IN THE COURT OF APPEAL (CIVIL DIVISION) **CA-2025-001994**

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/Appellants

RESPONDENTS' SKELETON ARGUMENT
(SUPPORTING RESPONDENTS' NOTICE)

SANTANDER'S APPEAL: THE AGENCY AGREEMENT INDEMNITY

Overview

1. Below, Ds raised no fewer than seven reasons why Cs' losses were said not to fall within the scope of the indemnity in cl. 12 of the Agency Agreement ("**AA**"), ranging from denying that Cs' losses were "*liabilities*" under the indemnity, to invoking limitation **[J256] [CB/9/161-162**]. Save for finding that c. £30m of Cs' losses were outside the scope of the indemnity (out of a total of c. £550m, excluding interest), the Judge rejected all of Ds' objections, over the course of 15 pages of the Judgment **[J255-330] [CB/9/161-175]**. Ds now appeal on just one of those grounds, *viz*. their contention that the indemnity did not cover losses incurred by Cs after the date of the AA, where such losses arose from the selling of policies prior to it.

2. At the heart of Ds' appeal is the contention that the Judge, in rejecting that contention, wrongly found that the indemnity was "*retrospective*". Ds' skeleton contains 17 references to "*retrospectivity*" or retrospective effect. There was, however, no suggestion that the indemnity would apply to losses incurred by Cs before its date. Rather, the Judge found that the indemnity covered future losses, incurred by Cs after its date, whether those losses arose from policies sold before or after its date: just as the AA governed the sharing of future profits, received after its date, whether those profits arose from policies sold before or after its date; and just as the AA governed the future administration of all policies, whether sold before or after its date.

3. The real question, therefore, is whether the parties objectively reached a bargain whereby, after the date of the AA, profit-sharing and administration would proceed 'blind' as to the date on which policies were sold, but – as Ds contend – Cs would only benefit from the indemnity in respect of policies sold post-AA. As the Judge correctly found, that surprising result would be: (i) contrary to the language of the AA; (ii) devoid of commercial logic; and (iii) inconsistent with the factual matrix.

The language of the AA

Clause 1

4. Cl. 1.1 of the AA recited that "*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*", and stated that the parties "*now wish to record the terms and conditions on which GE-CB shall continue to act*" [**SCB/1/2**]. Hence, from the outset of the AA, the phrase "*marketing and sale of the Insurance*" was used to encompass historic, pre-AA marketing and sale.

5. That was consistent with the definition of "*Insurance*" in cl. 2.2(d), which defined that term as meaning: "*the Insurers' creditor and personal accident insurance products and services from time to time*" [**SCB/1/3**]. That general term contrasted with the defined term "*New Policy*", defined in cl. 2.2(e) as meaning: "*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" [**SCB/1/3**].

6. Cl. 1.2 then provided: "*Unless otherwise stated herein, the parties agree that, notwithstanding clause 3 [i.e. the clause providing for the AA to commence on the "Effective Date", being the date of signature], 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 Schemes and the parties respective rights and obligations in respect thereof*" [**SCB/1/2**].

7. Accordingly, cl. 1.2 provided that, absent express contrary statement, the terms of the AA would apply to "*the marketing and sale of the Insurance*", including policies sold pre-AA. Notably, the parties chose to refer there to the "*Insurance*" – a defined term that was not limited by time – in preference to the available alternative defined term "*New Policies*". By contrast, when referring to "*ongoing administration*", the parties chose to refer to "*Existing On-Risk Policies and New Policies*", i.e. not all of the "*Insurance*", but only active policies of the type that might require "*ongoing administration*". Those choices were logical, and should be found to have been deliberate.

8. That is the clear and unambiguous meaning of cl. 1.2 in any event, but was emphasised by the parenthesis: "*(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)*". That parenthesis emphasised that, as at the date of the AA, there were already Schemes in existence under which policies had been written, and the terms of the AA – absent express contrary statement – were to apply to the "*Insurance*" written under those Schemes, i.e. including "*Insurance*" already sold, pre-AA. This reflected that the parties were engaged in codifying a long, ongoing relationship between them, which had for many years involved D1 selling policies on behalf of

Cs, and which would (in the language of clause 1.1) "*continue*" to involve it doing so.

9. Importantly, in this regard, the Judge found as a fact (based on the evidence of one of Ds' own witnesses) that the "*Schemes set out in schedule 4*" comprised all Schemes under which policies had ever been sold, even if no further policies could have been sold under them after the AA **[J281]** [**CB/9/166]**.[1] Ds' skeleton has nothing to say about that factual finding. But it is fatal to their argument that cl. 1.2 merely clarified that the terms of the AA would apply to "*New Policies*" that were written under existing Schemes, as well as under further Schemes that might be established in future (Ds' skeleton, §42 [**CB/2/25**]). No such clarification was necessary, since "*New Policy*" was expressly defined by reference to policies sold under "*any Scheme*" (cl. 2.2(e) [**SCB/1/3**]), and "*Schemes*" was expressly defined to include both existing Schemes and those established in future (cl. 2.2(f) [**SCB/1/3**]). Nor was such clarification what was achieved by the parenthesis. Instead, the parenthesis emphasised that the AA was – subject always to express contrary statement – to apply to both future and historic "*marketing and sale of the Insurance*".

