degrees of experience and expertise that different consumers may have;
>
> (c) the needs that consumers may have for the timely provision of information and advice that is accurate and fit for purpose;
>
> (d) the general principle that consumers should take responsibility for their decisions;
>
> (e) the general principle that those providing regulated financial services should be expected to provide consumers with a level of care that is appropriate having regard to the degree of risk involved in relation to the investment or other transaction and the capabilities of the consumers in question;
>
> (f) the differing expectations that consumers may have in relation to different kinds of investment or other transaction;
>
> (g). . . . .
>
> (h) any information which the scheme operator of the ombudsman scheme has provided to the FCA pursuant to section 232A."

169. By intervening and making submissions that essentially align with the claimant banks, I judge that the FCA has advocated a construction of the defendant's jurisdiction that is correct in law. That must be "compatible with" the FCA's general duty. The degree of consumer protection it is the duty of the FCA to help secure is what is "appropriate". By supporting a legally correct interpretation of the defendant's jurisdiction, the FCA

is advancing its strategic objective of ensuring that relevant markets "function well". The FCA's statutory objective of consumer protection is not a protection-at-any-cost mandate. That would plainly be inappropriate.

170. Therefore, I judge that the FCA has acted in accordance with its statutory duty, not in dereliction of it.

5. Conclusion: Route 1

171. The corrective responsibility (Route 1) approach to the defendant's jurisdiction is wrong in law.

IX. Ground 1: Route 2 (Acts)

172. Route 2 of the jurisdictional pathways asserted by the defendant involves the following argument: events (relevant acts/omissions) within the six-year period extend the range of the defendant's jurisdiction to potentially permitting investigation of events during the entire credit relationship irrespective of how remote in time and appropriate redress. The defendant emphasises that the redress under section 229 of FSMA 2000 is not articulated as being restricted to "events" complained of.

A. Submissions

173. The relevant events (acts or omissions) relied on by the defendant are set out in helpful summary form in its supplementary skeleton argument (DSS, para 2(b)) in this way:

> "The alleged acts (or omissions) within that six-year period which were complained about included by way of specific and various examples: an increase in a credit limit (Barclays); requiring repayment of allegedly unaffordable amounts (Barclays and Vanquis); imposing fees and charges (Barclays and Vanquis); the act of continuing to provide credit (all); specifically allowing the prolonged and continued use of an overdraft facility (Santander and NatWest); and failing properly to monitor use of an overdraft facility, resulting in significant charges of interest (Santander and NatWest)."

174. The ombudsmen's decisions contain, the defendant submits, "multiple and specific references to acts". The decisions should, for recognised public law reasons, be read fairly as a whole. This last point I accept. The defendant acknowledges that the decisions do not (or do not always) identify the dates for each of these events. It submits that the events within the six-year period were "clearly sufficient" for the ombudsmen to conclude "correctly" that they had jurisdiction to consider the complaints and the whole credit relationship. The defendant refutes any suggestion that it is "rowing back" from its original position, as Santander puts it (C4SS, para 26). It submits that the defendant has jurisdiction "to consider the subsisting credit relationship as a whole at the merits stage: not simply by way of "background", but as part of determining what is fair and reasonable." However, no redress decision has been made by any

ombudsman as that is a "merits-stage determination". It is therefore premature to anticipate it now.

175. These submissions caused controversy. All the other parties submitted that the defendant sought to retreat from its initial position. The basis for their concern is crystallised in the following submission (DSS, para 36):

> "As for the potential implications for redress, the Claimants … argue that any compensation the Ombudsman might award at the merits stage must be limited to redress for acts which occurred in the six years preceding the complaint. The short answer is that such submissions are premature. The question of the lawfulness of any money award an Ombudsman might make following a determination on the merits, even if the events complained of do not include any analysis of omissions relating to the corrective responsibility, simply has not arisen. The issue for this Court is limited to whether the jurisdiction decisions which have been made are correct."

176. The concern of the remaining parties was deepened by the next paragraph:

> "37. If the Ombudsmen were to go on to find that the events complained of involved unfairness in the relationships and that the unfairness arose at a point earlier than six years before the complaint, and if a money award rather than a direction (DISP 3.7.11R) were contemplated, the Ombudsmen would need to decide what "fair compensation" for financial loss (DISP 3.7.2R) would be. This would require the Ombudsmen to consider, on the facts of the case, any ongoing economic consequences for the consumer, as well as other potentially relevant factors, such as any delay in bringing the complaint as the Ombudsmen have indicated they would do consistent with the principles expressed in *Smith*."

177. The submissions on all sides were advanced energetically, and the MAS5 case was widely cited (*R (Mortgage Agency Service Number Five Ltd) v FOS* [2022] EWHC 1979 (Admin) ("*MAS5*"). It is necessary to examine it.

B. MAS5

178. In 2006, Ms Davies (the interested party) took out a mortgage on a property in Wales that the claimant the Mortgage Agency Service Number Five Limited ("MAS5") took over in 2007. The mortgage was subject to a fixed rate that would revert to a Standard Variable Rate ("SVR") after a certain period. Ms Davies complained to the ombudsman about the last four SVR changes from 2009. The value of the property had fallen below the amount borrowed and Ms Davies felt herself a "mortgage prisoner". Ms Davies made a written complaint to the lender on 31 October 2018, which the parties took as the endpoint for the countback period of events the ombudsman could consider. No resolution resulting, she complained to the ombudsman on 21 December 2018.

