CA-2025-001994

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

The Hon. Mrs Justice Dias
[2025] EWHC 1881 (Comm)

B E T W E E N:

(1) AXA FRANCE IARD S.A.
(2) AXA FRANCE VIE S.A.

Claimants/Respondents

-and-

(1) SANTANDER CARDS UK LIMITED
(2) SANTANDER INSURANCE SERVICES UK LIMITED

Defendants/Applicants

APPLICANTS' SKELETON ARGUMENT

In support of application for permission to appeal

References to the Appeal Bundles are in the form {**Bundle/Tab/Page**}

8 August 2025

Mark Howard KC
Brick Court Chambers

Adam Zellick KC
Fountain Court Chambers

Andrew Scott KC
Blackstone Chambers

Aaron Taylor
Fountain Court Chambers

A. INTRODUCTION

1. Ds seek permission to appeal against the Order of Dias J (the **"Judge"**) dated 25 July 2025 entering judgment for Cs against D2 for approximately **£677 million**[1] in respect of the Indemnity Claim further described below **{Core/8/93}**. The reasons for that Order are set out in the Judge's judgment of the same date (the **"Judgment"**) **{Core/9/96}**.

2. Cs and Ds are entities within the AXA and Santander groups respectively. The Indemnity Claim was brought pursuant to Clause 12.2 of the written Agency Agreement further described below. Cs and Ds are successors to the rights and obligations under the Agency Agreement of "Insurers" and "GE-CB", respectively, each as defined in its preamble.

3. The indemnity awarded was against certain liabilities incurred by Cs in connection with alleged or actual mis-selling of payment protection insurance (**"PPI"**) prior to 14 January 2005. The relevant policies were underwritten by "Insurers"; entities referred to in the Judgment and below as FICL/FACL. At the time, GE-CB was a sister company of FICL/FACL within the GE Capital group and it acted as their agent; latterly, under the Agency Agreement entered into on 1 December 2000 (the "**Agency Agreement**") **{Supp/1/2}**.

4. From the mid-1970s, GE-CB acted as agent for FICL/FACL in relation to the marketing and sale of PPI products. While GE-CB owed FICL/FACL duties of care in contract and tort it is common ground that it had not, prior to 1 December 2000, agreed to indemnify FICL/FACL for liabilities incurred by FICL/FACL in connection with such marketing and sales. The proposed appeal raises a short question of construction regarding Clause 12.2 of the Agency Agreement, under which the position on indemnity changed.

5. The question is whether the indemnity set out in Clause 12.2 **{Supp/1/11}** retrospectively applies to encompass liabilities arising from GE-CB's conduct as agent *before* the Agency Agreement was entered into. The answer is of considerable financial importance:

[1] Including interest.

approximately **85%**[2] of the sum awarded (i.e., approximately £575 million[3]) corresponds to liabilities arising in connection with PPI sold before that date.

6. The Judge concluded that Clause 12.2 does have such retrospective application. Ds respectfully submit that she erred in doing so. There were four main errors.

7. **First**, the Judge's construction was irreconcilable with the clear and unambiguous terms of Clause 12.2. The indemnity is *"against any liability which [FICL/FACL] may incur by reason of any act or omission by GE-CB… **while performing their duties under this Agreement"*** (emphasis added). That language is prospective in nature. Its focus is on acts or omissions of GE-CB to be done while performing the Agency Agreement (i.e., in respect of duties performed under the Agency Agreement). So too is that the focus of the provisions under Clause 6 of the Agency Agreement which imposed such *"duties"* in terms of what GE-CB *"will"* and *"will not"* do rather than what it had historically done.

8. So, the issue in relation to a claim for an indemnity is or should be straightforward: was the liability incurred by FICL/FACL by reason of an act or omission of GE-CB while performing the Agency Agreement? Acts or omissions of GE-CB while performing under earlier agreements or arrangements plainly could not fall within the ambit of the indemnity **unless** the Agency Agreement provided that these should be treated as if they had been carried out under it. The Agency Agreement contains no such provision.

9. **Second**, the Judge drew false support for her construction from Clauses 1.1 and 1.2 of the Agency Agreement. Clause 1.1 merely recorded that GE-CB had previously acted as agent for FICL/FACL and that the parties *"now wish to record the terms and conditions on which GE-CB shall continue"* to do so – a provision which sheds no light on what those terms and conditions would be. Clause 1.2 likewise said nothing about indemnity, let alone in terms sufficiently clear to give Clause 12.2 retrospective effect.