10. Indeed, Ds' approach relegates clause 1.2 to little more than a recital; and a curiously elaborate, redundant and erroneous recital at that. On Ds' construction:

    10.1. The striking phrase "*notwithstanding clause 3*" is redundant. It does nothing that is not otherwise done by the various defined terms.

    10.2. The inclusion of the word "*ongoing*" before "*administration*", but not before the phrase "*marketing and sale*" is erroneous – on Ds' construction, the word "*ongoing*" or "*future*" should have been used in both cases, or neither, since Ds say the intention was only to cover activities after the Effective Date.

[1] Accordingly, Schedule 4 of the AA included several schemes under which no premium had been collected since 1995 and under which no new policies could have been sold after the Effective Date [**J281**] [**CB/9/166**].

10.3. A needless distinction is drawn as regards the Agency Agreement governing: (i) the "*administration*" of only "*Existing On-Risk Policies*" and "*New Policies*" (i.e. only those policies capable of giving rise to customer claims); and (ii) the "*marketing and sale*" of all "*Insurance under all of the Schemes*" (see para. 7 above). No such distinction is necessary if Ds are correct that the AA does not apply to the marketing and sale of PPI sold before the Effective Date.

11. By contrast, Cs' (and the Judge's) construction gives full effect to all the language of what was clearly a carefully drafted opening clause.

Clause 12

12. One then comes to the indemnity in cl. 12.2. This provided: "*Subject to the Insurer* [sic] *complying with their duties under this agreement, GE-CB will indemnify the Insurer* [sic] *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*" [**SCB/1/11**].

13. Ds' case is that the words "*while performing their duties under this agreement*" can only mean duties imposed for the first time under the AA, being the duties set out in cl. 6 (Ds' skeleton §32 [**CB/2/23**]). That is wrong. The effect of cl. 1 is that, absent express contrary statement, the terms of the AA apply to both future and historic "*marketing and sale of the Insurance*". Cl. 12.2 contains no such express contrary statement in relation to the "*duties*" referred to. Rather, it refers simply to "*duties under this agreement*". Pursuant to cl. 1, such "*duties*" included the duties performed by D1 when engaged in historic "*marketing and sale of the Insurance*". There is no limitation, in cl. 12.2, to duties in respect of "*New Policies*", or duties performed after the "*Effective Date*", or duties imposed by cl. 6. Quite the opposite: cl. 12.2 refers to "*any act or omission by GE-CB (including negligence)*": i.e. it expressly captures acts or omissions beyond breaches of specific contractual duties, under cl. 6 or otherwise.

14. At the same time, Cs' (and the Judge's) interpretation does not render the caveat "*while performing their duties under this agreement*" redundant. The caveat restricts

the indemnity to the subject matter of the AA. So, for example, if the parties had subsequently expanded their commercial relationship to include the sale of new types of insurance policy, and these were not added to the running list of "*Schemes*" provided for in cl. 2.2(f), the indemnity would not apply to losses arising from D1's acts and omissions in such sales. But, where "*Insurance*" was sold by D1 within the scope of the AA, whether before or after its date, the indemnity would apply. In other words, the caveat imposed a subject matter limitation, not a temporal limitation.

15. None of the analysis above is affected by Ds' observation that cl. 1 "*said nothing about indemnity*" (Ds' skeleton §§9, 34, 37, 41-42 **[CB/2/17, 23, 24, 25]**). That is correct, in the sense that there was no express cross-reference to cl. 12; but it is hopelessly irrelevant. Cl. 1 expressly set the scope of all that followed, including the scope of the "*duties*" later referred to in the indemnity clause. This was particularly the case since, as the Judge noted, cl. 1 was an obviously elaborate and carefully-drafted scope-setting clause, whereas cl. 12 was essentially a boiler-plate indemnity clause **[J278]** [**CB/9/165**].

16. More broadly, Ds are wrong to criticise the Judge for supposedly focusing on cl. 1 rather than cl. 12 (Ds' skeleton, §34 **[CB/2/23**]). Per the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] AC 1173 at [10], it has "*long been accepted*" that contractual interpretation is "*not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole*". See also the review of the authorities cited in *The Interpretation of Contracts* (Lewison, 8th ed.) at 7.07-7.23, in support of the canon: "*In order to arrive at the true interpretation of a document, a clause must not be considered in isolation, but must be considered in the context of the whole of the document*". This has particular force when the interpretive debate concerns the scope of a provision, and the contract in question opens with an express scope-setting clause.