179. In her provisional decision dated 12 February 2021, the ombudsman stated:

> "In considering the fairness of each of the monthly charges from 31 October 2012 onwards, we need to consider all relevant matters contributing to those events. That means we will need to consider the whole history of the interest rate, including before 31 October 2012. That is because the interest variation decisions taken by MAS5 from 2008 to 2012 are important context for the later monthly charges. MAS5 may have determined, in part, the rate that was charged during the period we can consider."

180. On 26 August 2021, the ombudsman (Emma Peters) decided that the FOS was only able to investigate Ms Davies' complaint about the interest rate that the claimant applied to her mortgage from 31 October 2012 (the six-year date). There was no challenge to that decision, which was in the claimant's favour. But the ombudsman repeated the approach in her provisional decision that "As part of this we will be reviewing the history of Mrs D's mortgage from the time it reverted onto the SVR, i.e. January 2009". In the final decision letter, the ombudsman stated:

> "And so I consider it appropriate and proper that we now take into account the whole history of the MAS5's SVR since Mrs D's mortgage reverted to it on 31 December 2008 in order to determine whether charges from 31 October 2012 onwards were fair. The historic changes made to the interest rate are relevant factors to the interest rate applied over the period I can consider. I believe that it's important background Mrs D's complaint about the interest rate applied to this mortgage from October 2012 onwards.
>
> I see this as being an essential part of establishing the fairness of Mrs D's interest rate from 31 October 2012 onwards. Whether historic variations have led to unfairness during the period of time we can consider Mrs D's complaint is a matter that would be explored as part of the merits investigation of this complaint. Otherwise we won't be looking at the full picture and all the circumstances of the case when we consider whether charges from 31 October 2012 were fair."

181. The claimant submitted that this part of the decision was an error of law. This is because the consideration reached back further than the ombudsman's jurisdiction permits, exceeding the six years before the complaint was made in 2018. The defendant submitted that the ombudsman was clear that complaints about charging events prior to October 2012 were "out of time", as she said in her witness statement at para 2.4, where she concluded that she did not "have jurisdiction to consider complaints about charging events that took place more than six years before the complainant made her complaint." By considering the entire credit relationship, the ombudsman was not asserting a wider jurisdiction. The FOS relied on the much-cited observation of Laws LJ in *R (Khatun) v Newham London Borough Council)* [2004] EWCA Civ 55 at para 35 that

> "… where a statute conferring discretionary power provides no lexicon of the matters to be treated as relevant by the decision-

> maker, then it is for the decision-maker and not the court to conclude what is relevant subject only to *Wednesbury* review."

182. Griffiths J agreed with the FOS (para 75). He explained at paras 85-86:

> "85. … When the Ombudsman's actual decision is examined, there is nothing wrong with it so far as the claim to jurisdiction is concerned. She accepts complaints about interest charging events after 31 October 2012 and she rejects complaints about interest charging events (or, indeed, any losses) before 31 October 2012.
>
> 86. The Ombudsman's proposed consideration of interest variations before 31 October 2012 is firmly set as background, or context, for the complaints under consideration about interest rate charges from 31 October 2012 only. This is a point made repeatedly in the last three paragraphs of my quotation from the final decision letter in para 33 above. The Ombudsman is not considering them as free standing complaints or as complaints at all, within the meaning of DISP 2.8.2 R. There is, therefore, no basis for challenging her final decision on the basis that it accepts jurisdiction over complaints which are out of time."

183. Griffiths J then continued at paras 88-89:

> "88. These are not jurisdiction findings in relation to events before 31 October 2012. In these passages, the Ombudsman is exercising her discretion under section 228 of FSMA and DISP 3.6.1 R to decide what she ought to look into before determining "what is, in [her] opinion, fair and reasonable in all the circumstances of the case" in respect of interest charges after 31 October 2012 and not before. This discretion is broad, and it is not limited to the sort of narrow analysis that might be appropriate to a jurisdiction founded (as hers is not) only upon legal causes of action which, once accrued, cannot be revived for limitation purposes by reference to the working out of their consequences. The Ombudsman is entitled to form the opinion that she has expressed about what she will take into account when deciding what is "fair and reasonable in all the circumstances of the case". The passages which I have quoted appear to me to be neither irrational nor unlawful, and I see no reason why they should be quashed.
>
> 89. The Ombudsman has ruled out "complaints" before 2012. The interest rates increases before 2012 have not been accepted as "complaints" and no financial or other redress will be considered in respect of them or in respect of monthly interest charges based on them which were required before 31 October 2012. But that does not mean that they cannot be considered (as the Ombudsman proposes) as part of the background to the complaints that are admittedly within her jurisdiction. It is a

> matter for her to decide whether it is "fair and reasonable" to impose those charges, and she is entitled to consider the background, including the setting of the prevailing rate, when doing so. It would be absurd to exclude the whole background before 31 October 2012 from her consideration."