10. **Third**, the Judge drew false support for her construction from her own conclusion that the *"aim"* of the Agency Agreement was *"continuity in the relationship between the*

[2] The percentage of 85% is calculated based on the percentage of redress paid in respect of sales before 1 December 2000 within a sample of complaints which was prepared for these proceedings. Further calculations would be needed to finalise the exact amount payable under the Indemnity Claim were it to be held that Clause 12.2 does not have retrospective application.
[3] Including interest.

parties rather than to bring about any bright-line change".[4] That conclusion provided no support for the Judge's construction whereby Clause 12.2 imposed a new indemnity with retrospective effect, in particular where, as she found, the parties' prior (informal) agency relationship involved no express or implied indemnity at all.[5]

11. **Fourth**, the Judge considered that there would be an *"asymmetry"* of commercial benefits and burdens if Clause 12.2 was not given retrospective effect.[6] With respect, that: (i) contravened well-established principles pursuant to which the Court's duty is to give effect to clear and unambiguous terms of a written contract and not to invoke perceived commercial common sense to rewrite them; (ii) ignored the fact that any *"asymmetry"* was the result of the fact (as she found) that the pre-Agency Agreement relationship involved no indemnity; and (iii) ignored reasons why it may have appeared commercially sensible to FICL/FACL and to GE-CB to agree the historical contractual arrangements from which any "*asymmetry*" arose, particularly where each was part of the same corporate group with benefits and burdens of these arrangements accruing to the same shareholder.

12. Ds respectfully submit that the proposed appeal has at least a real prospect of success such that permission to appeal ought to be granted under CPR r.52.6(1)(a).

B. THE SCOPE OF THE PROPOSED APPEAL

13. The Order against which Ds seek to appeal was made following a trial at which Cs asserted four causes of action by which to recover in respect of alleged losses relating to the pre-2005 policies, as identified at J/§8 **{Core/9/101}**. One of these was the claim for an indemnity under Clause 12.2 of the Agency Agreement (the **"Indemnity Claim"**).

14. The proposed appeal does not concern the other three causes of action. These: (i) failed in the case of the Settlement Claim;[7] (ii) failed in the case of the Contribution Claim;[8]

---

[4] J/§261 **{Core/9/163}**.
[5] J/§273 **{Core/9/165}**.
[6] J/§279 **{Core/9/166}**.
[7] J/Section J **{Core/9/155}**.
[8] J/Section L **{Core/9/175}**.

and (iii) while the Negligence Claim succeeded to some extent,[9] it was of far less financial importance because Cs accepted that for limitation reasons it only encompassed PPI sold after 7 December 2002 and it was advanced by Cs as a *"fall-back"*,[10] consistently with which they did not seek to have judgment entered upon it.

15. The proposed appeal is only concerned with the Judgment in respect of the Indemnity Claim. Furthermore, as already noted, Ds only seek permission to appeal in respect of the Judge's conclusion on the short point of construction identified above concerning the temporal scope of Clause 12.2 of the Agency Agreement and upon which 85% of the indemnity awarded by the Judgment rests. The Judge's reasoning on that point was set out over just 5 pages of her 129-page Judgment, at Section K.1 **{Core/9/162}**.

16. Thus, much of the Judgment is of no direct relevance to the proposed appeal. That includes the Judge's findings regarding: the operation of the relationship between FICL/FACL and GE-CB in practice;[11] the regulatory framework;[12] the circumstances in which PPI mis-selling complaints emerged;[13] the responsibility for these as between FICL/FACL and GE-CB;[14] and the factual background that led up to the dispute, including Cs' (failed) allegation that an informal settlement was concluded in 2015.[15]

17. Accordingly, and notwithstanding its considerable financial significance, the proposed appeal is narrow in scope. It requires the Court to consider the correct construction of a single provision of a relatively short written agreement where the relevant background matters fall within a narrow compass, as explained in Section C below.