Clause 17

17. Finally, there is nothing in Ds' reliance on the entire agreement provision in cl. 17 (Ds' skeleton, §§33, 38 [**CB/2/23, 25**]). As the Judge found, this merely confirmed that the AA regime – including its indemnity provisions, properly construed to encompass future loss flowing from prior sales – would apply *"from and including the Effective Date"* **[J277]** [**CB/9/165**]. In other words, for present purposes the indemnity would capture losses arising after its signature (*"from and including the Effective Date"*), but not before. The entire agreement clause might well have been relevant if it had been suggested that the indemnity was truly "*retrospective*", i.e. that it covered losses incurred before the date of the AA. But, as explained above, that has never been suggested. Further, the result of Ds' approach would be for a standard-form entire agreement clause to undermine the carefully-drafted scope-setting cl. 1, which included the striking reference to "*notwithstanding clause 3*" (i.e. notwithstanding the Effective Date).

18. In truth, the entire agreement clause supports Cs' (and the Judge's) interpretation.

    18.1. **First**, cl. 17 provided that the AA would regulate "*the marketing and sale of Insurance*" by D1, and that it "*supersedes and invalidates all previous agreements and understandings in relation thereto"* [**SCB/1/15**]. That language confirms what is in any event apparent from cl. 1, *viz*. the AA was to apply henceforth to both pre- and post-AA policies. This is because: (i) the reference was to "*marketing and sale of Insurance*", as opposed to "*New Policies*", with the former phrase (as set out above) covering pre-AA policies; and (ii) if the AA did not apply to pre-AA policies, it would not be possible (at least without leaving an implausible and offensive legal black hole) for it to "*supersede[] and invalidate[] all previous agreements and understandings*" in relation to them.

    18.2. **Second**, and more broadly, the language of cl. 17 emphasises that the parties were engaged, by the AA, in streamlining and consolidating their long-standing relationship (cl. 1). It made clear that, from the Effective Date, the operation of the parties' relationship would be conducted exclusively by

reference to the AA, rather than to any previous agreements or understandings. That is inconsistent with Ds' interpretation, which would instead create distinct and parallel regimes for dealing with future losses arising from sales of policies, depending on date of sale.

Commercial purpose and common sense

19. The Judge rightly found that there was no commercial rationale for Ds' construction. Ds' skeleton §11 [**CB/2/18**] suggests that commercial common sense was irrelevant because the language of cl. 12.2 was "*clear and unambiguous*" in support of their interpretation (see also §§29-30 [**CB/2/22**]). For the reasons above, this was not so. As to commercial purpose and common sense, Cs submit as follows.

20. **First**, the Judge found that the aim of the AA was "*to effect continuity in the relationship between the parties rather than to bring about any bright-line change*" **[J261]** [**CB/9/163**]. The Judge made that finding by reference to multiple witnesses, including those called by Ds **[J271]** [**CB/9/164**]. This did not mean that the legal terms of the relationship were not to change at all upon the AA; as the Judge noted, there had not previously been any mutual indemnities **[J273] [CB/9/165**]. Instead, the finding was that there was no intention to draw a line in the sand ("*bright-line change*") by introducing different terms for pre- and post-AA policies (cf. Ds' skeleton §10, 50-53 [**CB/2/17, 28-29**]). Hence:

    20.1. As is common ground, the provisions dealing with premium allocation and profit-sharing did not distinguish on the basis of whether the policies generating premiums and profits had been sold pre- or post-AA (cll. 8 and 9 [**SCB/1/7-8**]);

    20.2. As is common ground, the provisions dealing with handling customer claims did not distinguish on the basis of whether the policies generating claims had been sold pre- or post-AA (cll. 6.1(k) and 14.4 and schedule 2 [**SCB/1/5, 13, 21**]); and

20.3. As the Judge rightly found, D1 did not objectively intend to give the broadest of indemnities for post-AA policies, while leaving its principal with only such common law rights as might remain available in respect of pre-AA policies; or indeed to limit its own reliance on the mutual indemnities given to it (under cl. 12.1 [**SCB/1/11**]) in such a manner.

21. In this regard, and contrary to Ds' skeleton §62 [**CB/2/31**], the Judge did not proceed on the "*false basis*" that Cs could have no relevant common law remedies for the future consequences of historic sales. She found that they did have claims in negligence; but that such claims provided much less protection than cl. 12.2 properly construed, since: (i) negligence would need to be proved case-by-case; and (ii) the limitation back-stop of 15 years would apply to many policies, given the length of the parties' relationship.

