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 Honourable Mrs Justice Dias DBE

Claim No. CL-2021-000046

B E T W E E N:

(1) AXA FRANCE IARD SA
(2) AXA FRANCE VIE SA

Claimants/Appellants in the Cross-Appeal

-and-

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

Defendants/Respondents in the Cross-Appeal

RESPONDENTS' SKELETON ARGUMENT

For the Cross-Appeal

References below to the Judgment are in the form J/paragraph number. The Respondents adopt the defined terms used in the Judgment. References to the Appeal Bundles are in the form {**Bundle/Tab/Page**}.

20 March 2026

Mark Howard KC
Brick Court Chambers

Adam Zellick KC
Fountain Court Chambers

Andrew Scott KC
Blackstone Chambers

Aaron Taylor
Fountain Court Chambers

Introduction

1. If the Court grants Santander's appeal, AXA cross-appeals the Judge's dismissal of its Contribution Claim. AXA intends thereby to seek to avoid (or substantially mitigate) the financial consequences if this Court concludes that it has no contractual right to pass on the costs of complying with its regulatory responsibilities to Santander.[1] AXA does so based on a novel and expansive interpretation of the 1978 Act which has no foundation in the relevant statutory language or any authority.

2. The Judge correctly dismissed AXA's Contribution Claim for the reasons she gave at J/334-368 {**Core/9/177-184**}. Males LJ acknowledged the force of those reasons when granting AXA permission to cross-appeal, describing them as "*compelling*".[2] His Lordship did not suggest that AXA's arguments have any real prospect of success, and it may be that permission was only granted on the basis of CPR r.52.6(1)(b) in the light of the novelty of the arguments that AXA advances. Regardless, AXA's arguments have no merit.

3. By its Contribution Claim, AXA seeks contribution under the 1978 Act in respect of the Redress Payments and sums paid under the OR Settlement, each as further described below. AXA paid these sums pursuant to its regulatory responsibility. No other basis for

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[1] AXA admits that this is its objective: see its Skeleton at §29 {**Core/4/51**}. Whether AXA could succeed in this is a separate question concerning apportionment under s.2 of the 1978 Act, upon which the Judge reached no conclusion, which is not before this Court, and which would require determination in further proceedings before the Commercial Court as AXA accepts: see its Skeleton §58 {**Core/4/62**}. Santander therefore does not address the question here. Its position is that it will never arise because the Contribution Claim is unsustainable.

[2] Court of Appeal Order granting AXA permission to cross-appeal of 21 January 2026 {**Core/11/226**}.

them was pleaded or argued by AXA below, as the Judge correctly noted;[3] and "*a claim for contribution on that [regulatory] basis cannot succeed*" as she correctly held.[4]

4. That conclusion necessarily follows from the express and unambiguous terms by which the statutory entitlement to contribution is conferred under s.1 of the 1978 Act. Pursuant to s.1(1), the entitlement is only granted to someone who is "*liable in respect of any damage suffered by another person*"; and pursuant to s.1(6), that means (and only means) a "*liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage*".

5. The Redress Payments were not paid pursuant to any such "*liability*"; nor were the sums paid under the OR Settlement. That completely answers the Cross-Appeal. It means that Grounds 1 and 2 are unsustainable; and Grounds 3 and 4 (concerning Santander's alleged liability to PPI complainants) do not arise.

6. Santander develops this primary response to the Cross-Appeal below. In doing so, it explains why the Judge was correct to reject AXA's misplaced reliance on the possibility of hypothetical actions against it under FSMA for regulatory non-compliance. In short: such actions were never brought; the Judge was right to doubt whether they could have been brought (they could not); and in any event, they were not the basis for the payments made, which were instead (and alone) AXA's regulatory responsibility to make. The Judge was bound (as this Court is) to give effect to the clear terms of s.1(6) of the 1978 Act, pursuant to which AXA's Contribution Claim was and remains unsustainable.

7. Having developed this primary response, and without prejudice to it, Santander addresses below the further reasons given by the Judge for dismissing the Contribution Claim. They correspond to and further answer Grounds 2 to 4 of the Cross-Appeal.

The 1978 Act

[3] J/340 {**Core/9/178**}.