184. Griffiths J dismissed the application for judicial review.

C. Discussion

185. While *MAS5* was extensively cited by the parties, they drew support from it in different ways. I make one initial observation. The defendant sought to distinguish *MAS5* as it was not governed by the CCA 1974 (DSS, para 35). For my part, this is a misunderstanding of the relevance of Griffith J's judgment. The decision illustrates that it is appropriate to consider the wider (even entire) credit relationship as context. However, those contextualising events beyond the six-year period do not themselves fall within the ombudsman's investigative and redress jurisdiction. That was the ombudsman's approach in *MAS5* and not doubted in the judgment.

The nature of the dispute

186. I am persuaded that in its skeleton argument for the part-heard hearing, the defendant sought to resile from its earlier-stated position. This caused much unnecessary forensic heat and disputation. The court was required to seek precise clarification from the defendant during the oral hearing about how it put its case on this question. Once such clarification was elicited, the issue - and the legal answer – was plain.

187. The argument developed in writing by the defendant illustrates the point. The defendant's skeleton argument (DSS, para 8) states, "the Ombudsmen expressly identified specific acts because these were part of their reasoning for concluding that the complaints come within the Defendant's jurisdiction." The defendant continues at para 29 that in each ombudsman decision, the ombudsman "rationally and correctly identified acts - in the context of subsisting credit relationships - that they had taken place in the six years preceding the complaints." Further, at para 32, the defendant submits that, corrective responsibility aside, such acts "are patently sufficient in and of themselves for the Ombudsmen to conclude correctly that they had jurisdiction to consider the complaints." Then at para 34, the defendant submits that to determine the complaints and the fairness of the credit relationship will require a consideration of "the relationship as a whole, which includes acts/omissions which took place earlier (including formation of the credit relationship itself)."

188. All this begs the question: over what events does the defendant's jurisdiction extend? The claimants and intervenor submit that in its further written submissions the defendant seeks to turn away from its initial position on jurisdiction. The criticisms were voiced in different ways but come to the same thing: the defendant was retreating from its initial position in which it asserted investigative and redress jurisdiction over the entirety of the credit relationship. The question before this court is not and has never been a merits decision, thus it will not do for the defendant to submit that it is "premature" to consider the lawfulness of any money award "following a decision on the merits … simply has not arisen" (DSS, para 36).

189. To my mind, the correct answer is reached by avoiding conflating an "is" with an "ought". The "is" question is whether there is jurisdiction to provide redress for the entire credit relationship. The "ought" question is different: whether in any individual case the ombudsman ought to provide any particular redress on the merits - a conceptually distinct question. As a reminder, Agreed Issue 1 supplied by the parties at the outset of the trial is whether the defendant's:

> "conclusion in the relevant final decision **that it had jurisdiction over the entirety of the complaint** referred to it [is] wrong as a matter of law by virtue of its interpretation and application of the time limit in DISP 2.8.2 R(2)." (emphasis provided)

190. To return to the meaning of jurisdiction over a complaint, it means the "power to enquire into such a claim" and consider "whether any relief is called for" (*Symonette*, para 32). Given the equivocal comments in the defendant's supplementary skeleton argument, and the consternation of the other parties, the court sought clarification from the defendant at the resumed hearing. The defendant then confirmed that the ombudsman "can grant redress for everything right from the start of the credit relationship". This clarification is vital. After this exchange, the defendant's case can be seen in a clearer light.

191. The significance is that the defendant contends for a second route to assert jurisdiction over the entire credit relationship in addition to the Route 1 corrective responsibility. Route 2 is based on acts within the six-year period opening up jurisdiction over the entirety of the credit relationship. The critical point is that the defendant claims that acts exceeding six years before the complaint are said to be not just background in *MAS5* terms, but to fall within jurisdiction as being themselves capable of merits assessment and receiving redress– these historic acts are part of "everything". The defendant claims jurisdiction to grant redress for "everything" within the history of the credit relationship.

Identification of acts

192. The claimants' understanding of the acts initially complained of was set out as follows:

- **Barclays claim (Mr Domer)**. The act appears to be the decision to increase the credit limit. The last increase was in June 2018. Mr Domer's complaint was made in October 2023. It is within the six-year period, but events prior to October 2017 are not.

- **NatWest claim (Mr Gajraj)**. The act again appears to be to increase the credit limit. The last increase was in July 2007. Mr Gajraj's complaint was made on 31 August 2023.

- **Vanquis claim (Ms Campbell)**. The acts appear to be to increase the credit limit. The last increase was in January 2017. Ms Campbell made her complaint on 22 August 2023. Therefore, no credit limit increase is within the six-year period.

- **Santander claim (Mr Brown)**. It appears the act complained of is the decision to grant an overdraft prior to December 2014. The complaint to Santander is dated 27 November 2023. Therefore, the act is beyond the six-year period.