22. **Second**, the rationale for affording protection to Cs, against future losses arising from historically marketed policies, was overwhelming, given the extreme skewing of future economic upside in favour of D1 from all policies, whether sold pre- or post-AA. D1 would continue after the AA to receive some 95% of the premiums (after payment of claims) on all policies, whether sold pre- or post-AA **[J259, 279]** [**CB/9/162, 166**].[2] In those circumstances, there was no reason for D1 to agree to provide a broad indemnity against future loss, but only in respect of policies sold post-AA.

[2] That division of profit is illustrated starkly by the breakdown of the redress payments made by Cs to customers, which the Judge held were recoverable under the indemnity. The relevant redress payments comprised **[J122]** [**CB/9/130**]: (a) c. £113m in premiums returned to customers, of which premiums D1 had received 95% after paying claims; (b) c. £140m in return of interest that D1 had charged to customers on those premiums in the course of their credit relationship, of which D1 had received 100% of the benefit; and (c) c. £207 million in statutory interest on (a) and (b), i.e. interest on sums that had been almost exclusively retained by Ds rather than Cs.

23. The points above are unaffected by Ds' observation that, during some of the period of their relationship prior to the AA (but by no means all – in fact, only since 1992, in circumstances where the commercial relationship stretched back to the 1970s **[J13]** [**CB/9/103**]), Cs and D1 were under common ownership (Ds' skeleton, §63 [**CB/2/31**]).

23.1. **First**, the evidence at trial was that: (i) each of Cs and D1 at all times maintained their own separate statutory accounts; (ii) they did not pay their profits into a common pool at the end of each year; and (iii) the AA was agreed by an "*arm's length commercial negotiation*" (per Ds' witness Mr Brandon-Cross, at trial transcript day 7, pages 31-32[3]). All of that is contrary to any suggestion that the parties were indifferent to a startling asymmetry of risk and reward, when they came to formalise their relationship *via* the AA, because they had been under common ultimate ownership.

23.2. **Second**, when the AA was negotiated, there was no alteration of the already-established profit-sharing arrangements, which did not change by reference to the introduction of the indemnity in Cs' favour or for any other reason (per Mr Brandon-Cross, at trial transcript day 7, pages 32-33[4]). That is significant, because it is contrary to any suggestion that the parties objectively intended to draw a distinction, in their overall bargain, based on date of policy sale – whether because of their historic common ownership or for any other reason. In particular, there can be no suggestion that it was objectively intended that Cs would receive better protection against risk in respect of future sales, in exchange for increasing D1's upside in respect of such sales (e.g. by reducing Cs' amount of 'retention' from premiums on "*New Policies*").

23.3. **Third**, and in any event, D1 and Cs were still under common ownership at the time of the AA, and indeed remained so until 2004 **[J11]** [**CB/9/102**]. Yet it is common ground that D1 nevertheless provided Cs with a broad indemnity

[3] [**SCB/9/187**].
[4] [**SCB/9/187-188**].

in respect of post-AA sales. So, the relevant question is: was there any reason for the parties to carve out, from that protection, future losses arising from historic sales, in circumstances where their ownership structure was and would remain the same as it had been when thousands of past policies had been sold? There was none.

Factual matrix

24. The Judge made various findings as to factual matrix that supported and confirmed her interpretation. Hence, far from simply raising a narrow point of law, Ds' appeal in fact seeks – repeatedly without even acknowledging the same – to reopen a number of factual findings made after a lengthy trial.

25. **First**, the Judge found that both parties would have been aware that indemnities were market-standard in agency agreements **[J273] [CB/9/165**]. This meant there was nothing surprising in the new indemnity covering all products sold throughout their long-established relationship; they were simply, if belatedly, putting in place a market-standard provision. Ds' skeleton, §58 [**CB/2/30**] complains that this was not pleaded as factual matrix; but it arose out of expert evidence that Ds themselves had sought permission for.

26. **Second**, the Judge found that the AA was concluded in the context of the new FSMA regulatory regime, which had received Royal Assent on 14 June 2000 (some six months before the AA was signed), and was set to govern both future sales of PPI and policies which had already been sold **[J272]** [**CB/9/164**]. This is a key factual finding, about which Ds' skeleton has nothing to say.

27. **Third**, the AA provided for continuation of 'bulk reporting', i.e. bordereaux which did not even identify the sales date of individual policies **[J269]** [**CB/9/164**]. Ds' skeleton §48 [**CB/2/27**] asserts that bulk reporting might not have created the "*logistical nightmare*" that the Judge found it would have done, on Ds' construction. That is a factual matter determined by the Judge; in any event, the established and continuing reporting system emphasised the lack of any intention to introduce an

indemnity contingent on date of sale. Notably, Ds have never been able to identify any other provision of the AA to which such a distinction would apply.