[4] J/340 {**Core/9/178**}.

8. It is foundational to any claim under the 1978 Act that the contribution claimant must establish a statutory entitlement to contribution. The key provision is s.1 ("*Entitlement to contribution*") the material parts of which the Judge quoted at J/332 {**Core/9/175**} along with s.2 ("*Assessment of contribution*") and s.6 ("*Interpretation*").

9. Pursuant to s.1(1) of the 1978 Act, the contribution claimant must show that it and the contribution defendant are each "*liable*" to another in respect of the "*same damage*". Such a common liability – that is to say, a liability against the contribution claimant and the contribution defendant in respect of the "*same damage"* – only exists if it could be established by an action in England and Wales at the suit of the person who has suffered such "*damage*".

10. The requirement for a liability that could be established by an "*action*" is clear from s.1(1) of the 1978 Act, however this is put beyond doubt by the express provision under s.1(6) of the 1978 Act. It provides in relevant part that "*... references in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established* ***in an action brought against him in England and Wales*** *by or on behalf of the person who suffered the damage...*" (emphasis added).

11. That reflects the natural and ordinary meaning of the word "*liable*" particularly when used, as it is in s.1(1) of the 1978 Act, in conjunction with the words "*in respect of any damage suffered by another person*". The language clearly connotes a liability that that "*person*" could establish by an action against both the contribution claimant and defendant. So too does the provision under s.1(3) whereby the contribution defendant cannot rely on the subsequent expiry of a period of limitation or prescription to contend that he is not "*liable*" in the sense required by the statute "*… unless [it] extinguished* ***the right on which the claim against him in respect of the damage was based***" (emphasis added).

12. The requirement for a liability that could be established by such an "*action*", as emphasised by the language of s.1(1), s.1(3) and s.1(6) of the 1978 Act, is also reflected

in s.6(1) of the 1978 Act. It provides that "*a person is **liable in respect of any damage** for the purposes of this Act if **the person who suffered it** (or anyone representing his estate or dependents) is **entitled** to recover compensation from him **in respect of that damage** (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise)*" (emphasis added). Read together with s.1(6) of the Act, that can only mean an entitlement to recover by way of an action in England and Wales, at the suit of the damaged person (or anyone representing his estate or dependents), to establish the liability for which contribution is sought.[5]

The Contribution Claim and the Judge's decision to dismiss it

13. The Contribution Claim is brought in respect of the Redress Payments and the sums paid under the OR Settlement. The former are the sums that AXA paid in respect of regulatory complaints brought by PPI customers. The latter are sums that AXA paid the Official Receiver of 95,880 bankrupt estates to "*forestall*" the possibility of such complaints.[6]

14. None of these payments were made pursuant to a "*liability*" that was or could be established by an "*action*" against AXA. The actual or apprehended complaints were not the subject of any such "*action*" and nor could they have been. They were not made as legal complaints and nor were they based on any legal liability. They were regulatory complaints. AXA paid because it considered it to be its regulatory responsibility to do so.

15. That regulatory responsibility was not referable to any "*liability*"; it could not have been established by an "*action*"; and it was fundamentally different from the legal liabilities that can be so "*established*" at the suit of those who have "*suffered damage*" and are "*entitled to recover compensation in respect of*" it. The regulatory responsibility was referable solely to the status of FICL and FACL as regulated entities; it was for those entities and the Ombudsman – and not the Court – to determine what redress was

[5] It follows that AXA is not assisted by s.6(1) of the 1978 Act. Cf. AXA's Skeleton at §35 {**Core/4/54**}, as regards which see further at §§29 to 31 below.