193. I must add, in fairness to the defendant, that each ombudsman recorded in the impugned decision an understanding of the complaint as being about participation in and perpetuation of an unfair relationship. That said, I concur with the various submissions of the claimants and the intervenor that the defendant did not initially pursue the proceedings and resist the applications for judicial review on the basis that an act within the six-year period conferred jurisdiction on the entire credit relationship. Further, the ombudsmen decisions were not made on that basis. It is clear that jurisdiction was asserted on the corrective responsibility basis, not on a single act opening up the entirety of the credit relationship. The claimants expressed concern at the reliance on the purported "failure to monitor" credit facilities, submitting that this was a new and previously unheralded act.

194. These are in themselves formidable objections. That said, there has been substantial analysis by the defendant to support the submission that the ombudsmen identified relevant acts and/or omissions. Overall, it is the case that some acts within the six-year period were identified. Others were not. All the parties have had the opportunity to make submissions on this question at the part-heard hearing and I judge that no one was prejudiced by the defendant's developing stance on this question. Ultimately, it seems to me that Route 2 is another hard-edged question of law and I examine the submissions in that light.

195. To return to the jurisdictional question at stake, the analysis of acts within the six-year period is irrelevant if there is no lawful mechanism to convert identified acts within the six-year period into jurisdiction to entertain complaints about – that is, investigate and provide redress for – the entire credit relationship. I turn to the two mechanisms proffered by the defendant.

Mechanisms

Mechanism 1

196. The defendant pointed to DISP 3.7.2 R and 3.1.1 G. It argues that the terms of the provisions reveal a breadth of the conferred discretion to determine what is fair compensation or redress and just and appropriate directions. Supporting this submission is the point that DISP 2.8.2 R should not be construed as "narrowing" the ombudsman's jurisdiction. Given the wide redress discretion, the defendant submits that it is open to the ombudsman to "effect a complete reset of the credit relationship", or put more succinctly, "unwind" it. Such an approach would be "harmonious" with that of the court and the defendant would have "the same flexibility the court has". There are difficulties with this argument. I examine two immediate ones now.

197. **First,** the FOS submits that in FSMA 2000 the award or redress is "not articulated" as the power to award redress for the complaint or the event(s) complained of. The defendant points out that section 229 and the rules in Chapter 3.7 of the Handbook are wider. First, the ombudsman may award "fair compensation" through a "money award" beyond what a court may award (DISP 3.7.2 R). Second, under DISP 3.7.11 R, the

ombudsman may require the respondent to "take such steps" the ombudsman considers "just and appropriate (whether or not a court could order those steps to be taken)".

198. If this is a suggestion that the sheer breadth of the ombudsman's discretion means that the decision-maker may disregard the events complained of, it seems to me that this misses the point. This is losing sight of what a complaint is about. It is defined. The complaint itself is the notification of person's "dissatisfaction". But the substance of an admissible complaint under the ombudsman's compulsory jurisdiction is defined under statute by section 226(1) of FSMA 2000 as relating to "an act or omission" by a provider of regulated financial services. Therefore, it seems to me that one must connect the award or redress to admissible acts or omissions, to the substance of the complaint. Certainly, an ombudsman should have regard to what is fair compensation and may direct just and appropriate steps, but that does not mean that events that are otherwise out of time thereby become in-time and within jurisdiction. The breadth-of-redress argument comes back to the fundamental jurisdictional question and to my mind cannot escape it.

199. It is true that the ombudsman may grant redress beyond what a court may award. But that is not and cannot be licence to make awards for acts or omissions that are otherwise time-barred (or even grant redress unconnected to complained of acts or omissions, if that is the suggestion). Such a construction substantially undermines the purpose of creating and enforcing time limits. That awards are connected to acts or omissions finds support elsewhere in the DISP rules. DISP 3.7.4 R states:

> "(1) The maximum money award which the Ombudsman may make is:
>
> (a) £350,000 for a complaint concerning an act or omission which occurred on or after 1 April 2019; and
>
> (b) £160,000 for a complaint concerning an act or omission which occurred before 1 April 2019."

200. Therefore, the rule ties the limit to the money award to the date that the act or omission occurred. This suggests at the very least suggests that the act or omission possesses some significance for the redress by way of money award. By way of historical background, the relevance of the 1 April 2019 date is that following public consultation, the FCA published a policy statement stating that there should be an increase in the earlier money award limit of £150,000 to £350,000 (and marginally increased the previous limit to £160,000). This focus on the date of the act or omission seems to me to cut across any suggestion that the ombudsman's redress discretion is not necessarily connected to the act or omission complained of. DISP 3.7.4 R indicates otherwise. The redress must rationally refer back to admissible and in-time acts and omissions complained of.

201. Put another way, I cannot think it is fair and reasonable or just and appropriate to make an award for events that are prima facie out of time under the time limit that Parliament decreed that the statutory regulator create. DISP 2.8.2 R provides the rule. It has a six-year time limit. That rule of secondary legislation is expressly designed to limit the class of complaints the ombudsman may entertain. The FOS's interpretation of *Plevin* and *Smith* is that time does not run for that rule of secondary legislation while unfairness

remains uncorrected. I judge that this construction is wrong in law. Therefore, while the redress may be different, even wider, than a court would award, it must nevertheless remain within the four corners of the FOS's jurisdiction. Discretion is not synonymous with disregard of jurisdiction.

