



Hilary Term
[2026] UKSC 11
On appeal from: [2024] EWCA Civ 765

JUDGMENT

**Kession Capital Ltd (in Liquidation) (Appellant) v
KVB Consultants Ltd and others (Respondents)**

before

**Lord Lloyd-Jones
Lord Sales
Lady Rose
Lord Richards
Lady Simler**

**JUDGMENT GIVEN ON
1 April 2026**

Heard on 21 July 2025

Appellant

Simon Howarth KC

Lucile Taylor

(Instructed by DWF LLP (London))

Respondent

Hugh Sims KC

Jay Jagasia

Charlotte Mallin-Martin

(Instructed by Acuity Law Ltd (Cardiff))

LORD RICHARDS (with whom Lord Lloyd-Jones, Lord Sales, Lady Rose and Lady Simler agree):

Introduction

1. This appeal arises out of the regulation of financial services under the Financial Services and Markets Act 2000 (“FSMA”). A person may be authorised by the regulator, the Financial Conduct Authority (“the FCA”), to carry on financial services business. Such a person, known as an “authorised person”, may itself by contract permit another person, known as an “appointed representative”, to carry on financial services business and thereby accept responsibility for the activities of the appointed representative: section 39. The issue on this appeal concerns the extent of the authorised person’s responsibility for the activities of the appointed representative under the terms of section 39. Unless otherwise stated, references in this judgment to sections are to sections of FSMA.

2. The overall purpose of FSMA is to regulate the financial markets and the provision of financial services. The FCA is the relevant regulator for the purposes of this appeal. Its strategic objective is to ensure that the financial markets and the markets for financial services function well and its operational objectives relate to consumer protection, the integrity of the UK financial system and the promotion of effective competition in the interests of consumers (section 1B(2) and (3)). Consumers include all users of regulated financial services (section 1G).

3. Section 1C(1) defines the FCA’s consumer protection objective as “securing an appropriate degree of protection for consumers”. Section 1C(2) lists the matters to which the FCA must have regard in considering what degree of protection may be appropriate for consumers. These include “the differing degrees of experience and expertise that different consumers may have”, “the general principle that consumers should take responsibility for their decisions” and “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”. As will be seen, the regulatory regime established by FSMA distinguishes between professional and retail consumers in the degree of protection that is provided.

The relevant statutory provisions in summary

4. Section 19 prohibits a person from conducting a regulated activity in the United Kingdom, unless that person is either “authorised” or “exempt”. This is called “the general prohibition”: section 19(2). Regulated activities are specified in delegated legislation, principally the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) (“the RAO”), as amended. For present purposes, it

is enough to note that regulated activities include arranging deals in investments and advising on investments. Relevant investments are also identified in the RAO and include units in a collective investment scheme.

5. Authorised persons are defined by section 31 and include those who are authorised to carry on one or more regulated activities by the FCA. The grant of such authority has been governed since 2013 by Part 4A of FSMA. Under section 55E, the regulated activity or activities which may be carried on by an authorised person are specified in the permission granted to it. In addition, under section 55E(5), the FCA may

“(a) incorporate in the description of a regulated activity such limitations (for example as to circumstances in which the activity may, or may not, be carried on) as it considers appropriate;

(b) specify a narrower or wider description of regulated activity than that to which the application relates ...”.

6. Section 55E(5) enables the FCA to impose a limitation which restricts the authorised person’s business to dealing only with certain categories of clients and excluding others, for example retail clients. It was inserted by the Financial Services Act 2012, replacing section 43 of FSMA which was to similar effect but differently worded. The notes accompanying the Bill stated that the new section 55E “provides that the regulators may grant permission for all the activities applied for, or just some of them, may impose limitations (for example, limitations on the class of consumer to whom the authorised person may provide services ...)”.

7. If an authorised person carries on a regulated activity otherwise than in accordance with the permission given to it, it will be in breach of its regulatory obligations (section 20(1)) and liable to regulatory sanctions under Part XIV of FSMA, including financial penalties, the suspension of its Part 4A permission and the imposition of restrictions, and will also be liable to the variation or cancellation of its Part 4A permission under sections 55J et seq. It may also be subject to claims for compensation: section 20(2)(c) and 20(3). It will not, however, commit a criminal offence nor generally will any transaction be rendered void or unenforceable (section 20(2)).

8. A person is “exempt” either if an exemption order made by the Treasury pursuant to section 38(1) applies to that person or if the person is an appointed representative of an authorised person pursuant to an agreement in writing made under section 39. Section 39(1) provides for the appointment and for the consequent exemption from the general prohibition:

“(1) If a person (other than an authorised person)—

(a) is a party to a contract with an authorised person (‘his principal’) which—

(i) permits or requires him to carry on business of a prescribed description, and

(ii) complies with such requirements as may be prescribed, and

(b) is someone for whose activities in carrying on the whole or part of that business his principal has accepted responsibility in writing,

he is exempt from the general prohibition in relation to any regulated activity comprised in the carrying on of that business for which his principal has accepted responsibility ...

(2) In this Act ‘appointed representative’ means—(a) a person who is exempt as a result of subsection (1), or ...”

9. Section 39(3) provides for the authorised person to be responsible for the activities of the appointed person within the permission granted pursuant to section 39(1):

“(3) The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility.”