C. RELEVANT BACKGROUND

18. The Judge acknowledged that she was required to *"investigate events which took place many years or even decades ago"*, namely, the sale of PPI prior to 14 January 2005, and in circumstances where *"[q]uite what the exact starting point might have been, no-one*

---

[9] J/Section M **{Core/9/184}**.
[10] J/§369 **{Core/9/184}**.
[11] J/Section E **{Core/9/109}**.
[12] J/Section F **{Core/9/113}**.
[13] J/Section G **{Core/9/119}**.
[14] J/Section I **{Core/9/131}**.
[15] J/Section H **{Core/9/121}** and J **{Core/9/155}**.

was able to identify".[16] The parties were not themselves involved in the marketing, sale, and underwriting of these pre-2005 policies. Rather, and as already noted, they were litigating as successors to FICL/FACL and GE-CB.[17]

19. The Judge also acknowledged that *"[a]n important feature of this case is that for much of the relevant period, the various insurance entities and credit entities were all part of the GE corporate group reporting to the same profit centre within GE"*.[18]

20. In this regard, the Judge found that *"[f]rom approximately May 1992, FICL/FACL and GECB were both part of the GE Capital group and FICL/FACL were the exclusive underwriters of store card PPI offered by GECB in the UK"*. She noted that *"[i]t was common ground that in relation to the sale of PPI specifically… GECB was acting as FICL/FACL's agent"*.[19] GE-CB so acted on an informal basis (i.e., without any written agreement governing the relationship) before the Agency Agreement was entered into.

21. The Judge accepted *"that there was no express indemnity provision governing the prior relationship between the parties* [i.e., between FICL/FACL and GE-CB] *and that none could be implied"* and *"[t]o that extent clause 12 was a "new" provision"*.[20]

D. THE AGENCY AGREEMENT

22. The Judge set out the provisions of the Agency Agreement of relevance to the Indemnity Claim in the Annex to her Judgment. So far as concerns the proposed appeal, the critical provision is Clause 12.2 **{Supp/1/11}**. It provides as follows under the heading "Indemnities":

> "12.2 Subject to the Insurer complying with their duties under this agreement, GE-CB will indemnify the Insurer against any liability which they may incur by reason of any act or omission by GE-CB (including negligence) while performing their duties under this agreement."

[16] J/§§1-2 **{Core/9/100}**.
[17] The Judge summarised the parties' corporate history at J/§§10-13 **{Core/9/102}**.
[18] J/§2 7 **{Core/9/100}**.
[19] J/§13 **{Core/9/103}**.
[20] J/§273 **{Core/9/165}**.

23. As further described below, the Judge's reasoning in support of her construction was not based on the language of Clause 12.2, which was neither quoted in the body of the Judgment nor the subject of any textual analysis there. Rather, she relied on other provisions of the Agency Agreement, and in particular Clauses 1.1 and 1.2 **{Supp/1/2}**. They provide as follows under the heading "Introduction":

> "1.1 GE-CB has prior to the date of this agreement acted as the Insurers' agent in respect of the marketing and sale of the Insurance. The parties now wish to record the terms and conditions on which GE-CB shall continue to act as the Insurers' agent.
>
> 1.2 Unless otherwise stated herein, the parties agree that, notwithstanding clause 3, this agreement shall apply to and govern the marketing and sale of the Insurance under all of the Schemes (including the Schemes set out in schedule 4 in respect of which there are in existence at the date of this agreement Existing On-Risk Policies), the ongoing administration of all Existing On-Risk Policies and New Policies entered into between insured customers and the Insurers pursuant to such Scheme and the parties respective rights and obligations in respect thereof."

24. The capitalised terms in this provision are defined in Clause 2.2 **{Supp/1/3}** as follows:

> "…
>
> (c) **"Existing On-Risk Policy"** means a creditor insurance policy or personal accident insurance policy entered into before the date of this agreement between an insured customer and the insurers pursuant to one of the Schemes set out in schedule 4 under which an insured customer has made a valid claim which remains outstanding or there remains a risk that the relevant insured customer may make a claim against the Insurers in accordance with the terms of such policy;
>
> (d) **"Insurance"** means the Insurers' creditor and personal accident insurance products and services from time to time;
>
> (e) **"New Policy"** means a creditor insurance or personal accident policy entered into on or after the date of this agreement between an insured customer and the Insurers pursuant to any Scheme;
>
> (f) **"Schemes"** means the existing schemes for the marketing and sale of the Insurance set out in schedule 4 and any new scheme launched by the parties for the marketing and sale of the Insurance after the date of this agreement the details of which are set out in an addenda executed by the parties pursuant to clause 4.4."