[6] J/343 {**Core/9/178**}.

required; and the relevant determinations were made without reference to legal liability.[7] In proceedings it successfully brought against Genworth for reimbursement of the same redress payments that are the subject of the present action,[8] AXA itself emphasised that these redress payments were not based on any legal liability. Bryan J summarised AXA's submission as follows: "*AXA emphasises that the regulatory context discourages regulated entities such as FICL and FACL from adopting an adversarial approach to complaints made against them by customers. The key submission was that the consumer redress regime was not about legal liability and differed markedly from what is expected of parties to ordinary civil litigation*.": ***AXA S.A. v Genworth Financial International Holdings, Inc.*** [2019] EWHC 3376 (Comm) at [13]. [9]

16. Consistently with this, AXA did not allege below in these proceedings – much less seek to establish – that the Redress Payments and sums paid under the OR Settlement were paid pursuant to any such "*liability*". On the contrary, AXA's pleaded case at the trial was that it was "*liable to complainants for the compensation paid to them* ***under*** *the DISP Sourcebook or pursuant to a FOS determination or following a bona fide settlement of their complaint*" (emphasis added).[10] The Judge correctly recognised that AXA's case was not "*pleaded or argued*" on the basis that the sums were paid on the basis of any

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[7] FICL and FACL were required to offer redress where, having considered a complaint, they determined redress was appropriate ***[DISP 1.4.1R]***, and in so far as a complaint was referred to the Ombudsman it was determined "*by reference to what is, in the opinion of the ombudsman fair and reasonable in all the circumstances of the case*" ***[DISP 3.6.1]***.

[8] In those proceedings, AXA was reimbursed by Genworth for c.90% of the redress payments that AXA claims in the present proceedings. As explained at J/119 {**Core/9/130**}, it is therefore Genworth rather than AXA which stands to benefit from success in the present proceedings, which are for Genworth to recover what it has reimbursed to AXA. Genworth (originally a GE company, where FICL/FACL and GECB were all GE businesses in the same profit centre) was the previous parent of FICL/FACL, with FICL/FACL being acquired by AXA, and GECB being acquired by Santander.

[9] {O/5/5}.

[10] See AXA's Re-Re-Re-Amended Particulars of Claim §89 {B/2/29} {**Core/14/263**}.

liability to complainants in contract or tort;[11] and nor was it "*pleaded or argued*" on the basis of any other liability that was or could have been established by an action. Rather, and as the Judge correctly observed "*[t]he **only** liability asserted was a regulatory liability…*" (emphasis added).[12]

17. The Judge concluded that a claim for contribution on that basis could not succeed because AXA could not thereby show that it was "*liable*" for any "*damage*" within the meaning of the 1978 Act; accordingly, the Contribution Claim did not "*get off the ground*".[13] In addition to this primary basis for dismissing the Contribution Claim, the Judge held that AXA could not establish that Santander was "*liable*" to customers in relation to the Redress Payments or the OR Settlement on any of the bases it contended for.[14]

AXA's Cross-Appeal is unsustainable: Santander's primary response

18. While AXA's Cross-Appeal is advanced on four grounds, each depends on the foundational proposition under Ground 1 that the Judge was wrong to conclude that the 1978 Act is not engaged by payments on account of regulatory responsibility. If the Judge was correct so to conclude then none of the other Grounds arise.

19. The Judge's conclusion on this threshold issue was correct. It is a conclusion which necessarily follows from applying the express and unambiguous terms of the 1978 Act to the Contribution Claim that AXA advanced; and which avoids the expansive and unjustified construction of the statute for which AXA contends, unsupported in that endeavour by any decision, dicta, or even commentary to justify its arguments.

[11] J/340 {**Core/9/178**}.

[12] J/340 {**Core/9/178**}.

[13] J/334 to 344 {**Core/9/177**}.

[14] J/345 to 361 {**Core/9/178**}.

20. The Judge rightly took as her starting point s.1(6) of the 1978 Act.[15] Having referred to the requirement it imposes for a liability that can be established by an "*action*" in England and Wales at the suit of the person suffering "*damage*", the Judge correctly held that "*the Act clearly requires some form of legal liability which could be established against AXA in the civil courts*" – this reflecting "*the plain meaning of the statutory language*". AXA rightly does not criticise the Judge's analysis in these respects. It reflects the only available meaning of the statutory language that falls to be applied.

21. Applying that language to AXA's Contribution Claim, the Judge was bound to conclude that the requirements it lays down were not satisfied. As already noted, AXA's own case was that it was liable to complainants under the regulatory regime.[16] Whereas "*[i]n closing, [AXA] argued that a consumer could have claimed directly against Genworth/AXA on the basis of a liability in negligence or for breach of contract*" the Judge rightly dismissed this because "*AXA's case was not pleaded or argued on that basis*".[17] Nor does (or could) AXA seek to advance the Cross-Appeal on that basis.