10. The phrase “business of a prescribed description” in section 39(1) is a reference to business prescribed in regulation 2 of the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001 (SI 2001/1217), which includes arranging deals in investments and advising on investments, as defined in the RAO.

11. The exemption from the general prohibition provided by section 39(1) is limited to the regulated activity which the appointed person is permitted to carry on by the terms of the agreement with the authorised person. If an appointed person carries on any other regulated activity, it will commit an offence under section 23(1) and agreements made by it in the course of doing so will be unenforceable against the other party under section 26.

The consequences are therefore different from those which apply to an authorised person acting outside the terms of its Part 4A permission.

12. The FCA (and its predecessor) has promulgated general principles and made detailed rules (and guidance) pursuant to powers conferred by FSMA. These are contained in its Handbook and include those in the Conduct of Business Sourcebook (“COBS”) and those in the Supervision Manual applicable where an authorised person appoints an appointed representative (“SUP 12”).

The facts

13. The appellant, Kession Capital Ltd (“Kession”), was at all material times an authorised person with a permission under Part 4A. The permission which it held at the time material to this appeal (June 2015) included arranging deals in investments and advising on investments. One or both of those permissions were subject to the limitation that Kession could not deal with retail clients. The Part 4A permission in force in June 2015 is not in evidence but the terms of the ARA (as defined in the next paragraph) and in particular schedule 5 suggest that the limitation applied to both advising on investments and arranging deals in investments. The Part 4A permission in force in October 2022 is in evidence. A limitation to professional clients and eligible counterparties, hence excluding retail clients, applied to advising on investments but Kession was expressly permitted to arrange deals in investments for retail clients.

14. By an agreement dated 30 June 2015 and headed Appointed Representative Agreement (“the ARA”), Kession (referred to in the ARA as “the Appointor”) appointed Jacob Hopkins McKenzie Ltd (“JHM”) (referred to in the ARA as “the AR”) “as its appointed representative to carry on the Relevant Business on behalf of the Appointor from the date of this Agreement and the AR agrees to carry on the Relevant Business on behalf of the Appointor and to comply with the provisions of this Agreement” (clause 1.1). In carrying on the Relevant Business, JHM undertook to comply with all applicable legal and regulatory requirements (clause 2 and schedule 1). Kession was entitled to terminate the ARA for any material breach by JHM, which was defined to include any breach of FSMA or any material breach of the rules of the FCA. JHM agreed to pay a fixed monthly fee to Kession and provided it with an indemnity against claims made as a result of JHM carrying on Relevant Business.

15. The “Relevant Business” included arranging deals in investments and giving advice on investments, but the terms of the ARA made clear that JHM was not permitted to conduct any business with retail clients.

16. Recital (B) to the ARA stated that JHM had “agreed to advise on and arrange deals in designated investments for professional clients and eligible counterparties. The AR will not advise on and arrange deals for retail clients or US resident citizens”.

17. “Relevant Business” was defined as follows (with the addition of paragraph numbers for convenience):

“(1) Relevant Business means regulated activities which the AR is permitted to carry out under this Agreement which are subject to the limitations of the Appointor’s part IV permission as detailed in Schedule 5. For the avoidance of doubt, the AR is not permitted to carry out any investment management activities.

(2) The AR is permitted to market and promote its services, arrange business and give advice.

(3) The AR will conduct business with professional clients, elective professional clients and eligible counterparties.

(4) The AR is not permitted to conduct any business with retail clients.

(5) The Appointor acknowledges that the AR will offer advisory and arranging services to third party investors with regard to residential Property investment. There is no pooling of capital and no CIS [collective investment scheme].”

18. Para (1) of the definition of Relevant Business provided that the regulated activities which JHM was permitted to carry on under the ARA were “subject to the limitations of the Appointor’s part IV permission as detailed in Schedule 5”. Schedule 5 listed the regulated activities falling within Kession’s Part 4A permission and the limitations imposed by the FCA. In the case of all such regulated activities, including arranging deals in investments and advising on investments, the customers with which Kession was permitted to deal were limited to “Eligible Counterparty” and “Professional” (or, in one case, to “Professional” only), thereby excluding retail clients in all cases.

19. Schedule 5 further provided:

“For the avoidance of doubt the AR cannot:

- conduct any investment management activities; or

- conduct business with US resident citizens; or

- directly hold client money; or

- operate a collective investment scheme; or

- market or promote a fund that is an Alternative Investment Fund without the consent of its manager and the Appointor; or

- give advice to retail clients”

20. The ARA was entered into with a view to JHM promoting investment in schemes under which properties would be purchased for residential development and sold following completion of the development works. Each property was acquired by a separate company and the shares in each company were subject to a “declaration of bare trust” in favour of the investors in the relevant scheme. There were eight such schemes, of which seven are relevant to this appeal. It was not contemplated by Kession and JHM that JHM would conduct any other business under the ARA and it did not do so. All investors in the scheme were classified by JHM as professional, not retail, clients.

21. All the schemes failed and there was no return to the investors, who had invested a combined total of £1.7 million. In October 2021, the investors issued proceedings against JHM, its controlling director and shareholder Andrew Callen, the individual scheme companies, a legal practice and Kession. All except one claimant asserted that they were in truth retail clients and should have been treated as such and made their claims on that basis.

22. Judgment in default was entered against JHM and the scheme companies, all of which are insolvent and from which no recovery is expected. Mr Callen was declared bankrupt and a consent judgment was entered against the legal practice.