E. SUBMISSIONS IN SUPPORT OF THE PROPOSED APPEAL

25. The Judge concluded that *"the objective intention of the parties was that the entire Agency Agreement, including clause 12, should apply without distinction to all policies sold by GECB on behalf of FICL/FACL irrespective of the date of sale"*.[21] She thereby gave retrospective effect to the indemnity provision under Clause 12.2.

26. Ds respectfully submit that the Judge's construction was wrong. The main grounds upon which that submission is advanced are summarised at §§7 to 11 above. They are developed below following a summary of the applicable principles.

E.1 Applicable principles on the construction of written contracts

27. The applicable principles on contractual construction are well-established having been summarised by the Supreme Court in ***Wood v Capita Insurance Services Ltd*** [2017] AC 1173, per Lord Hodge JSC (with whose judgment the other members of the Court agreed) at [10] to [15], endorsing the guidance in its prior decisions in ***Arnold v Britton*** [2015] AC 1619 and ***Rainy Sky SA v Kookmin Bank*** [2011] 1 WLR 2900.

28. The Court will no doubt be familiar with the relevant passages in ***Wood***. As they make clear, the Court's task is to ascertain the objective meaning of the relevant contractual language taking due account of the terms in which it is expressed, other relevant contractual provisions, the relevant factual context in which the contract was entered into, and the implications of the rival constructions. The weight given to these indications depends on the quality (i.e., clarity) of the relevant language.

29. In ***Arnold***, Lord Neuberger PSC (with whose judgment Lords Sumption and Hughes JJSC agreed) emphasised the importance of focusing on the provision that is to be construed and giving effect to the natural meaning of the language with which it is expressed save where it is unclear: see at [17] and [18]. Lord Neuberger also explained that *"commercial common sense is not to be invoked retrospectively"*: see at [19].

30. This Court more recently reiterated (with reference to prior appellate authority) that: *"[c]ontractual construction involves determining the meaning of what the parties have said ..."*; the Court's duty to give effect to unambiguous language; where rival meanings

---

[21] J§260 **{Core/9/163}**.

are suggested, there must be *"a basis in the words used, within their factual matrix, for the rival meaning"*; and the Court *"... should be wary of assuming that it knows what is or is not commercially sensible where the language used points to a clear answer"*: ***Palladian Partners LP v The Republic of Argentina*** [2024] EWCA Civ 641, per Popplewell LJ (with whose judgment Falk and Lewison LJJ agreed) at [58] to [61].

E.2 The Judge's construction is contrary to the unambiguous language of Clause 12.2

31. Clause 12.2 **{Supp/1/11}** was set out in terms above. The natural meaning of the provision is clear and unambiguous. It is an indemnity against liability arising from an *"act or omission by GE-CB* ***while performing their duties under this Agreement****"* (emphasis added). Such an *"act"* or *"omission"* could only occur after the Agency Agreement was entered into because it is only then that GE-CB could be *"performing their duties under"* it.

32. That is reinforced by the nature of the *"duties"* to which Clause 12.2 refers. They are set out in Clause 6 of the Agency Agreement **{Supp/1/5}**, expressly in terms of what *"GE-CB will"* and *"will not"* do. That clearly and unambiguously connotes the imposition of duties as regards conduct to be done or not done in future, i.e., after the Agency Agreement has been entered into. It does not purport to impose duties as regards antecedent conduct. Nor does the Agency Agreement purport to impose such duties on FICL/FACL, Clause 7 instead providing for what they *"will"* do *"during the term of the Agreement"*.

33. The prospective nature of the parties' duties under Clauses 6 and 7 of the Agency Agreement, and the indemnities under Clause 12, is reflected in and reinforced by Clause 17. It provides that that the Agency Agreement *"contains the entire and only agreement between the parties relating to the marketing and sale of Insurance by GE-CB* ***from and including the Effective Date****"* (emphasis added). In the light of that provision, it is impossible to construe the Agency Agreement as applying retrospectively to the *"marketing and sale of Insurance by GE-CB"* that pre-dates the Effective Date. Taken together, Clauses 6 **{Supp/1/5}**, 7 **{Supp/1/6}**, 12 **{Supp/1/11}** and 17 **{Supp/1/15}** make clear that the Agency Agreement has no application to, imposes no duties regarding, nor provides any indemnities in respect of, that historic conduct.