202. **Second**, at the heart of the defendant's submission is equating a wide redress discretion (which does exist) with an expanding of the age of events that the wide redress can be granted for (claimed to be potentially for "everything"). They are two separate things. A wide discretion in granting redress is not the same a redress over as wide range of events. One is about the breadth of available remedy for any qualifying event. The other is about which events qualify. The defendant's argument is founded on an erroneous conflation of range of redress with range of qualifying event.

203. Further, the logic of the FOS's position is that every act that is prima facie out of time in DISP 2.8.2 R terms as being beyond six years, even if by decades, is potentially brought within the scope of the defendant's jurisdiction once there is one act within six years of a complaint. I reject it.

Mechanism 2

204. The defendant submits that if the ombudsman is considering the credit relationship as context, why could the ombudsman not "also use the exercise for redress". The defendant submitted that if the whole credit relationship is "legitimate for the assessment of fairness" (in *Smith* terms) then at the same time it can be "legitimate for the assessment of redress". This confuses convenience with principled jurisdictional basis. The argument is unconvincing. Expediency is not the same as a valid legal basis for jurisdiction. I cannot accept this second argument.

Absurdity

205. There was substantial argument on the question of absurdity. One example suffices to illustrate the point.

206. The essential facts of Mr Gajraj's case (NatWest claim) may be briefly revisited for these purposes. Mr Gajraj applied for and was granted an overdraft limit of £150 in December 1998. It was progressively increased until it reached £3000 in July 2007. He complained to NatWest on 31 August 2023. However, on the defendant's construction of its jurisdiction, it is open to the ombudsman to grant redress for events in the "previous century", as counsel for NatWest put it, if there is an act within the six-year period. The defendant claims that the qualifying act in Mr Gajraj's case to be the continuing participation in and perpetuation of an unfair relationship. I note that in its Summary Grounds of Resistance (para 77), the defendant states that "perpetuation" is said to indicate "continuing" in an unfair relationship and not taking "the type of corrective action" required. Thus, this argument relies on the validity of the wider corrective responsibility concept that has been rejected.

207. Nevertheless, and for the sake of discussion, if a qualifying act were identified within the six-year period (and this is disputed by NatWest), on the defendant's construction redress would be available for events 19 years prior to the ostensible DISP 2.8.2 R six-year time limit. On the face of it, this is a puzzling state of affairs. When the defendant was invited to explain how an ombudsman may approach a situation similar to Mr

Gajraj's, the defendant's response was that undesirable outcomes (my summation) can be prevented by the exercise of the ombudsman's discretion, and this was addressed by Lord Leggatt in *Smith*. I next examine this argument.

Smith and absurdity

208. The defendant (DS, para 18(d)) submits that the absurdity argument was considered rejected by the Supreme Court in *Smith*. Lord Leggatt considered a hypothetical case postulated by the bank in *Smith* (paras 54-60, "The absurdity argument"). For reasons similar to those articulated by Lord Leggatt, the defendant invites this court to reject the claimants' attempts to "revive these unmeritorious absurdity arguments". I am not persuaded that the position is so straightforward. It is important to be clear what Lord Leggatt discussed.

209. In *Smith*, the bank argued that the approach to time limits whereby a claim under section 140B may be brought at any time within six years of the credit relationship ending "leads to absurdity" (para 54). It must be remembered that the bank contended that the cause of action accrues for the purposes of section 9 of the Limitation Act 1980 when each PPI payment is made (para 32). Lord Leggatt rejected this argument. In support of its accrual-on-payment argument, the bank offered the example of a claim complaining about interest paid at an unfair rate for only the first year of a 25-year loan (para 54). The bank submitted it would be absurd if such a claim could be pursued over 30 years after the interest was paid, despite the fact that the interest rate applied during the last 24 years of the loan was fair.

210. Lord Leggatt made two points. One might view them as divided into the *Smith* Stage 1 and Stage 2 questions. First, on the classificatory Stage 1 question, he said that unfairness 30 years previously due to "extortionate rates" (para 55) that were not subsequently repeated would be unlikely to cause a difficulty or lead to absurdity because it would be hard to imagine that the credit relationship "as a whole when it ended" would be seen as unfair (para 56).

211. Second, on the remedial Stage 2 question, Lord Leggatt said that the court would retain its section 140B redress discretion and it "seems inconceivable that the court would think it just to make such an order" (para 57).

212. One must not lose sight of what the absurdity claimed by the bank went to. It argued that due to the purported absurdity, the proper understanding of accrual is PPI payment, not the end of the relationship. This hypothetical is about when a cause of action accrues in a civil claim and time begins to run under section 9 of the Limitation Act 1980. The case before the court now is not concerned with civil claims, nor the Limitation Act 1980. The ombudsman's jurisdiction was never considered in *Smith*. There was no reason to do so. The absurdity pointed to by the claimants and the intervenor in the instant case is the notion that a single in-time event opens up jurisdiction to grant redress for the entire credit relationship including all the otherwise stale and out-of-time acts. This strikes me as very different. I find no support for the defendant's submission in the analysis of absurdity in *Smith*.