23. This appeal arises from an application for summary judgment against Kession. The claimants sought summary judgment on three bases. The application was heard by Paul Stanley KC (“the Judge”), sitting as a Deputy High Court judge, in the London Circuit

Commercial Court (KBD), who gave judgment on 6 July 2023: [2023] EWHC 1686 (Comm). He refused the application on two of those bases – claims for damages under section 138D for breach of rules in SUP 12 and claims for damages under section 241 brought on the basis that Kession itself approved the marketing material for the schemes. But he gave summary judgment on the basis that, by virtue of Kession’s responsibility for the activities of JHM under section 39(3), it was liable in damages under section 241 because JHM had invited participation in the schemes which were as matter of law collective investment schemes.

24. The claim on which summary judgment was given required the claimants to establish, first, that the schemes were collective investment schemes and, secondly, that on the basis that the claimants were properly to be treated as retail clients, Kession was responsible for JHM’s activity in arranging and advising on investments with the claimants, notwithstanding the limitations on Kession’s own Part 4A permission and the terms of the ARA which clearly prohibited JHM from dealing with retail clients.

25. The Judge held that the claimants succeeded on both these issues, and his decision was affirmed by a majority in the Court of Appeal. There is no appeal from the decision that the schemes were collective investment schemes. The appeal relates solely to the issue whether Kession was responsible under section 39(3) for the activities of JHM in dealing with retail clients. I summarise below the reasons given on that issue by the Judge and the Court of Appeal.

The judgments below

26. The Judge noted at para 49 of his judgment that the decision of the Court of Appeal in *Anderson v Sense Network Ltd* [2019] EWCA Civ 1395; [2020] Bus LR 1, to which I will return, “shows that it would be wrong to apply section 39 with the single-minded objective of imposing the broadest possible liability upon those who appoint representatives”. In a striking sentence, he said: “Promiscuously broad liability would entail promiscuously broad exemption, and that is not what the Act intends.” However, he cautioned that it was “equally necessary not to dissect an appointment in a spirit of pedantry, divorced from commercial reality”. An appointed representative agreement was “not to be read as encouraging or requiring the court to take an artificially narrow view, or to assist appointors to draft away or around responsibility for business which in commercial reality falls squarely within the contemplated appointment”. I agree with these sentiments, but the question will always arise as to how they are to be applied, if at all, in the particular case before the court.

27. In concluding that the exclusion of dealing with retail clients in the ARA did not absolve Kession from responsibility under section 39(3) for JHM’s activity in dealing with such clients, the Judge said at para 54 (referring to a distinction drawn in *Anderson*

v Sense Network Ltd between “how” an activity is conducted and “what” activity is conducted):

“Specifying the characteristics of those investors who may be appropriate candidates for an investment seems to me to be a central case of an instruction which is directed at *how* the appointed representative should carry on the business, not part of the definition of the business. It would strip section 39 of much of its intended effect if a mistake about the categorisation of a client deprived the appointed representative of exemption, and the client of protection. The line between ‘how’ and ‘what’ is drawn not by considering the way a particular limitation is expressed. Skilful drafting can easily express instructions about an agent’s conduct (‘do not market to retail clients’) or legal categorisation (‘market only if the investment is suitable’) as if they were limitations on authority (‘you may market only to professional clients for whom the investment is suitable’) or on the scope of the business (‘relevant business is marketing suitable investments to professional clients’). What matters is the commercial activity (‘marketing’), and its substance.”

28. The majority judgment in the Court of Appeal was given by Males LJ, with whom Sir Geoffrey Vos MR agreed. He accepted at para 67 that the provisions of the ARA made clear that JHM was prohibited from giving advice to or arranging deals for retail clients, but he said that “the real question” was:

“whether such a limitation on the scope of the permission given to JHM by KCL is permitted by section 39 of FSMA – in *Anderson* terms, whether it is an effective limitation as to *what* activity may be carried on or an ineffective limitation which seeks impermissibly to prescribe *how* the permitted activity (e.g. of arranging deals) is carried on; or in terms of section 39 itself, whether the business of a prescribed description (e.g. arranging deals) for which KCL is authorised can be divided into two parts, one consisting of arranging deals for professional clients and eligible counterparties, and the other consisting of arranging deals for retail clients.”

29. Males LJ identified at para 85 the critical question as being the meaning of “business of a prescribed description” in section 39(1)(a) and “the whole or part of that business” in section 39(1)(b). He continued:

“These expressions must be interpreted having regard to the purposes of the section, which include providing investors who deal with appointed representatives with a remedy against the principal whose grant of permission to carry on investment business has enabled the appointed representative to operate in the financial services sector.”

30. As regards the meaning of “business of a prescribed description”, Males LJ said at para 86 that:

“the ‘description’ of the business in subsection (1)(a) refers to the activity in question, in this case ‘Advising on investments’ and ‘Arranging deals in investments’. Those generic descriptions are not defined by reference to the classification of the clients to whom advice may be given or for whom deals may be arranged. They do not distinguish, as descriptions of activities, between giving advice to or arranging deals for professional clients and eligible counterparties on the one hand and retail clients on the other.”

31. As regards the meaning of “the whole or part of that business”, Males LJ considered that it was “not a sensible reading” of that phrase to divide the business into two parts, one consisting of advising and arranging deals for retail clients and the other consisting of doing so for other types of customers. He gave three reasons for this view.