34. As appears from Section K.1 of the Judgment, most of the Judge's reasoning was focused on *other* provisions of the Agency Agreement or extrinsic considerations. These points (and the Judge's further errors regarding them) are addressed below. However, and with respect to the Judge, her fundamental error was a failure to focus on the language of Clause 12.2, which was the provision required to be construed. That error was compounded by the Judge's misplaced reliance on Clauses 1.1 and 1.2 of the Agency Agreement, which say nothing about indemnities and provide no support for the Judge's retrospective construction of Clause 12.2. Had the Judge properly construed those other provisions, it would have been apparent that they are concerned with future conduct under the Agency Agreement much like Clause 12.2 is: see further, Section E.3 below.

35. The Judge addressed the language of Clause 12.2 in just two paragraphs: J/§275 and §276 **{Core/9/165}**. The former recorded Ds' core submission at §31 above. The latter rejected it, giving two reasons. With respect, neither is sustainable.

36. **First**, the Judge reasoned that *"[a]s I have concluded above, the clear intention of clauses 1.1 and 1.2 was that from the Effective Date the regime set out in the Agency Agreement should be applied to the entirety of the parties' relationship, past and future"*. This reflected a failure, contrary to the principles summarised in Section E.1 above, to focus on the relevant contractual language being construed: i.e., the language of Clause 12.2. That error is further illustrated by the fact that the conclusion to which the Judge referred in the passage just quoted was reached in prior passages of her Judgment (*"above"*) which do not refer to the language of Clause 12.2 or the clear and unambiguous indications that it does not apply retrospectively, as set out at §§31 and 32 above.

37. **Second**, the Judge said of Clauses 1.1 and 1.2 that it was *"not without significance that these were bespoke clauses specifically negotiated in the context of a particular longstanding relationship"*.[22] The Judge did not identify what *"significance"* she derived from this and with respect to her there is none. As developed in Section E.3 below, Clauses 1.1 and 1.2 do not purport to deal with the question of indemnities, which is instead addressed (and only addressed) in Clause 12.2. As developed in Section E.4

---

[22] J/§276 **{Core/9/165}**.

below, the relevant *"context"* is that the Agency Agreement was entered into in circumstances where the prior *"relationship"* involved no indemnity at all, which is a further factor pointing against construing Clause 12.2 to have retrospective effect.

38. The Judge apparently had no regard to the prospective nature of the parties' duties under Clauses 6 and 7 of the Agency Agreement: as to which, see §§32 to 33 above. Those Clauses are not mentioned in Section K.1 of the Judgment. While the Judge referred to Clause 17, she perceived no *"conflict"* between it and her construction on the basis that it *"merely confirms that the Agency Agreement regime applies from the Effective Date"*.[23] With respect to the Judge, that is not what Clause 17 says. It is clear from its language, to which the Judge did not refer, that the Agency Agreement is one *"relating to"* the *"marketing of insurance by GE-CB"* on and after the *"Effective Date"*: see §33 above. There is an irreconcilable conflict between that language and the Judge's construction, which treats the Agency Agreement as applying to pre-Effective Date marketing and sales.

E.3 The Judge's erroneous reliance on and misconstruction of Clauses 1.1 and 1.2

39. The Judge's reliance on Clauses 1.1 and 1.2 of the Agency Agreement was foundational to her construction of Clause 12.2. Ds respectfully submit that that reliance was misplaced. Properly construed, Clauses 1.1 and 1.2 provide no support for construing Clause 12.2 to have retrospective effect. Indeed, if anything, those other Clauses reinforce the conclusion that Clause 12.2 only applies prospectively.

40. Insofar as the principles summarised at Section E.1 above permit regard to be had to other provisions of a contract, that is only so where they are relevant to the provision that the Court is required to construe, i.e., Clause 12.2 in the present case. With respect to the Judge, neither Clause 1.1 nor Clause 1.2 has any such relevance; let alone any sufficient relevance to overcome the clear and unambiguously prospective language of Clause 12.2.