22. Instead, AXA argues that it is sufficient for the purposes of the 1978 Act that hypothetical actions might have been brought against it under FSMA for regulatory non-compliance.[18] The Judge correctly rejected this argument for the reasons she gave at J/336-338 {**Core/9/177**}. She did so because "*Section 1(6) contemplates that the action brought by the person who suffered the damage must be one which has established or is capable of establishing the liability*" and that would not be the case for the hypothetical actions AXA posited.

23. The <u>first</u> was an action under s.138D(2) of FSMA. That would be an action for contravention of DISP 1.4.1R or 1.4.4R pursuant to which AXA had a regulatory responsibility to investigate complaints, offer appropriate redress, and comply with any

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[15] J/334-335 {**Core/9/177**}.

[16] See §16 above.

[17] J/340 {**Core/9/178**}.

[18] AXA's Skeleton §§33 {**Core/4/53**} and 39 {**Core/4/55**}.

offers accepted or awards made by the FOS. Under s.138D(2), such a "*contravention*" would be "*actionable at the suit of a private person who suffers loss as a result of the contravention…*" as an action "*for breach of statutory duty*". No such actions were brought. The Judge correctly doubted whether they could have been: "*far from being in breach of these rules, AXA/Genworth appear to have observed them meticulously*".[19]

24. Putting aside the fanciful nature of the hypothetical, an action under s.138D(2) of FSMA could only have been based on a contravention of the relevant regulatory rules rather than the customer's complaint. It would not be an "*action*" to establish "*liability*" in respect of a complaint in the sense required under s.1(6) of the 1978 Act. Insofar as an action under s.138D(2) of FSMA would involve any "*liability*" for "*damage*" for the purposes of the 1978 Act, it would not correspond to any such "*liability*" in respect of the underlying complaint – because there is no such "*liability*" at all.

25. For example, if AXA had contravened DISP 1.4.1R or 1.4.4R by failing to investigate a complaint or to comply with an offer of redress accepted by a customer, or with a FOS award, and if that caused the customer loss, the customer could pursue an action against AXA for breach of statutory duty under s.138(D)(2) of FSMA. But the basis for such liability would be the regulatory contravention. It would not be the customer's complaint, for which AXA was not "*liable"* in the sense required by the 1978 Act: the complaint did not assert and was not based on any "*liability in respect of any damage… which has been or could be established in an action against [AXA] … by or on behalf of [the customer]"*. The sole basis for the complaint was AXA's regulatory responsibility.

26. Where the regulated person discharges that responsibility – as AXA maintains that it did – there necessarily is no regulatory contravention; no breach of statutory duty under s.138(D)(2) of FSMA; and no "*liability*" to discharge as required by the 1978 Act.

27. The second hypothetical action that AXA posited below was Schedule 17, paragraph 16 of FSMA, pursuant to which a FOS decision on redress may be enforced (if not paid) as

[19] J/337 {**Core/9/173**}.

if it were a judgment.[20] That would be an enforcement process, not an action establishing any liability, and it does not transform what is enforced into a "*liability*" in the sense required by the 1978 Act, as the Judge correctly held.[21] Perhaps in recognition of this, AXA's Skeleton makes no express mention of this irrelevant enforcement process.

28. But in any event, such hypothetical court proceedings were not the basis for the Redress Payments or the sums paid under the OR Settlement. On AXA's own case, the sole basis for these payments was its regulatory responsibility to make them.[22] Pursuant to the clear terms of s.1(6) of the 1978 Act that does not confer an entitlement to contribution.

29. It is no answer to these points to say – as AXA does – that the 1978 Act "*encompasses* inter alia *statutory liability*"[23] and that s.138D(2) of FSMA confers a "*private law right*" whereby to enforce DISP 1.4.1R or DISP 1.4.4R.[24] Even if that meant that payments pursuant to *such* liabilities were capable of engaging the 1978 Act, that was not the nature of the payments for which AXA seeks contribution by its Contribution Claim. They were payments made on account of actual or apprehended customer complaints on the basis that AXA had a regulatory responsibility to pay them. AXA was not "*liable*" to pay in the sense required under s.1 of the 1978 Act, because it had no actionable liability to do so, whether pursuant to s.138D(2) of FSMA or otherwise.