32. First, he said at para 88 that “the type of business which an appointed representative is permitted to conduct is distinct from the question of for whom that business is undertaken”. The issue was not comparable to the issue in *Anderson v Sense Network Ltd*.

33. Second, Males LJ said at para 89 that:

“deciding whether a client is a professional client or eligible counterparty requires an assessment which has a great deal in common with the assessment of suitability which must be carried out before an investment can be recommended to a client regardless of the client’s status. It is common ground that an assessment of suitability is concerned with how the business is conducted, so that if an appointed representative recommends an unsuitable investment, the principal is responsible. That responsibility cannot be avoided by a contract term purporting to limit the permission given to the appointed

representative to recommending investments which are suitable for the investor. Similarly, in *Anderson* terms, the decision whether a client should be classified as a professional client or eligible counterparty forms part of the way in which the business activity in question is carried on. If a client is mistakenly classified as a professional client or eligible counterparty, the principal should be responsible for the representative's error."

34. He expanded on this point at para 90, saying that the limitation on the type of clients necessarily involves entrusting the decision about how a prospective client should be classified to the appointed representative, just as it entrusts a decision as to whether an investment is suitable for a client. He said: "It makes no legal or commercial sense to say that the principal entrusts that decision to the representative when the representative gets it right, but not when it gets it wrong. That would be close to the kind of avoidance of responsibility by clever drafting which was ruled out in *Ovcharenko* [sc. *Ovcharenko v InvestUK Ltd* [2017] EWHC 2114 (QB)] and *Anderson*."

35. Third, Males LJ said at para 91 that:

"to interpret the term 'part of that business' in subsection (1)(b) as enabling a principal to grant permission, and to accept responsibility, limited to providing advice to or arranging deals for professional clients and eligible counterparties only would be contrary to the purpose of investor protection which underlies section 39. It would mean, as Mr Sims pointed out, that a professional investor dealing with an appointed representative would have a higher degree of protection than a retail client or indeed a retail client who was misclassified as a professional investor."

36. At para 93, Males LJ said that the only point which had caused him to doubt his conclusion was whether it meant that Kession was giving permission to JHM to do something (deal with retail clients) which it was not itself authorised to do. He said that while that might be so, it did not in his judgment detract from the interpretation of section 39 which he regarded as correct "and which gives sensible effect to the statutory purpose of investor protection".

37. Lewison LJ gave a dissenting judgment as regards Kession's responsibility under section 39(3) for JHM's dealings with retail clients. He was particularly concerned that an authorised person could permit an appointed representative to carry on regulated activities which that person was not itself permitted to carry on. He said:

“102. In the present case, [Kession’s] authorisation in relation to advising on investments does not authorise it to advise retail clients. Since the FCA is empowered to grant permission for such of the regulated activities as may be specified in the permission (describing them), and has done so in relation to advising on investments, I would regard the exclusion of retail clients as falling on the ‘what’ rather than the ‘how’ side of the line. I do not think that, for this purpose, it matters that the regulated activities are described in general and generic terms in the [Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001 (SI 2001/1217)]. Section 39 (1) (b) specifically permits a contract to cover a business which is only part of that generic description. On the face of it, it seems to me that [Kession] was not an ‘authorised person’ as regards advising retail clients on investments.

103. How to distinguish between retail clients and others is covered by COBS. COBS, I would accept, is part of ‘how’ to carry out regulated activities but that does not overcome what I regard (in the absence of further argument) as the fundamental point that [Kession] was not authorised to advise such clients.

104. In short, at this stage of the case, despite the strong consumer orientated arguments which militate in favour of the conclusion to which my colleagues have come, I would not be prepared to enter judgment summarily on this part of the case.”

Section 39: common ground

38. Section 39 was considered by the Court of Appeal in *Anderson v Sense Network Ltd*, in which I gave the judgment with which Hamblen LJ and Snowden J agreed. There has been no challenge before this court to the decision in that case or to the reasons given in the judgment.

39. Section 39(1) contains three critical steps. First, there must be a contract whereby the authorised person requires or permits the appointed representative to carry on business of a prescribed description: section 39(1)(a)(i).

40. Second, the authorised person must in writing accept responsibility for the appointed person’s activities in carrying on the whole *or part* of that business: section 39(1)(b). In order to determine the extent of the authorised person’s responsibility, it will be necessary to refer to the written acceptance of responsibility. The words “the whole or

part of that business” demonstrate that the acceptance of responsibility need not relate to all activity that could fall within a generic type of business described in the RAO.

41. Third, if paras (a) and (b) of section 39(1) are satisfied, the appointed person is exempt from the general prohibition, and thus from the criminal and civil consequences provided by sections 23 and 26, as regards the business or that part of it for which the authorised person has accepted responsibility.

42. I summarised the effect of section 39(1) in my judgment in *Anderson v Sense Network Ltd* at para 34:

“The scheme of section 39(1) is thus clear. An AR is an exempt person only to the extent that an authorised person has accepted responsibility for the business to be carried on by the AR. If an authorised person has accepted responsibility for only part of a category of business, the AR will be exempt only in respect of that part. This makes sense. Acceptance of responsibility is the equivalent of authorisation and is essential to the enjoyment of exempt status by the AR. The AR will be subject to the general prohibition as regards any activity falling outside the business, or part of the business, for which the authorised person has accepted responsibility.”