General absurdity

213. I next examine absurdity more widely. To begin, I note the approach to statutory interpretation in *Bennion, Bailey and Norbury on Statutory Interpretation* (8th Ed., 2020) ("*Bennion*"). The authors in *Bennion* explain the presumption against absurdity at para 13.1:

> "The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature. Here, the courts give a very wide meaning to the concept of 'absurdity', using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief."

214. Therefore, the starting-point is the presumption that Parliament does not intend to bring about absurd results, including results that are unreasonable or unworkable. Therefore, if a natural and foreseeable exercise of the jurisdiction is likely to result in manifest absurdity in hundreds or potentially thousands of complaints, which can only be prevented by ombudsmen having to exercise their redress discretion to prevent absurd outcomes, that strongly points to the interpretation of jurisdiction being wrong. If you are required to save the ordinary exercise of your jurisdiction from absurdity through the exercise of discretion, that is a clear indicator that you have misconstrued your jurisdiction. Such a construction creates an obvious and disproportionate "counter-mischief", as the *Bennion* authors put it. The absurdity principle is not determinative, but indicative and supportive. One expects a valid legal interpretation of jurisdiction to survive encounters with the run of real-world cases. Further, the purpose of the ombudsman jurisdiction is not to perfectly mirror court proceedings, but to provide something different: an informal ADR mechanism not hidebound by legal technicality and doctrine (*Heather Moor*, para 89; *Shawbrook*, para 12). Indeed, it is permissible for the defendant to provide redress in cases where there is no civilly actionable claim and to resolve the dispute through mediation. Under DISP 3.6.4 R defendant is required to "take into account" relevant law, not slavishly mimic it, and may depart from the law in appropriate circumstances.

215. I concur with the sentiment of the claimants' submissions (albeit voiced in trenchant language) that the mechanisms claimed by the defendant render the limitation provision in DISP 2.8.2 R devoid of meaning. I judge it unlikely that one in-time act can open up jurisdiction over the entire credit relationship in this way. As Lord Hodge said in the Supreme Court in *Project Blue Limited v HMRC 2* [2018] UKSC 30 at para 31:

> "it is without question a legitimate method of purposive statutory construction that one should seek to avoid absurd or unlikely results."

216. I add that to the extent that the defendant frames its approach as a failure to monitor the account and/or assist customers in difficulty with the "economic consequences" of credit decisions or a "participation in and perpetuation of allegedly unfair relationship" (DSS, para 2(c)), this is also flawed. I note that within each impugned decision, there is reference to the idea of participation/perpetuation. As this is said to be a failure to correct unfairness, this does little more than dress the corrective responsibility argument

in different attire. There is beneath the dressing a similarity of argument about corrective responsibility, and, it seems to me, a similar fallacy. I am not persuaded by it. It still fails to explain how such participation/perpetuation within the six-year period extends the defendant's jurisdiction to the entire credit relationship. It thus suffers from the same lack of coherent extending mechanism.

217. The claimants and the intervenor complain that the defendant is seeking to advance impermissible ex post facto reasoning or retrospective justification and not the reasoning relied on by the ombudsmen for their assertions of jurisdiction. Such an approach has been repeatedly queried by the senior courts (*R v Westminster City Council Ex p. Ermakov* [1996] 2 All E.R. 302 ("*Ermakov*"), 315-316)). As the Court of Appeal said in *R (United Trade Action Group Limited) v Transport for London* [2021] EWCA Civ 1197 (para 125(7)) while elucidating *Ermakov*, "Judges will usually be able to distinguish between genuine elucidation of a decision and impermissible justification or contradiction after the event." There is force in the concerns of the other parties. But it little assists descending into intricate analysis of the rival submissions on this. The fundamental point is that the defendant has failed to identify any valid legal mechanism for conferring jurisdiction over the full credit relationship.

D. Conclusion: Route 2

218. As the FOS recognises (DSS, para 42), the question is a "binary" one: either the acts (Route 2) analysis confers on the defendant jurisdiction to entertain complaints for the whole duration of the credit relationship or it does not. It does not. I judge that the defendant's characterisation of the issue to be wrong. It submits (DS, para 18(c)):

> "By excluding acts and omissions going back further than six years before the complaint, the Cs' interpretation would preclude the D from considering the entirety of the creditor-debtor relationships in relation to such complaints. That would be directly contrary to the Supreme Court's unequivocal exposition of the law and would lead to incoherent results."

219. This does not represent the case advanced by the other parties. They accept that the defendant can consider the entire credit relationship to determine whether the relationship is unfair in section 140A terms. But the time limit in ombudsman's jurisdiction is based on an "event complained of". No one disputes that. To the extent that the defendant persists in a prematurity argument (DSS, paras 2(b), 36), it is misconceived. There is no reason of principle preventing the court from ruling on a dispute about jurisdiction before an ombudsman has made a merits decision (*MAS5*; *R (Brinsons) v FOS* [2007] EWHC 2534 (Admin), para 29).

220. It is unnecessary to overcomplicate this. The proper approach to DISP 2.8.2 R is that acts exceeding six years before a complaint can be considered (a) by way of background and (b) in determining whether a remedy for an in-time act is appropriate, and if so, what is fair and reasonable. However, events preceding the six-year period cannot receive a separate remedy of their own.