41. As appears from its terms, Clause 1.1 of the Agency Agreement does no more than record the fact that GE-CB had acted as FICL/FACL's agent beforehand and that the parties wished to *"record the terms and conditions on which GE-CB shall continue to act as the*

---

[23] J/§277 **{Core/9/165}**.

Insurers' agent". That sheds no light on the question of what those terms and conditions would be. So far as concerns indemnities, that question is answered by Clause 12 alone.

42. As regards Clause 1.2, it too does not address the position on indemnities. It instead addresses a lack of clarity that might otherwise arise from the fact that whereas there were Schemes and Existing On-Risk Policies already in existence when the Agency Agreement was entered into, Clause 3 **{Supp/1/4}** provides that the Agency Agreement *"shall commence on the date hereof (the **"Effective Date"**)"*. Clause 1.2 clarifies the position by providing that *"unless otherwise stated herein"* and *"notwithstanding Clause 3"* the Agency Agreement *"shall apply to and govern"*: (i) *"the marketing and sale of the Insurance under all of the Schemes (including the Schemes set out in schedule 4 in respect of which there are in existence at the date of this agreement Existing On-Risk Policies)"*; (ii) *"the ongoing administration of all Existing On-Risk Policies and New Policies entered into between insured customers and the Insurers pursuant to such Schemes"*; and (iii) *"the parties respective rights and obligations in respect thereof"*.

43. In addition to not addressing the position so far as concerns indemnities, the provisions of Clause 1.2 do not connote any retrospectivity as regards the matters that it does address. The natural meaning of the provisions just quoted is that point (i) is concerned with the prospective marketing and sale of the insurance referred to; point (ii) is concerned with the prospective administration of the insurance referred to; and point (iii) is concerned with the rights and obligations arising from these prospective matters.

44. Thus, even if they were relevant (which they are not) Clauses 1.1 and 1.2 provide no support for the Judge's construction of Clause 12.2 once they are properly construed. Indeed, if anything, those other Clauses indicate that the Agency Agreement was intended to apply on a prospective basis, i.e., to future conduct. Consistently with that, Clause 12 provides indemnities in respect of such conduct alone. To construe it to apply in relation to historic conduct would not only violate its terms; it would also violate the wider logic of the Agency Agreement. For example, it would mean that although the Agency Agreement does not apply to the historic marketing and sale of products (Clause 17), and does not impose duties in respect of these historic matters (Clauses 6 and 7), it grants an indemnity in relation to consequences of those matters even though none existed at the time they were done. That is the effect of the Judge's construction of Clause 12.2. With

respect to the Judge, there is no textual or other basis for it in the Agency Agreement.

45. The Judge rejected Ds' construction of Clauses 1.1 and 1.2 in favour of Cs' construction of those provisions, under which (as the Judge put it) *"the provisions of the agreement should apply to the marketing and sale of any policy whenever sold"*.[24] For the reasons set out at §§39 to 43 above, that is a misconstruction of those Clauses because it does not reflect the natural meaning of the language used to express them. The Judge's conclusion and reasoning also involved the following further errors.

46. **First**, although Ds advanced in their written opening and closing submissions the construction of Clause 1.2 set out at §42 above,[25] it was not addressed in the Judgment. The Judgment instead focused on an alternative construction that Ds advanced in their oral closings which interpreted the last part of the provision such that it only applies to the parties' rights and obligations in respect of New Policies.[26] Offering that alternative did not mean that Ds had abandoned the other construction. In any event, the Judge was required correctly to construe Clause 1.2 and she failed to do so for the reasons set out in this Skeleton Argument.

47. **Second**, the Judge reasoned that Ds' construction of Clauses 1.1, 1.2, and 12.2 was a *"most unlikely intention viewed objectively"* because its *"effect would be that Existing Policies and New Policies were treated together in relation to the commercial aspects of the agency (premium, commission and claims handling etc.) but not for the purposes of the indemnity provisions"*.[27] With respect to the Judge, there is nothing inherently *"unlikely"* about this: the effect would simply be that the Agency Agreement applies prospectively to GE-CB's future conduct thereunder in administering FICL/FACL's policies (whether Existing or New), and marketing and selling such policies; with GE-CB granting an indemnity in respect of such conduct, all done – as Clause 12.2 provides – *"while performing their duties under this agreement"*. The clear and unambiguous language of these Clauses shows that this was the parties' intention.