43. The effect of accepting responsibility for the whole or part of the relevant business is stated in section 39(3). The extent of the appointed representative’s exemption under section 39(1) and the authorised person’s responsibility under section 39(3) are coterminous.

Anderson v Sense Network Ltd

44. The appointed representative agreement in *Anderson v Sense Network Ltd* permitted the appointed representative to carry on various regulated activities but only “using a Company Agency”. This meant that the appointed representative could advise on or market only products provided by institutions with which the authorised person (Sense Network) had an agency agreement. Unknown to Sense Network, the appointed representative had been promoting and selling units in a fraudulent scheme which did not involve a “Company Agency”. Defrauded investors relied on section 39(3) to bring claims against Sense Network. They argued that it imposed responsibility on Sense Network as the authorised person for the whole of a generic description of business (such as advising on investments) covered by the appointed representative agreement, provided only that it fell within the authorised person’s own Part 4A permission. It was argued that the purpose

of referring to a part of the business in section 39(3) was to enable an appointed representative to have agreements with more than one authorised person.

45. This submission was addressed at para 37 of the judgment:

“While I accept that the words ‘the whole or part of’ facilitate the involvement of more than one authorised person with the same AR, I do not see the basis for restricting the clear and unqualified words of section 39(1) to this situation. The purpose of section 39(1) is to confer exempt status on persons in a manner which will fulfil the underlying regulatory and protective purposes of the legislation. It may make perfect sense to limit an AR to a partial exemption, having regard to the breadth and depth of the expertise of that AR or indeed of the authorised person.”

Retail clients

46. Given that the principal purpose of the regulatory regime for financial services is to provide protection for users of financial services, it is no surprise that distinctions are drawn between retail clients and business, or professional, clients. Professional clients can be expected to be more sophisticated and better able to make decisions as to what is in their own best interests. While they are entitled to protection against providers who are incompetent or unscrupulous and are entitled to expect that providers will adhere to proper standards, they do not need, and should not be hampered in the conduct of their business by, the level of protection that needs to be accorded to retail clients.

47. The classification of clients on 30 June 2015, the date of the ARA, was contained in COBS 3. A retail client was defined as a client who was not a “professional client” or an “eligible counterparty” (COBS 3.4.1 R).

48. A professional client was either a “per se professional client” or an “elective professional client” (COBS 3.5.1 R). Per se professional clients were entities authorised to operate in financial markets and other substantial institutions or trusts meeting certain objective criteria (COBS 3.5.2 R). A client could be categorised as an elective professional client only if two conditions were satisfied (COBS 3.5.3 R). First, the firm dealing with the client undertook “an adequate assessment of the expertise, experience and knowledge of the client that gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understanding the risks involved”. Secondly, the client must have stated in writing that it wished to be treated as a professional client, the firm must have given the client a clear written warning of the protections and investor compensation rights the

client may lose, and the client must have stated, in a separate document from the contract, that it was aware of the consequences of losing such protections.

49. An “eligible counterparty” was either a “per se eligible counterparty” or an “elective eligible counterparty” (COBS 3.6.1 R). All eligible counterparties were firms or undertakings, and in most cases they had that status by reason of objective criteria.

50. The regulatory burden on firms which chose to deal with retail clients was greater than on other firms.

51. First, firms were held to higher standards of conduct in their dealings with retail clients. Among other examples, rules on the marketing of investment products to retail clients were stricter including a ban on “cold calling” (COBS 4.8 R) as were rules on the structure and transparency of fees charged. In certain categories of transaction considered to present a high risk of abuse, firms were required to charge retail clients fixed fees for advice rather than a commission or share of profits (COBS 6.1A). Firms were permitted to exclude liability in respect of retail clients only if it was honest, fair and professional to do so (COBS 2.1.3 G).

52. Firms were required to ensure that employees who dealt with retail clients met specific training and competence standards. These were contained in the FCA’s Training and Competence Sourcebook, particularly TC 2 Competence and TC App 1 and TC App 4. To perform most regulated activities on behalf of retail clients, employees were required to hold an appropriate FCA approved qualification from an approved institution. For example, to advise retail clients on securities an employee was required to hold one of 38 FCA approved qualifications from one of 20 approved institutions. Firms also had to ensure that employees dealing with retail clients maintained their expertise through continuous professional development and received appropriate supervision. If a firm chose to deal with retail clients, it had significant implications for recruitment and training of staff. Authorised persons which breached these training and competence standards were subject to regulatory action and might have their authorisation to deal with retail clients suspended or removed.

Interpretation of section 39

53. The issue in this appeal is one of statutory construction and the applicable general approach and principles are not in doubt. They have been restated in numerous decisions of this Court, including *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, paras 30–31 and *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28; [2023] 1 WLR 2594, paras 41–43. The primary source by which the meaning of a provision is to be ascertained are the words of the provision, read in the context of the relevant provision and the statute as a whole and in the light of the purpose

of the provision and the statute. External aids, such as explanatory notes, may cast light on the meaning of a particular provision.

54. The construction of provisions of FSMA must be undertaken with the purpose of client protection firmly in mind but remembering also Lord Sumption's cautionary words in *Financial Conduct Authority (formerly Financial Services Authority) v Asset LI Inc (trading as Asset Land Investment Inc)* [2016] UKSC 17; [2016] Bus LR 524 at para 88 that "most regulatory legislation is a compromise between the protection of consumers and the avoidance of regulatory overkill". Subject to that consideration, a reasonable interpretation that best promotes consumer protection is likely to be correct.