Disposal of the appeal

28. For the reasons given by the Judge, the Court is respectfully requested to dismiss the appeal.

AXA'S CROSS-APPEAL: THE CONTRIBUTION ACT

Overview

29. Cs seek permission to cross-appeal the Judge's rejection of their alternative claim under the Civil Liability (Contribution) Act 1978 ("**Contribution Act**"), so as to allow them – if Ds' appeal on the indemnity succeeds – to seek to recover certain of their losses under that Act at a further quantum trial, subject to proving Ds' liability to customers under: (i) common law negligence; or (ii) the 'unfair relationship' provisions of the Consumer Credit Act 1974 ("**CCA**"). The losses in question are less extensive than those that the Judge found were covered by the indemnity, but are substantial, comprising: (i) customer redress payments made on or after 7 December 2015 (i.e. two years before the issuing of the proceedings below, taking into account the period of a standstill agreement), totalling c. £450m excluding interest; and (ii) a bulk redress settlement reached with the Official Receiver of bankrupt customers on 3 December 2021 ("**OR Settlement**"), in the sum of £24m excluding interest [**SCB/2/107ff**].

30. The Judge addressed Cs' Contribution Act claim in **[J331-368]** [**CB/9/175-184**]. She found that:

    30.1. If Cs had discharged a "*liability*" to customers for the purposes of the Contribution Act when paying regulatory redress, this was for those purposes compensation in respect of the "*same damage*" suffered by customers as would have been recoverable by them from Ds in any successful common law negligence claim or by way of an 'unfair relationship' award **[J362]** [**CB/9/182**].

30.2. If D1 had owed customers a common law duty of care, its methods of selling PPI meant "*it is very likely that [D1] was in breach of many occasions*" **[J350]** [**CB/9/179**].[5]

30.3. There were various grounds for finding that those selling methods had given rise to an 'unfair relationship' between D1 and customers **[J357-358]** [**CB/9/182**].

30.4. If the question of apportionment had arisen under the Contribution Act in cases where both Cs and D1 were liable to customers, "*it is difficult to envisage circumstances where the apportionment would not be very heavily, if not entirely, against [D1]"* **[J364]** [**CB/9/183**].

31. The Judge, however, rejected Cs' Contribution Act claim because she found as a matter of law that:

31.1. In making payments of regulatory redress, Cs were not satisfying a "*liability*" for purposes of the Contribution Act, but instead forestalling one from arising.

31.2. The OR Settlement could not represent a settlement of "*claims*", because intimated complaints had not yet actually been made by the OR.

31.3. Ds did not owe customers a common law duty of care not to sell PPI negligently.

31.4. Ds did not have a relevant "*liability*" under the CCA, because courts can order a range of discretionary remedies when an 'unfair relationship' is found.

[5] The Judge having found *inter alia*, as a matter of fact, that D1 was engaged in systemic mis-selling, in the form of: (i) routinely failing, in 'opt-out' sales, to make customers aware that they were buying PPI and could decline cover; (ii) routinely failing to provide even an outline explanation of the PPI policy; and (iii) routinely failing to draw attention to the summary of cover before concluding the sale **[J185]** [**CB/9/148**].

32. Cs' cross-appeal is concerned with those four conclusions of law.

Cross-appeal ground 1: Cs' liability to PPI complainants

33. The Judge found that Cs were under a "*regulatory liability*" to pay customer redress, by virtue of their obligations under the Dispute Resolution section of the FSA/FCA Handbook ("**DISP**") **[J288-293]** [**CB/9/167-169**], specifically:

    33.1. DISP 1.4.1R, which obliged them to investigate and assess complaints, offer appropriate redress, and comply with any offer of redress accepted by a complainant; and

    33.2. DISP 1.4.4R, which obliged them to comply with any settlements or awards made by the Financial Ombudsman Service ("**FOS**") – including, as the Judge found, provisional determinations **[J/341]** [**CB/9/178**].

34. That was correct. The Judge erred, however, in finding that this was insufficient for the purposes of the Contribution Act, on the basis that the DISP rules merely created a "*regulatory liability*" as opposed to a liability *"which the consumer could enforce directly"* **[J337]** [**CB/9/177**]. The Judge apparently regarded this conclusion as unsatisfactory, because the result would be that Cs were worse off, in terms of being able to claim contribution from Ds, as a result of having followed the regulatory regime, as opposed to ignoring it and giving complainants a clear private law claim for breach of statutory duty. The Judge appeared to regard the requirements of the Contribution Act as giving rise to an "*illogicality or injustice*" in this regard, based on "*somewhat technical distinctions*"; but held that this was nevertheless their clear effect **[J339] [CB/9/177]**. In fact, there is no statutory lacuna, because the correct position is as follows.

35. **First**, s. 6(1) of the Contribution Act 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 dependants) 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)*". "*Liability*" under the Contribution Act therefore encompasses

inter alia statutory liability: *Crowley v Rushmoor BC* [2009] EWHC 2237 (TCC) at [94]-[95], [120]. Indeed, per Auld LJ in *Friends' Provident Life Office v Hillier Parker May & Rowden* [1997] QB 85 at 102H-103B, *"[i]t is difficult to imagine a broader formulation of an entitlement to contribution"*, and the Contribution Act "*was clearly intended to be given a wide interpretation*".