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[20] For the avoidance of doubt, as AXA did not contest, the enforcement mechanism in Schedule 17, paragraph 16 is only available in respect of registrable "*money awards*" made by an Ombudsman, not provisional assessments made by a FOS adjudicator: AXA's Closing Submissions §276 {A/8/133} **{Supp/10/321}**. Further, at the trial, counsel for AXA explained that "*virtually every FOS redress payment for which compensation is sought in this action falls within* [the] *provisional assessment category*" {Day 1/ 104:9 – Day 1/104:11} **{Supp/8/185}**. And as far as Santander is aware, none of the 771 complaints within the Complaints Sample led to such a registrable money award.

[21] J/338 **{Core/9/177}**.

[22] AXA's Skeleton §33 **{Core/49/53}**.

[23] AXA's Skeleton §35 **{Core/4/54}**.

[24] AXA's Skeleton §§36, 37, and 39 **{Core/4/54-55}**.

30. AXA is wrong to assert that "*"liability" for the purpose of the [1978] Act encompasses the payment of a sum which would have been enforceable by civil action had it not been paid in compliance with regulatory duty*".[25] The assertion cannot be reconciled with the clear terms of s.1(6) of the 1978 Act, which involve no such enquiry. Consistently with that, AXA points to not a single authority that supports its novel interpretation. The two authorities to which AXA refers[26] have nothing to do with payment pursuant to a regulatory regime and neither suggests that the 1978 Act applies in such a case.

31. Furthermore, insofar as it relies on the observations in ***Friend's Provident Life Office v Hillier Parker May & Rowden*** [1997] QB 85 (CA) at 102H-103B regarding the breadth of the statutory entitlement to contribution under the 1978 Act, AXA omits to point out that: (i) the issue being considered by Auld LJ in that case was whether a claim for restitution of sums paid under a mistake of fact or for no consideration was a claim for "*compensation*" in respect of "*damage*" for the purposes of ss. 1 and 6(1) of the Act; and (ii) whereas Auld LJ concluded that it was on the basis that these statutory phrases are to be interpreted broadly, that was disapproved in ***Royal Brompton Hospital NHS Trust v Hammond (No 3)*** [2002] 1 WLR 1397 (HL), per Lord Steyn (with whose speech the other members of the Appellate Committee agreed) at [33]. Lord Rodger said this at [45]:

> "… It is clear that the purpose of the 1978 Act was to extend the law to enable contribution to be recovered in situations where it was not previously available. In that respect, the wording in section 6(1) is undoubtedly very wide. But I think it is a misconception to regard the Act as a whole as being open to the widest possible interpretation."

The extension achieved is described in Lord Bingham's speech (with which the other members of the Appellate Committee agreed) which traced the development of the law on contribution from its ancient origins, through the enactment of s.6(1)(c) of the Law

[25] AXA's Skeleton §39 {**Core/4/55**}.

[26] AXA's Skeleton §35 {**Core/4/54**}.

Reform (Married Women and Tortfeasors) Act 1935 (which addressed only the position among tortfeasors), up to the enactment of the 1978 Act. Lord Bingham said this at [5]:

> "It is plain beyond argument that one important object of the 1978 Act was to widen the classes of person between whom claims for contribution would lie and to enlarge the hitherto restricted category of causes of action capable of giving rise to such a claim. It is, however, as I understand, a constant theme of the law of contribution from the beginning that B's claim to share with others his liability to A rests upon the fact that they (whether equally with B or not) are subject to a common liability to A. I find nothing in section 6(1)(c) of the 1935 Act or in section 1(1) of the 1978 Act, or in the reports which preceded those Acts, which in any way weakens that requirement. Indeed both sections, by using the words "in respect of the same damage", emphasise the need for one loss to be apportioned among those liable."

The law of contribution had always required a common liability that is actionable. The purpose of the 1978 Act was to widen the cases in which contribution could be sought as between parties subject to liabilities of this kind. It was no part of that purpose to dispense with the requirement that the liability be actionable at the suit of the person who suffered the relevant damage. That is plain from s.1(6) of the 1978 Act.