55. The status of an appointed representative is dependent on a contract with an authorised person complying with section 39(1)(a) and, critically for present purposes, on compliance with section 39(1)(b) that the appointed representative is "someone for whose activities in carrying on the whole or part of that business [viz, business of a prescribed description] his principal has accepted responsibility in writing".

56. The acceptance of responsibility by an authorised person for an appointed representative's activities has very significant consequences. First, in carrying on that business, the appointed person is exempt from the criminal and civil consequences that would otherwise flow from a breach of the general prohibition. It therefore directly engages the public interest. Secondly, it has serious consequences for the authorised person who, by reason of section 39(3), becomes responsible and potentially liable to third parties (most obviously, clients of the appointed person) for anything done or omitted by the appointed person in carrying on that business "as if he had expressly permitted it".

57. As in *Anderson v Sense Network Ltd*, the issue is the meaning to be given to the words "part of" in the phrase "the whole or part of that business". Just as in that case the issue was whether a limitation of responsibility to dealing with "company agency" products identified a "part" of the business to be carried on by the appointed person, so in this case the issue is whether a limitation of responsibility to dealing with professional clients (including eligible counterparties), and therefore not with retail clients, identifies a "part" of the business of advising on investments and arranging deals in investments. Expressed in a different way, the issue is whether dealing with retail clients is, for the purposes of section 39, a "part" of the business of a prescribed description and, for convenience, I will treat that as the issue.

58. There is no difficulty as a matter of ordinary language in describing dealing with retail clients as part of a financial services business. Although it is not precisely the distinction that is being drawn here, the distinction between retail and wholesale customers is centuries old. No-one would suggest that it was inapposite to say of a

supplier who deals with both business and retail customers that the retail customers are a “part” (and a clearly identifiable part) of the supplier’s business.

59. As detailed above, the different treatment of retail and professional clients in the regulation of financial services forms a very important element of the regime, on account of their significantly different needs as regards protection. This, in my judgment, provides some support for the view that dealing with a particular class or category of clients, such as retail clients, is properly treated as “part” of the business of a financial services provider.

60. Support for that view is also provided by the fact that the FCA may restrict a Part 4A permission to dealing with professional clients only. If the FCA is entitled to impose such a restriction on an authorised person, it suggests that “part” of a business can be identified on the same basis for the purposes of section 39.

61. It is important to note that, as with many regulatory regimes, the regulation of financial services operates primarily on a prophylactic basis, seeking to prevent the occurrence of abuse, with proper person tests, staff qualifications and so on. It is important that remedies are available when things go wrong, but to be effective a regime such as that under FSMA is focused on the prevention of abuse and should be construed with this in mind. I therefore disagree with the Court of Appeal’s endorsement (at para 74 of Males LJ’s judgment) of what HH Judge Waksman QC said in *Ovcharenko v InvestUK Ltd* [2017] EWHC 2114 (QB) at para 33: “the whole point of section 39(3) is to ensure a safeguard for clients who deal with [appointed] representatives ... so that they have a long stop liability target which is the party which granted permission to the [appointed] representative in the first place”. I prefer the way that the purpose of section 39 was stated in para 37 of the judgment in *Anderson v Sense Network Ltd*: “The purpose of section 39(1) is to confer exempt status on persons in a manner which will fulfil the underlying regulatory and protective purposes of the legislation. It may make perfect sense to limit an [appointed representative] to a partial exemption, having regard to the breadth and depth of the expertise of that [appointed representative] or indeed of the authorised person.”

62. There are three substantial grounds for saying that the purposes of consumer protection would be well served by construing “part” of the business as including dealing with retail clients.

63. First, the assumption of responsibility by the authorised person under section 39(3) means that the authorised person has a real interest in the proper conduct by the appointed representative of the business which the latter is permitted to carry on. The purpose of the appointed person regime is to enable a non-authorised person to be permitted to carry on regulated business not by the FCA but by a person who, by virtue of their own Part 4A

permission and the skills necessary to conduct the business for which they are authorised, can assess the suitability of the appointed representative to carry on particular types of business and can monitor the appointed representative's conduct of such business.

64. It would defeat the regulatory purpose if an authorised person, whose experience and expertise lay in dealing with professional clients, was required to assume responsibility for an appointed representative's conduct of retail business, notwithstanding that the permission granted to the appointed representative was for good reason limited to dealing with professional clients. Self-evidently, such a result would not serve the interests of consumers. It is fundamental to any system of regulation that the regulator, or in this case the authorised person as its proxy, should have the experience and expertise appropriate to the permitted business. In these circumstances, the purpose of consumer protection is better served if the permission is limited to business for which the authorised person has experience and expertise.

65. As earlier mentioned, the Supervision Manual in the FCA Handbook contains rules and guidance made by the FCA. SUP 12.4.2 R, in force in June 2015 at the date of the ARA, stated that before "a firm appoints a person as an appointed representative ... it must establish on reasonable grounds that ... the firm has adequate: (a) controls over the person's regulated activities for which the firm has responsibility ... and (b) resources to monitor and enforce compliance by the person with the relevant requirements applying to the regulated activities for which the firm is responsible and with which the person is required to comply under its contract with the firm". This underscores the need for the authorised person itself to be in a position to monitor the business permitted under the appointed representative agreement and to ensure compliance with regulatory requirements applicable to that business.