36. **Second**, s. 138D(2) of FSMA provides a specific private law right to enforce the DISP rules that the Judge found created the relevant "*regulatory liability*" (which are in any event binding as statutory obligations): *"A contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention"*.

37. **Third**, and consequently, upon Cs either determining that redress ought to be paid to complainants, or the FOS determining the same: (i) Cs became legally obliged (per DISP 1.4.1R or DISP 1.4.4R, as appropriate) to pay the redress; and (ii) any failure to pay would have been actionable in private law by the complainant.

38. **Fourth**, s. 1(6) of the Contribution Act states: *"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"* (emphasis added).

39. **Fifth**, the result of the above is that, in paying redress found to be due, Cs were not merely satisfying a "*regulatory liability*". They were satisfying a legal liability to each relevant complainant, which if unsatisfied could have been established in a private law action. The Judge accordingly erred in proceeding on the basis that the only relevant hypothetical private claim that "*could*" have been brought was one to enforce the general DISP obligation to assess and determine complaints using discretion, and that no such claim could have arisen because Cs observed those rules **[J337] [CB/9/177]**. In fact, at the end of the DISP process – i.e. upon the determination of appropriate redress – a definite and enforceable legal obligation to pay the redress arose. That was a "*liability*" for Contribution Act purposes, which Cs satisfied by paying redress.

Cross-appeal ground 2: Cs' liability in respect of the OR Settlement

40. The Judge found that the OR Settlement was not a "*bona fide settlement or compromise of any claim made against*" Cs, for the purposes of s. 1(4) of the Contribution Act, on the basis that the OR had not actually made complaints that Cs were obliged to consider and determine under DISP **[J343] [CB/9/178]**. That was an error, because the OR Settlement was a *bona fide* settlement of complaints that the OR had intimated *would* formally be issued in the absence of a satisfactory bulk settlement.

41. The correct position is that the "*claim made*" referred to in s. 1(4) need not be a claim that has actually been issued. It may be a claim that has e.g. merely been intimated in correspondence. That is consistent with the clear purpose of s. 1(4), *viz*. to avoid requiring contribution claimants to force the litigation of underlying claims, in order to obtain contribution from a contribution defendant. Per *Clerk & Lindsell* at 4-17: "*Where proceedings have begun, the person seeking contribution can establish liability on the basis of the facts set out in the statement of claim. In other cases, the factual basis of the claim may have to depend on the facts as he understood, or ought to have understood them, to be and the question in such a case of the bona fide nature of the settlement becomes crucial*".

42. Further, the correct position is that a claim may be the subject of a *bona fide* settlement even where, if the claim were formally made, the establishment of liability would depend on a process of assessment. It could not reasonably be suggested that e.g. s. 1(4) could not apply to the *bona fide* settlement of a prospective underlying claim because the determination of such claim would require a judge to assess damages for loss of a chance, or for pain and suffering. Hence, it is no objection to the OR Settlement coming within the scope of s. 1(4) that the OR's prospective complaints, if formally made, would have required assessment under DISP, by Cs or the FOS. The appropriate protection for Ds is instead in the statutory requirement that the settlement be *bona fide*.

Cross-appeal ground 3: Ds' duty of care to PPI customers

43. The Judge found that D1 could have no relevant liability to PPI complainants in negligence, because it had owed customers no duty of care when selling them PPI. In particular, the Judge held that: (i) D1 had "*no direct nexus with the customers and certainly no contractual link*"; (ii) D1 was not "*in a sufficiently proximate relationship with customers to say that it voluntarily assumed responsibility to them for the sale of the policy*", in circumstances where it "*ultimately only had a relationship with the customers in relation to PPI as agent for FICL/FACL and not in its own right*"; and (iii) it "*is further arguable that the imposition of a generalised direct duty in this situation would cut across the contractual allocation of responsibilities as between FICL/FACL and GECB and as between GECB and the retail stores*" **[J346] [CB/9/178]**.

44. The correct position is that a duty of care was assumed by D1, notwithstanding that it sold PPI as Cs' agent. Cs submit as follows.

45. **First**, 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: *Customs and Excise Commissioners v Barclays Bank Plc* [2007] 1 AC 181 at [36]. Duties of care may be found, where necessary, by the incremental development of existing categories: *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736 at [27].

46. **Second**, if a duty of care was owed in this case, there is no difficulty (and the Judge apprehended none) in identifying its content. The Judge found that the standards for selling PPI were those set out in the applicable regulatory Codes, and that these did not differ materially throughout the relevant period **[J130-131] [CB/9/212]**. The Judge summarised her findings as to what was required at **[J132-136] [CB/9/212-213]**, and her findings as to D1's widespread and systemic breaches at **[J184-185] [CB/9/146-148]**.