48. **Third**, the Judge reasoned that Ds' construction would give rise to logistical difficulty in

---

[24] J/§263 **{Core/9/163}**.
[25] As recorded at J/§264 **{Core/9/163}**.
[26] J/§§265-266 **{Core/9/163}**.
[27] J/§267 **{Core/9/164}**.

circumstances where GE-CB's reporting system did not distinguish between Existing Policies and New Policies.[28] With respect to the Judge, it is difficult to see how this point (even if accurate) bears on the proper construction of Clause 12.2 of the Agency Agreement. On Ds' construction of that provision, it can only apply in respect of conduct by GE-CB after the Agency Agreement was entered into. That does not require a reporting system which distinguished between Existing Policies and New Policies; it required the parties to be able to ascertain when GE-CB's conduct occurred. That does not entail any particular difficulty, let alone any sufficient to justify rewriting Clause 12.2 as a retrospective indemnity as the Judge effectively did. Even if that avoided logistical difficulty, it is not the contract the parties agreed.

E.4 The Judge's erroneous reliance on the *"aim"* of the Agency Agreement

49. Pursuant to the principles summarised above, the aim of the Agency Agreement was at best a matter to be factored into an iterative interpretation of Clause 12.2. For the reasons set out in Sections E.2 and E.3 above, Ds respectfully submit that the Judge failed properly to conduct that exercise because she did not give due weight to the natural meaning of the language with which that Clause is expressed and drew false support for her construction of it from Clauses 1.1 and 1.2, which she anyway misconstrued.

50. The Judge also erred in her reliance on the *"aim"* of the Agency Agreement. The Judge characterised this as being to *"effect continuity"* in the relationship between FICL/FACL and GE-CB.[29] However, that was not accurate – and indeed was inconsistent with the Judge's own findings – so far as concerns the position on indemnity.

51. As already noted, the Judge (correctly) found that there was no express or implied indemnity governing the relationship prior to the Agency Agreement.[30] To that extent (at least) its *"aim"* was not to *"effect continuity"* in the relationship but rather to introduce new rights and obligations as set out in Clause 12.2. Given the novelty of such provision as between these parties, the *"aim"* of the Agency Agreement was not a relevant indicium of the scope of Clause 12.2; or at least it was of minimal relevance compared with the

---

[28] J/§269 **{Core/9/164}**.
[29] J/§261 **{Core/9/163}**.
[30] J/§273 **{Core/9/165}**.

clear indications derived from the language with which the provision is expressed.

52. With respect, the Judge failed to recognise the significance of this point. She instead erroneously relied on four matters.

53. **First**, the Judge reasoned that *"the idea of continuity"* was *"further supported"* by Clause 4.1 **{Supp/1/4}** and aspects of the witness evidence referred to at J/§271 **{Core/9/164}**. Insofar as the Judge intended to rely here on her construction of Clause 1.2, that was erroneous for the reasons set out in Section E.3 above. So far as concerns Clause 4.1 specifically, it does no more than confirm GE-CB's appointment as agent going forwards, which sheds no light on the terms upon which it was to so act, let alone as regards indemnity. As regards the witness evidence that (as the Judge put it) *"there had been no intention to alter the nature of the relationship between the parties",* it is difficult to see on what basis such subjective material was admissible. But in any event, there *was* an intention to change the relationship so far as concerned the position on indemnity – as the Judge herself found.

54. **Second**, on the premise that the *"aim*" of the Agency Agreement was to *"achieve a formalisation of arrangements which were already being operated"* the Judge reasoned that *"one would expect it to be clearly stated … if it had nevertheless been intended to draw a distinction for any specific purpose between policies sold after the Effective Date and those sold before"*.[31] As explained above, that premise was false as regards the position on indemnity. The conclusion was also false for the further reasons that: (i) there was no legal basis for the Judge to require clear words: the question for her was one of construction applying the principles set out in Section E.1 above; and (ii) as set out in Section E.2 above, the Judge in any event failed to have due regard to the natural meaning of Clause 12.2, the clear terms of which drew exactly such a distinction by extending the indemnity only to GE-CB's future conduct as agent.