66. The contrary argument, that dealing with retail clients is not a "part" of the permitted business, also leads to the startling proposition that an authorised person would be responsible for an appointed representative's conduct in dealing with retail clients, even though its own Part 4A permission excluded dealing with retail clients. This does not seem to be a sensible feature of an effective regulatory regime.

67. Further, it is contrary to the way in which section 39 is intended to operate. The explanatory notes which accompanied the Financial Services and Markets Bill when introduced to the House of Commons in November 1999 stated as regards clause 34 (which became section 39):

"74. This clause makes an exemption from the general prohibition for appointed representatives of authorised persons. An authorised person cannot be an appointed representative. The exemption only applies if the authorised person, referred

to as the principal, has contracted with the representative for the latter to carry on the relevant sort of investment business on their behalf; and accepted responsibility in writing for the conduct of those regulated activities.

75. Any regulated activities which are carried on by the representative in accordance with such an arrangement are the responsibility of the principal, *who must therefore have permission (see Part IV below) for all the activities.*” (Emphasis added.)

68. SUP 12.4.1A G (guidance) stated that the effect of sections 20 and 39(4) is that “the regulated activities covered by an appointed representative’s appointment need to (1) fall within the scope of the principal’s permission”. SUP 12.5.3 G stated that an authorised person “should satisfy itself that the terms of the contract with its appointed representative ... are designed to enable the [authorised person] to comply properly with any limitations or requirements on its own permission”. The same point is made in Jackson & Powell on Professional Liability 9th ed (2022) at para 14–018.

69. The second ground for saying that the purposes of consumer protection would be well served by construing “part” of the business as including dealing with retail clients is that the authorised person, whether or not it is permitted to deal with retail clients, may form the view that an appointed representative is qualified to deal with professional clients, but not with retail clients. In such a case, it would make little sense to require the authorised person to be responsible for the appointed representative’s dealings with retail clients, notwithstanding that permission under the terms of the appointed representative agreement was rightly limited to professional clients. SUP 12.6.11 G stated that an authorised person “should take reasonable care to ensure that ... (2) its appointed representative has adequate arrangements in respect of training and competence, which meet the requirements in [other parts of the rules]”. This would be impossible to fulfil in the case of an appointed representative who was not qualified or equipped to deal with retail clients.

70. The third ground is that, unless “part” of the business is construed as including dealing with retail clients, an appointed representative which is specifically prohibited by the appointed representative agreement from dealing with retail clients will nonetheless be exempt from the general prohibition if it does deal with retail clients. It would therefore commit no offence under section 23 nor suffer the civil consequences under section 26. In circumstances where for good reasons, based on the interests of potential retail clients, an appointed representative has been prohibited from dealing with retail clients, this is not a result which is calculated to improve consumer protection. On the contrary, it would, in the Judge’s phrase, create a “promiscuously broad exemption”.

71. Taking also into account what Lord Sumption said in *FCA v Asset LI Inc*, as quoted above, there would seem to be an element of regulatory overkill, and indeed unfairness, in making an authorised person responsible for an appointed person’s activities in dealing with retail clients when it is expressly prohibited from doing so by the terms of its appointment. It is likely to discourage the appointment of appointed representatives unless both the authorised person and the appointed representative are qualified and competent to deal with all categories of client. If that is a result which the FCA considers appropriate, it may well be able to achieve it through its rule-making powers.

72. I turn to the reasons given by Males LJ for holding that dealing with retail clients did not constitute a “part” of the business for the purposes of section 39.

73. The first reason was that the type of business which an appointed representative is permitted to conduct is distinct from the clients for whom the business is undertaken (para 88). That is no doubt true if by “type of business” Males LJ was referring to, for example, advising on investments, but it does not follow that dealing with retail or professional clients do not form different parts of that business. As a matter of ordinary language, they can form parts of that business, and the distinction between dealing with retail clients and dealing with professional clients constitutes a significant element of the regulatory regime.

74. The second reason was that deciding whether a client is a retail or professional client “requires an assessment which has a great deal in common with the assessment of suitability which must be carried out before an investment can be recommended to a client regardless of the client’s status” (para 89). I disagree. The definitions of the different types of clients have been summarised above. In many cases, they involve no assessment at all. There will be an element of assessment in the case of elective professional clients (and in the case of elective eligible counterparties but they must be “undertakings”) but it is not comparable to the assessment of suitable investments which requires a detailed and holistic evaluation of the circumstances and needs of an individual client. In most cases there is unlikely to be much difficulty in deciding the correct categorisation of a client. Moreover, the default category is retail, so that unless the appointed representative is satisfied that a client is clearly professional, the client must be treated as retail. In any event, I do not understand why some assessment or evaluation should disqualify what would otherwise be a part of a business from being treated as such.

75. As part of this second reason, Males LJ said at para 89 that “the decision whether a client should be classified as a professional client or eligible counterparty forms part of the way in which the business activity in question is carried on”. This refers to the distinction drawn in *Anderson v Sense Network Ltd* between *what* business is carried on and *how* it is carried on. I said in my judgment at para 40:

“A further submission made by Mr Sims [counsel for the claimants] was that, even if statutory responsibility may be restricted to only part of a business, liability cannot be excluded by reference to a failure properly to conduct that business. I agree with that, but I do not agree with Mr Sims’ next submission that it is impossible to distinguish between ‘what’ and ‘how’, so that the only sensible answer is to define the authorised person’s responsibility by reference to its authority to conduct business of a prescribed, generic description. In my view, it will be a rare case which presents any difficulty in distinguishing between what activity may be carried on and how a permitted activity is carried on.”