32. AXA speculates that the Judge "*apparently regarded* [her] *conclusion as unsatisfactory*".[27] AXA does so based on a partial quotation of the Judge's tentative observations in the first two sentences of J/339. However, the key passage (which AXA omits to cite) is the following sentence, in which the Judge correctly held that the 1978 Act "*is a statutory remedy and the statutory requirements must be observed. Where those requirements are clear, as they are, it is not for the courts to correct any perceived illogicality or injustice in their operation*". Santander respectfully agrees.

[27] AXA's Skeleton §34 {**Core/4/53**}.

33. Furthermore, there is no "*illogicality*" or "*injustice*" in the operation of the 1978 Act once its purpose is recalled in terms of facilitating contribution among those who are subject to a common liability in respect of the same damage actionable at the suit of the person who suffered it. It is no part of that purpose to enable a person subject to regulatory responsibility to charge the costs of complying with it to someone else.

34. It bears emphasis that such regulatory responsibility was imposed in the present case (as it will be in most cases) as part of a statutory regime and in the exercise of powers that Parliament conferred on the regulator. The regulatory regime confers on regulated persons such as AXA no right to seek contribution from others towards the costs of doing that which the regulator requires to be done. Respectfully, it is a matter for Parliament and the regulator to judge whether this is appropriate having regard to the various policy considerations that would bear on the question. It is not for the Court to do so by extending the 1978 Act – the more so where that would contradict its clear terms.

Santander's further responses to the Cross-Appeal

35. For the reasons set out in the previous section, Santander respectfully submits that the Cross-Appeal must fail. Without prejudice to that, there are additional reasons why Grounds 2 to 4 are unsustainable. These are addressed below.

(i) Ground 2

36. Ground 2 concerns the OR Settlement {**Supp/2/107**}, whereby AXA paid a lump sum to the Official Receiver to forestall the possibility that regulatory complaints might be brought on behalf of some of the tens of thousands of bankrupt estates the Official Receiver represented. The Ground is unsustainable for the same reason that Ground 1 is: the sums in question were not paid by AXA in respect of any "*liability*" for the purpose of the 1978 Act but instead, as AXA accepts, only in respect of its potential regulatory responsibility.[28]

[28] See references to "*complaints*" and "*prospective complaints*" in, respectively, AXA's Skeleton §§40, 42 {**Core/4/55-56**}.

37. Ground 2 is also unsustainable for the further reasons given by the Judge at J/343 {**Core/9/178**}. The OR Settlement was entered into in circumstances where neither the bankrupts nor the Official Receiver on their behalf had made any regulatory complaints at all. The Judge correctly rejected AXA's argument that the sums paid fell within s.1(4) of the 1978 Act, under which "*a person who has made… any payment in bona fide settlement or compromise of any* ***claim made*** *against him… shall be entitled to recover contribution in accordance with this section*" (emphasis added). She found that "*no claims had been made*" and that the OR Settlement was a "*payment to forestall any such claims*".[29]

38. AXA rightly does not challenge these findings. They are fatal to Ground 2. Whereas Ground 2 asserts that "*… the OR Settlement was a bona fide settlement of complaints that the OR had intimated would formally be issued in the absence of a settlement*", the Judge made no such finding. That too is fatal to Ground 2.

39. In addition, contrary to AXA's assertion that the OR Settlement related to complaints that would be issued, a significant majority (approximately 88%)[30] of store card PPI sales in the relevant period never generated a complaint, and of those complaints which were made, the majority (approximately 57%)[31] were rejected, such that the vast majority of the bankrupt estates cannot be taken to have been able to identify or make or to have had a good complaint at all. AXA is therefore seeking contribution for complaints that were never made and for complaints that never could have been made.

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[29] J/343 {**Core/9/178**}; see also J/302-304 {**Core/9/170**}.

[30] In the process of selecting the Complaints Sample, the statistical experts for the parties (Mr Hennig and Dr Gudat) agreed that the total complaints population was 1,521,774 complaints. This formed approximately 12% of the total 12.5 million customer sales pre-2005 {G/402}.