47. **Third**, as regards how PPI was sold in practice, the Judge found as facts that:

    47.1. The precise mechanics of selling were determined between D1 and individual retailers, with Cs having no involvement in the physical sales; being

excluded from D1's relationship with retailers; and having no direct contact with customers unless and until a policy claim was made **[J49] [CB/9/109]**.

47.2. Around 95% of the policy premium remaining after payment of claims (so, c. 61%-76% of the total premium) went to D1 as lender, while only 5% was retained by Cs **[J50-51] [CB/9/110]**.

47.3. D1 was motivated to sell as many policies as possible: policy sales were not only profitable in themselves, but the PPI protected D1's own credit risk against customer default, and PPI revenue could be used by D1 to expand its position in the credit market by cross-subsidising its core lending rates **[J51] [CB/9/110]**.

47.4. D1, rather than Cs, drove the design of the PPI product and modifications to it over time **[J53] [CB/9/111]**.

47.5. The vast majority of PPI was sold as an ancillary product, bolted on to the store card being marketed by D1 for its own account, in the course of a transaction that was focused on the store card rather than the PPI **[J59-60] [CB/9/112]**.

47.6. When D1 took the opportunity to seek to attach PPI to its store cards (as it invariably did, whenever it sold a store card), it did so by employing assertive 'hard sell' techniques, typically in a rushed sales environment **[J184(c)] [CB/9/146]**.

47.7. That was a conscious choice by D1, which had the "*primary concern […] to maximise sales*"; which incentivised sales staff to achieve as many sales as possible; and which "*was largely content to pay lip-service to compliance*" **[J184(f)] [CB/9/147]**.

48. **Fourth**, in those circumstances, there was a sufficiently "*direct nexus*" and sufficient "*contractual link*" between customers and D1 as regards the sale of PPI; and it could not be said that D1 was merely selling PPI as agent for Cs. The sale of PPI only took place because the customer had agreed to enter into a primary credit contract

with D1 in its own capacity. The sale almost always took place as part of the same process of entering into that primary contract, in a manner wholly controlled by D1 and where the economic incentives and rewards for mis-selling lay almost exclusively with D1.

49. **Fifth**, it is significant that D1 itself was not only obliged to follow applicable regulatory Codes as Cs' agent, but had also in its own right announced to the world that it would meet published standards. It did so by its membership of the Finance and Leasing Association ("**FLA**"), of which Cs, as insurers, were not members. From 1993 the FLA published a Code requiring members to act with integrity, responsibility and care in conducting their business, including specifically when marketing ancillary "*credit protection insurance policies*" **[J70-71] [CB/9/118]**. That is consistent with D1 having assumed a responsibility to its customers so to act. Indeed, the Judge when first referring to the FLA Code noted that: "*While [D1] was not a member of any independent adjudication scheme, complaints could nonetheless be made against it in relation to mis-selling under the FLA Code and at common law*" **[J72] [CB/9/118]**.

50. **Sixth**, recognising a duty of care would not cut across any contractual division of responsibilities – which the Judge, in fairness, merely noted as an "*arguable*" concern, it not being determinative to her decision.

    50.1. As between Cs and D1, the latter owing a duty to PPI customers would be consistent with it at all times taking the lion's share of profit and having the whip hand in dictating the product and the sales process **[J58] [CB/9/112]**. It would also be consistent with its express agreement, in the AA, to indemnify Cs against the consequences of its acts and omissions in selling PPI – since the parties thereby recognised both that D1 could cause loss to customers, and that D1 was the party that should bear responsibility for such loss.

    50.2. As between D1 and retail stores, the latter acted as sub-agents for the former. There was nothing to prevent D1 from putting contractual provisions in place so as to require fair selling by the retail stores, breach of which would

allow D1 to recover losses incurred through negligence claims against it by customers.

51. **Seventh**, although it is not necessary in order to identify a similar duty of care that would found an incremental recognition of duties, it is instructive that an insurance broker has a duty of care to its client in tort, even where there is not a contractual relationship between them.

    51.1. That duty of care applies to both advice and any other professional activities which the broker carries on: *Punjab National Bank v de Boinville* [1992] 1 WLR 1138 at 1152H. The basis of that duty of care in tort can be analysed as an assumption of responsibility: *Involnert Management Inc v Aprilgrange Ltd* [2015] 2 CLC 307 at [278]. Specifically, brokers have been found liable for breach of their duty of care for failing to question a client sufficiently to make sure that he came within the list of categories which were acceptable to an insurer: *McNealy v Pennine Insurance Co Ltd* [1978] RTR 285 at 289A.