76. At para 80 of his judgment, Males LJ said that “the distinction between ‘what’ and ‘how’ sheds valuable light on section 39” but he correctly added that “it is always necessary to ensure that such a striking phrase does not come to replace the statutory language” which refers to “part of that business”. The same is of course true of the phrase used by Males LJ in para 89 that the classification of a client is “part of the way” in which the business is carried on. The point of the “what/how” distinction is to make clear that an authorised person cannot escape responsibility under section 39(3) by relying on a contractual term that, for example, an appointed representative must conduct the business in accordance with applicable regulatory standards. A failure to follow applicable standards clearly concerns how, or the way in which, the business is conducted. It does not relate to what business, or the scope of the business, which the appointed representative may carry on. In my judgment, however, dealing with retail clients, as opposed to professional clients, constitutes for the reasons given above a part of the business of a prescribed description. It relates to the scope of the business, not to the way in which it is carried on.

77. The third reason given by Males LJ, at para 91 of his judgment, was that to interpret “part of that business” as “enabling a principal to grant permission, and to accept responsibility, limited to providing advice to or arranging deals for professional clients and eligible counterparties only would be contrary to the purpose of investor protection which underlies section 39”. It would mean that a professional client but not a retail client could have a remedy against the authorised person for the actions of its appointed representative. This “would make little sense”.

78. I agree with the submission of Mr Howarth KC, appearing for Kession, that this is to misunderstand the way in which section 39 primarily works to provide protection to consumers. It does so not by the provision of a remedy but by putting in place a structure in which only those appointed representatives who are competent and qualified to deal with retail clients are permitted to do so and are supervised only by those authorised persons who likewise are competent and qualified to do so. It seems a denial of consumer

protection if an authorised person may permit an appointed representative to deal with retail clients when either or both lack the necessary competence.

79. I should add here that Mr Sims KC, for the respondents, made a submission which was a variation of Males LJ's third reason. He submitted that an appointed representative agreement could validly prohibit the appointed representative from dealing with retail clients, so that to do so would constitute a breach of contract entitling the authorised person to appropriate remedies including termination of the appointment, but the authorised person would nonetheless be responsible for the activities of the appointed representative under section 39(3). I am unable to see how this submission is consistent with the terms of section 39 which proceeds on the basis that it is the agreement which prescribes the extent of the permission granted by the authorised person and the corresponding extent of its responsibility under section 39(3), provided of course that the restriction concerns a "part" of the business.

80. Mr Sims also advanced, as his primary case, a submission which is not directly addressed in the judgments in the Court of Appeal. He submitted that the terms of section 39 demonstrated the "centrality" of "regulated activities" to the scope of an appointed representative's appointment and the authorised person's responsibility. This meant that any cutting down of the business for which the authorised person accepted responsibility must be by reference to a category of that business "properly so described", and not to the category of clients with whom that business could be conducted.

81. Part II of the RAO specifies the kinds of activity which are regulated activities, and Part III of the RAO specifies the kinds of investments applicable to those activities. For the purposes of arranging deals in investments and advising on investments, there are a significant number of relevant investments, including shares, debentures, loan stock, warrants, options and so on. As I understand Mr Sims' submission, a "part" of the business of investment advice could, for example, be advising in relation to shares only. In order to accommodate the decision in *Anderson v Sense Network Ltd* which dealt not with a restriction by reference to any defined type of investment but with a restriction by reference to permitted providers of investments (those with whom Sense Network had an agency agreement), the submission would permit any restriction by reference to the providers of investments to which advice could relate.

82. In my judgment, there is no basis in the language or purpose of section 39 for reading the ordinary words of section 39, "the whole or part of that business", as restricted in the way submitted by Mr Sims. If, as in *Anderson v Sense Network Ltd*, a restriction to particular providers of investments, which is not a restriction that can be derived from the definitions of regulated activities and investments, is permitted, it is difficult to see why the same is not also true of a restriction to particular categories of clients, especially as they are an important feature of the regulatory regime as a whole.

83. Lewison LJ was concerned that the Court of Appeal had received only limited argument on the overall scheme of FSMA and the regulatory regime. This Court has had the opportunity to examine in greater detail the regulatory regime of which section 39 forms part. In my view, Lewison LJ was right that judgment should not be given against Kession on the basis that it was responsible under section 39(3) for JHM's dealings with retail clients, but in the light of the more extensive submissions to this Court, I do not agree with his tentative view that Kession was not an "authorised person" save when dealing with professional clients. I think Mr Sims was right to say that under the scheme of FSMA a person, once authorised, is an authorised person for all purposes, although it will be in breach of its regulatory obligations if it acts outside its Part 4A permission.

Conclusion

84. For the reasons given above, I conclude that dealing with retail clients is a "part" of the business of a prescribed description within the meaning of section 39. I would therefore allow the appeal. Although the appeal arises from an application by the claimants for summary judgment, the issue has been fully argued and, by allowing the appeal, this Court rules as a final decision that Kession had no responsibility under section 39(3) for anything done or omitted by JHM in carrying on business with retail clients.