55. **Third**, the Judge said that she could see *"… no logical or commercial reason why the parties would have intended GECB to be liable for the consequences of its acts and omissions in relation to the New Policies but not Existing Policies…"*.[32] With respect to the Judge, her approach failed to reflect the principles summarised in Section E.1 above,

---

[31] J/§272 **{Core/9/164}**.
[32] J/§272 **{Core/9/164}**.

paying insufficient regard to the contractually-agreed language under Clause 12.2 and insufficient reticence before resorting to what she perceived to be commercial sense.

56. There were ample reasons why it may have appeared logical and commercial to the parties to the Agency Agreement to include an indemnity on a prospective basis. One is provided by the Judge's own finding that when GE-CB had marketed and sold the Existing Policies, it had done so without providing *any* indemnity to FICL/FACL. There is nothing illogical or uncommercial in parties contracting on the basis that whereas new rights and obligations (here to indemnify) are to be granted, that is on a prospective basis only; the more so given the broad terms in which Clause 12.2 is expressed.

57. In that regard, the Judge concluded that Clause 12.2 of the Agency Agreement *"applies to any act or omission, not just acts which amount to a breach of contract"*.[33] Its effect was accordingly to grant FICL/FACL additional rights, and subject GE-CB to additional obligations, going beyond those at common law. There is nothing illogical or uncommercial in the parties agreeing that these broad provisions should only apply prospectively. If anything, it would have been illogical or uncommercial for GE-CB to grant additional rights in respect of historic conduct for no apparent commercial benefit.

58. **<u>Fourth</u>**, the Judge referred to evidence that *"agency agreements between insurers and credit lenders invariably contained an indemnity agreement of this nature"*, i.e., in the nature of Clause 12.[34] Whereas the Judge reasoned that this *"formed part of the factual matrix"*: (i) it was not pleaded to be part of that matrix (as is required in the Commercial Court);[35] and (ii) it is difficult to see how it sheds any light on the question for the Judge, which was not whether the Agency Agreement contained an indemnity but the temporal scope of the indemnity it contained.

E.5 The Judge's erroneous reliance on *"asymmetry"* as regards commercial benefits

59. The Judge also relied on what she considered to be a *"surprising asymmetry"* that would result if Clause 12.2 were not given retrospective effect, *"with the majority of the commercial benefits going to GECB and FICL/FACL picking up all of the liabilities even*

---

[33] J/§296 **{Core/9/169}**.
[34] J/§273 **{Core/9/165}**.
[35] Commercial Court Guide, §C 1.3(h).

if attributable to GECB's acts and omissions".[36] With respect, this too was wrong.

60. **First**, the Judge's approach was contrary to the principles summarised in Section E.1 above. Instead of applying the clear and unambiguous words of Clause 12.2, she effectively rewrote them so as to give the Clause retrospective effect, to avoid what she perceived to be an uncommercial allocation of risk and reward. That showed a lack of due fidelity to the agreed language and over-readiness to invoke (her own view of) commercial sense.

61. **Second**, the Judge's reasoning failed to have any regard to the fact that the *"asymmetry"* she perceived was not the result of Ds' construction of Clause 12.2 of the Agency Agreement; but rather the fact – as she found – that there was no indemnity under the prior relationship.

62. **Third**, the Judge overstated that "*asymmetry"* because her reasoning had no regard to FICL/FACL's common law rights under the prior relationship and tortious and contractual duties of care that GE-CB owed to them as its agent. Insofar as FICL/FACL had to *"pick[ ] up liabilities… attributable to GECB's acts and omissions"*, for which there was no common law remedy, that would be because GE-CB had done nothing wrong (i.e., breached no duty) and had not granted additional, broader, rights under an indemnity, as it later did by the Agency Agreement. The Judge instead appears to have proceeded on the false basis that FICL/FACL had no legal remedies at all for GE-CB's past acts and omissions absent a retrospective indemnity.[37]

63. **Fourth**, insofar as there was such an *"asymmetry"* the Judge's reasoning had no regard to the reasons why it may have appeared commercially sensible to FICL/FACL and to GE-CB to agree the historical contractual arrangements under which it arose. One reason is the fact that the entities were part of the same corporate group with benefits and burdens of these arrangements accruing to the same shareholder.

F. CONCLUSION

---

[36] J/§279 **{Core/9/166}**.
[37] J/§259 **{Core/9/162}**, J/§272 **{Core/9/164}**, J/§278-279 **{Core/9/165}**.

64. For all these reasons, the Court is respectfully invited to grant permission to appeal.