221. The two extending mechanisms proposed by the defendant are without merit. The credit relationship preceding the six-year period may be relevant to context and fairness, but not to jurisdiction.

X. Overall conclusion: Ground 1

222. I step back and review the overall effect of my decisions on Route 1 and Route 2.

223. It seems to me that the defendant's approach, proceeding by either route, seriously and unjustifiably undermines not only the rationale of the statutory imperative under section 228 of FSMA 2000 to create a time limit, and the FCA's embodiment of it in DISP 2.8.2 R, but the spirit and statutory purpose of creating the Financial Ombudsman Scheme to provide swift and informal dispute resolution removed from the snares of legal doctrine. I reach this conclusion by noting the directory way in which DISP 2.8.2 R is framed ("cannot consider"). Once a complaint is referred in contravention of the rule, it cannot be considered unless there are "exceptional circumstances" (DISP 2.8.2 R (3)). Exceptional circumstances are not argued here. Nor is there consent between the parties for the complaint to be entertained even though it is outside the DISP 2.8.2 R jurisdiction rule.

224. The interpretation of the rule (by either route) proposed by the defendant is inconsistent with the fourth proposition enunciated by Singh LJ in *Shop Direct*. It does not produce "a practical and commercially sensible result", but one that results in the ombudsman having to contend with stifling in legal doctrine in *Heather Moor* terms in what has been created by Parliament as a swift and informal administrative ADR process. To be required to save the operation of the claimed jurisdiction from absurdity by the exercise of discretion illustrates a foundational flaw in the analysis.

225. The duty to take the law into account under DISP 3.6.4 R is not a licence to transplant legal doctrine in a way that materially corrodes the originating purpose and object of the statutory scheme you are transplanting that body of legal doctrine into. The defendant submits that the four complaints "fall squarely" within the jurisdictional rule. I find that they do not. The ombudsman erred in law in each of the four jurisdiction decisions.

226. Prima facie, Ground 1 succeeds, subject to the defence under section 31(2A) of the Senior Courts Act 1981 ("section 31(2A)") examined below in Section XII.

XI. Ground 2 (A1P1)

227. Barclays alone challenges the ombudsman's decision on the A1P1 ground. Protocol 1 of Article 1 of the ECHR is concerned with the protection of property. It provides:

> "Protection of property
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the

> conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties."

228. Barclays submits that the ombudsman's construction of section 226 of FSMA 2000 and DISP 2.8.2 R exposes lenders to financial liability of undefined scope and without limit of time as "it will always be possible for FOS to characterise a complaint as concerning the full duration of the relationship (however long it has been ongoing) and entertain the entirety of the complaint". This results in an unlawful, unjustified, and disproportionate interference with the right to peaceful enjoyment of possessions under A1P1. Consequently, it is the duty of the FOS and the court (as public authority) under section 3 of the Human Rights Act 1998 to construe section 226 of FSMA 2000 and DISP 2.8.2 R in a way that avoids such unlawful interference.

229. Barclays relies on *OAO Neftyanaya Kompaniya Yukos v Russia* (2012) 54 EHRR 19. The Strasbourg court held on the facts that a substantial and unforeseeable change by the Russian courts in the interpretation of the applicable limitation rule amounted to an unlawful interference with A1P1. The court said at para 570:

> "Limitation periods, which are a common feature of the domestic legal systems of the Contracting States, serve several purposes, which include ensuring legal certainty and finality and preventing infringements of the rights of defendants, which might be impaired if courts were required to decide on the basis of evidence which might have become incomplete because of the passage of time".

230. The defendant submits that this argument is misconceived. Even if A1P1 were engaged any interference with property would be in accordance with the law as prescribed under FSMA 2000, and with the ombudsman obliged to take into account the law under section 140A on unfair relationships. Accordingly, this cannot bear the description of being "unlawful, unforeseeable, or disproportionate as a matter of principle".

Conclusion: Ground 2

231. Ground 2 is essentially a quality of law argument. It is submitted that the uncertainty of the corrective responsibility concept transgresses the minimum quality of law requirement and confers on the ombudsman "a large and unguided discretion" that lacks "principle or constraint". This is an additional objection to the objection to the defendant's corrective responsibility argument. As argued, the concern appears to be the uncertainty from the ombudsman considering "the full duration" and the "entirety of the complaint".

232. I accept the defendant's submission that key principles were summarised by the Court of Appeal in *R (Miller) v College of Policing* [2021] EWCA Civ 1926 (see particularly

para 84). At para 85, the Court of Appeal held that the question of foreseeability, which is the core of the first claimant's concern, must be understood in a realistic way, appreciative of how things operate in the real world. Vitally, foreseeability is not the same as absolute certainty. This seems to me to be an important distinction. I am not persuaded that A1P1 adds to the analysis in this case. As noted, the ombudsman has a duty to take relevant law into account. It having been accepted that the ombudsman is competent to consider a section 140A complaint, it is clear from the Supreme Court in *Smith* that the ombudsman should assess whether the relationship is unfair if continuing at the point of assessment without narrowly confining the examination to the most recent developments. However, I remain unclear how the A1P1 argument relates to the question of ombudsman jurisdiction, which is the only matter for determination in this substantive hearing.