[31] Of the 1,521,774 complaints, the experts agreed that only 649,786 complaints were upheld, which equates to a complaint uphold rate of approximately 43% and a complaint rejection rate of 57%.

40. AXA argues that it suffices for the purpose of s.1(4) of the 1978 Act that a claim be "*intimated in correspondence*".[32] But even if that were correct, then any such claim would need to be sufficiently articulated in correspondence to amount to a "*claim made*" for the purpose of s.1(4); including by articulating the "*factual basis of the claim*" which if "*established*" would give rise to a liability. The Judge made no finding (and there is no evidence before the Court to suggest) that the Official Receiver or the bankrupts had articulated any such claims. Again, that is fatal to Ground 2.

(ii) Ground 3

41. As Grounds 1 and 2 are unsustainable, Ground 3 (concerning GECB's alleged liability in negligence to customers to whom it sold PPI for FICL/FACL) does not arise.

42. Ground 3 is in any event unsustainable for the reasons given at J/346-348 {**Core/9/178-179**}. The Judge was correct to reject AXA's argument that GECB owed a duty of care to customers, which would require a radical departure from established law. Where GECB was acting as agent for FICL/FACL in selling their PPI, it assumed no responsibility and owed no duty to their customers, whose contractual relation and nexus were with FICL/FACL alone.

43. This is a fundamental principle in the law of agency: see e.g. Bowstead & Reynolds on Agency, 23rd ed, Article 113; ***Williams v Natural Life Health Foods Ltd*** [1998] 1 WLR 830 (HL). It was no doubt this principle that the Judge had in mind when she held that "*GECB had no direct nexus with the customers and certainly no contractual link. I am not persuaded that it was in a sufficiently proximate relationship with customers to say that it voluntarily assumed responsibility to them for the sale of the policy – at least in the absence of circumstances taking a particular case out of the norm*".[33]

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[32] AXA's Skeleton §41 {**Core/4/55**}.

[33] J/346 {**Core/9/178**}.

44. AXA has no sustainable answer to this. AXA's abstract arguments on this point do not engage with the Judge's unchallenged factual findings regarding the relationships between the various parties.

45. In this regard, Santander agrees with AXA that "*assumption of legal responsibility is an objective test which turns on the facts and circumstances of the case, accounting for questions of fairness and policy*".[34] That is supported by ***Customs and Excise Commissioners v Barclays Bank plc*** [2007] 1 AC 181, [36] which AXA cites. However, AXA omits to mention that Lord Hoffmann there deprecated recourse to such "*high abstractions*" and stated a preference for "*lower-level principles which could be more useful*". The principle of agency law mentioned above is one such principle. It is reflected in Lord Hoffmann's observation in ***Customs and Excise Commissioners*** at [35] that:

> "… in a case in which A provides information on behalf of B to C for the purpose of being relied upon by C, it is useful to ask whether A assumed responsibility to C for the information or was only discharging his duty to B: ***Williams v Natural Life Health***… In these cases in which the loss has been caused by the claimant's reliance on information provided by the defendant, it is critical to decide whether the defendant (rather than someone else) assumed responsibility for the accuracy of the information to the claimant (rather than to someone else)… The answer does not depend on what the defendant intended but, as in the case of contractual liability, upon what would reasonably be inferred from his conduct against the background of all the circumstances of the case. …"

46. The Judge correctly concluded that when selling PPI as agent for FICL/FACL, GECB was not assuming any responsibility to the customers.[35]

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[34] AXA's Skeleton §45 {**Core/4/56**}.

[35] J/346 {**Core/9/178**}.