    51.2. Brokers are typically agents for the insured person and not the insurer. However, a broker may owe duties to and be agent for both the insurer and the insured: *HIH Insurance Ltd v JLT Risk Solutions Ltd* [2008] Bus. LR. 180 at [60].

    51.3. D1 did not play the classic role of a broker when selling PPI as Cs' agent. In particular, it only offered PPI from Cs to its store card customers, rather than searching the market for available policies. However, it assumed responsibility because it chose to recommend its credit customers an ancillary product, i.e. the PPI, which they were typically in no real position to understand or assess.

    51.4. As with insurance brokers, there was the same foreseeable risk that a customer might be presented with an insurance product for which he would be ineligible, which would be unsuitable for him, or in respect of which he would not be informed of important limitations and exclusions. In recognition of those risks, and of the reliance placed by the customer on the party presenting the product, the law has recognised a responsibility on the part of

brokers. So, too, it should recognise responsibility on the part of D1 as a creditor pushing an add-on insurance policy.

Cross-appeal ground 4: Ds' liability under the CCA

52. Under CCA s. 140A, a court may make an order under s. 140B in connection with a "*credit agreement*" if it determines that the relationship between creditor and debtor arising out of it, taken together with any "*related agreement*", is unfair to the debtor. In doing so, the court shall have regard to all matters it thinks relevant. Under s. 140B, a court may make one or more of various types of remedial order, including to "*require the creditor […] to repay (in whole or in part) any sum paid by the debtor […] by virtue of the agreement or any related agreement (whether paid to the creditor […] or to any other person)*".

53. As to Cs' alternative claim for contribution based on D1's liability, under the CCA, for the "*same damage*" as represented by redress payments made by Cs:

    53.1. The Judge proceeded on the correct basis that: (i) the store card agreement was a "*credit agreement*"; (ii) the PPI agreement was a "*related agreement*"; and (iii) the store card agreement could be unfair because of matters that arose in connection with the PPI agreement **[J356] [CB/9/181]**.

    53.2. She then recited, without demur, Cs' submissions that D1's mis-selling of PPI would in many cases have rendered the store card agreement unfair, such that an order could have been made under s. 140B for repayment of PPI premiums, i.e. the "*same damage*" as Cs compensated by redress payments **[J357-358] [CB/9/182]**.

    53.3. She then agreed with Cs that it does not matter, for purposes of the Contribution Act, that a prospective remedy under CCA s. 140B was "*hypothetical*" or "*notional*", since s. 1(6) of the Contribution Act merely requires that a contribution defendant had a liability that "*could be established*" **[J359] [CB/9/182]**.

54. So far, so good. The Judge then, however, found that Cs could not succeed because: "*there was a whole range of possible remedies under section 140B, some of which did not involve payment at all (for example, altering the terms of the agreement). In those circumstances, repayment might never have been ordered and it is therefore difficult to see how [D1] would be said to have been liable to make such repayment*" **[J360] [CB/9/182]**. Cs submit that this was an error of law.

55. **First**, the Judge's correct recognition of the sufficiency of a "*hypothetical*" or "*notional*" liability should have extended to the *form* of D1's liability, as well as to the *fact* of liability. The statutory language of "*could be established*" is contingent as to both a finding of liability in general terms, and its specific form.

56. **Second**, what matters under the Contribution Act is that the contribution defendant was liable to compensate the underlying victim for the "*same damage*"; not that he would necessarily have been required to provide compensation in the *same way* as the contribution claimant. Simply by way of example: a contribution claimant guilty of dishonest assistance might have been ordered to pay damages to the victim of breach of trust, whereas a contribution defendant who was a fiduciary might have faced a hypothetical order to return misappropriated trust property.

57. **Third**, the inclusive and flexible approach contended for by Cs gives effect to the purpose of the Contribution Act, without technical obstacles, while at the same time the court can as necessary take into account the different types of liability faced by contribution claimant and defendant when exercising its own discretionary power of apportionment as it considers "*just and equitable*", under s. 2 of the Contribution Act. No difficulty would arise in this case, however, given that the natural and overwhelmingly likely remedy under CCA s. 140B, upon a finding that an 'unfair relationship' arose because PPI was mis-sold, would be an order to repay PPI premiums with interest, i.e. the same basis as Cs were required by DISP to apply when calculating redress.

Disposal of cross-appeal

58. If the Court grants Cs' cross-appeal and also grants Ds' appeal, Cs seek remittal of their Contribution Act claim to the Judge, for determination at a further quantum trial. Such trial will involve applying the correct legal principles determined by this Court, to the Judge's factual findings to date as to the sample of complaint files disclosed (per the Appendix to the Judgment below) and to such further factual findings as are necessary upon a broader review of the sample with a view to extrapolation across the whole complaints population.

ANDREW GREEN KC
FRASER CAMPBELL KC
Blackstone Chambers, 18 November 2025