233. In any event, I have concluded that there is no corrective responsibility. If there is an event within six years of the complaint (not the relationship, not the failure of corrective responsibility), the ombudsman may have to reach back beyond the six years to consider the context of the relationship. This would be subject to the exercise of discretion mentioned in *Smith* by Lord Leggatt about delay as a basis of curbing section 140B redress or even whether the relationship as a whole is unfair. But I cannot see that the A1P1 argument, given my conclusion that corrective responsibility does not exist to create DISP 2.8.2 R "events", adds anything of substance, attractively and concisely argued as it was by Mr Ratan on behalf of the first claimant, to whom the court offers its thanks.

234. Ground 2 fails and is dismissed.

XII. Section 31(2A)

235. The defendant's section 31(2A) defence was not pleaded. Section 31(2A) provides as relevant:

> "(2A) The High Court—
>
> (a) must refuse to grant relief on an application for judicial review …
>
> …
>
> …
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

236. The conduct complained of is the legal error about scope of jurisdiction. It cannot be right that it is highly likely that the outcome would not have been substantially different if the error had not occurred. The FOS claims a jurisdiction for the whole of the credit relationship, a fundamental error of law. This is the "legal error or flaw which would

justify the grant of a remedy in judicial review" (*R (Bradbury) v Awdurdod Parc Cenedlaethol Bannau Brycheiniog (Brecon Beacons National Park Authority)* [2025] 4 WLR 58, per Lewis LJ at para 70).

237. I note that if the statutory test is met, the court's duty is to refuse relief ("must refuse to grant relief"). That does not arise here as the test is not established. That is because a proper legal analysis by the FOS would have resulted in a substantially different outcome for the applicants (the claimants) about the scope of the defendant's jurisdiction. If the ombudsmen had correctly interpreted the law, they would not have asserted jurisdiction over the entire credit relationship, including for events prior to the six-year period. In such circumstances, the court cannot find that it is "highly likely" that outcomes would have not been substantially different.

238. The likely alternative outcome has not been evidenced by the defendant. However, I concur with Bourne J in *R (CKT) v Twyford Church of England Academies Trust* [2025] EWHC 2396 (Admin) at para 270 that whether it is reasonable to expect evidence to show what would have happened "will depend on the facts". On this, I agree with the defendant that the filing of witness evidence would not much assist. This is because "the focus should be on the decisions themselves and on evaluating the significance of any error identified by the Court" (DSS, para 51(d)). However, I also concur with the claimants that there is nevertheless evidence indicative of what is likely to have happened absent the defendant's legal error. This comes in the form of the earlier decisions before the erroneous corrective responsibility approach was taken by the ombudsmen. These earlier decisions are substantially different – and narrower - on the question of jurisdiction.

239. I must say something about the – to choose a neutral term – modulations in the defendant's case. If the dispute between the parties were confined to whether any ombudsman had identified a relevant act within the six-year period, the claims would be very different: they would be in all likelihood rationality challenges. No rationality challenges have been made. A complaint within six years would be determined in the usual way under DISP 3.6.1R, and what is fair and reasonable would be assessed having regard to (but not separately redressing) any relevant relationship history before the six-year period. This is comparable to *MAS5* and gains statutory authorisation from section 228 of FSMA 2000. Distinct from this, these claims have been brought to challenge the assertion by the defendant of a new and expansive – what several claimants style "exorbitant" – jurisdiction. This is a different question of law. The impugned decisions are not merits decisions but decisions of law about jurisdiction.

240. I am very clear that the fundamental nature of the legal error in the assertion of jurisdiction over the entire credit relationship decides the section 31(2A) issue decisively against the defendant.

241. Finally, I note that this defence was not pleaded. Nonetheless, all the parties were provided with an opportunity to deal with the point, and none was, to my mind, disadvantaged or incapable of arguing the issue once it arose. Even if the defence had been pleaded, it would still have failed. I do not weigh the pleading failure in the scales against the defendant.

242. Therefore, the section 31(2A) defence fails.

XIII. Relief

243. In each claim, the error of law is so fundamental that the appropriate discretionary remedy is to quash the decision. As to any other relief, including declaratory relief if pursued, I will receive further submissions on the question.

XIV. Disposal

244. Summarising shortly, the court's key conclusions are:

Ground 1: succeeds in each of the four claims.

Ground 2 (Barclays only): fails and is dismissed.

Relief: each of the four jurisdiction decisions by the individual ombudsmen is quashed.

245. Nothing in this judgment undercuts the court's acceptance of the genuineness of the defendant's approach to its jurisdiction and its statement that it has "no agenda" save to get the law right. I judge that it did not. All four of the ombudsmen's jurisdictional decisions rest on a claimed corrective responsibility that does not exist. These errors of law require each of the four jurisdiction decisions to be quashed.

246. I will receive written submissions about consequential orders, including further relief, and direct the parties to agree an order to reflect the terms of this judgment.