47. Contrary to AXA's argument, the Judge's findings about how PPI was sold in practice do not support any such assumption of responsibility.[36] Nothing in those findings amounted to GECB assuming responsibility to customers, and nothing in the sales process was consistent with that. Critically, none of the matters upon which AXA relies in this regard alters the fundamental point that GECB was selling the product as agent for FICL/FACL and was held out to customers as such.[37]

48. Nor is AXA assisted by the fact that GECB joined the FLA and agreed to comply with its Code.[38] GECB thereby entered into a relationship with the FLA. It did not thereby enter any relationship with or assume any responsibility to customers. It is well established that even a mandatory statutory regulatory responsibility (which the FLA Code was not) does not give rise to a co-extensive common law duty of care: ***CGL Group Ltd v Royal Bank of Scotland*** *plc* [2018] 1 W.L.R. 2137, [82]-[87]. [39]

49. Nor is AXA assisted by the analogy it suggests to cases involving insurance brokers.[40] The Judge rejected this as "*inapt*"[41] and she was correct to do so. As she held "*GECB was not acting as an independent broker but as a tied agent of FICL/FACL. It was therefore very firmly on the insurers side of the fence and I can see no justification whatsoever for any "incremental" extension of a duty of care to this situation*".

50. That AXA is constrained to contend for so false an analogy illustrates the extent to which its case requires the law to be extended. As AXA rightly acknowledges "… *[b]rokers are*

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[36] AXA's Skeleton §48 {**Core/4/58**}.

[37] J/348 {**Core/9/179**}.

[38] Cf AXA's Skeleton §49 {**Core/4/58**}.

[39] The ***CGL*** case followed ***Green v Royal Bank of Scotland plc*** [2014] Bus. L.R. 168, in which the Claimant alleged that the defendant bank owed a duty of care co-extensive with the Conduct of Business Rules in respect of interest rate swap selling. That was rejected by the Court of Appeal: see ***Green*** at [23]; [29]-[30].

[40] AXA's Skeleton §51 {**Core/4/59**}.

[41] J/347 {**Core/9/179**}.

typically agents for the insured person…".[42] That is why they typically assume responsibility towards and owe duties of care to the insured as principal: the foundation for it is the underlying agency relationship. That foundation is entirely lacking here: GECB was not an agent for the customers – it was an agent for FICL/FACL alone.

51. Even were a duty of care to be established contrary to the above, the burden is on AXA to prove to the ordinary civil standard that GECB was "*liable"* to the customer (including all elements of negligence – not simply the existence of a duty of care) on the facts of each case: ***Merriman White v Mayall*** [2022] Ch 249 (CA), [82]-[89]; [118]. In the absence of any pleaded negligence claim by any of the underlying complainants (to say nothing of witness evidence or disclosure), AXA could not meet that burden in any case.

(iii) Ground 4

52. Ground 4 concerns GECB's alleged liability to customers under the CCA.[43] It does not arise for the same reasons that Ground 3 does not arise. Ground 4 is in any event unsustainable for the additional reasons given by the Judge at J/360 {**Core/9/182**}.

53. The CCA provisions upon which AXA relies, ss.140A and 140B of the CCA, involve a *sui generis* statutory action against a credit provider alone, and which could not be brought against insurers (or be a common liability). No such action was ever brought and none of the complaints at issue involved such a claim under the CCA.

54. Those CCA provisions (which were never engaged) involve a discretionary assessment of the relationship between the creditor and debtor under the relevant credit agreement and a discretionary remedy; unless and until this assessment is made on an application to the relevant Court, there is no liability in existence. By contrast, s.1(6) of the 1978 Act

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[42] AXA's Skeleton §51.2 {**Core/4/59**}.

[43] On any view, GECB's alleged liability cannot include the approximately 20% of policies which were attached to "completed agreements" and to which the CCA provisions in question do not apply: see {K/683} and {K/684}.

requires an existing "*liability*" when contribution is sought, whether established or capable of being established by an "*action*". GECB had no such "liability" under the CCA, where no repayment order under s.140B was ever made against it.[44]

55. Even if the 1978 Act could apply – contrary to the above – in cases in which there is no liability in existence until the Court makes a discretionary order, the burden would lie on AXA to prove to the ordinary civil standard that: (i) the Court would conclude that there was an unfair relationship between the parties; and (ii) the discretion would have been exercised (if invoked) on the particular facts so as to result in the making of a repayment order. AXA cannot do either here, as the Judge correctly recognised: J/360-361 {**Core/9/182**}.

Conclusion

56. For all these reasons, Santander respectfully asks the Court to dismiss the Cross-Appeal.

[44] AXA's Response to Santander's RFI dated 29 June 2023 {B/8/18} {**Supp/6/182**}.