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

AXA's SUPPLEMENTARY SKELETON ARGUMENT IN SUPPORT OF CROSS-APPEAL

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1. Per para. 39 of its main skeleton argument, AXA relies on the fact that, if relevant redress payments had not been made promptly in accordance with regulatory obligations, consumers could have obtained an order for the same compensation in the civil courts, under s. 138D FSMA [**CB/4/55**].[1] AXA says that it was accordingly 'liable' to consumers for the purposes of the Contribution Act. In the absence of prompt payment of the compensation determined under the regulatory regime to be payable in respect of the damage suffered, its liability to pay such compensation "*could be established in an action brought against [it]*" (s. 1(6)); and the consumer was "*entitled to recover compensation from [it] in respect of that damage*" (s. 6(1)). AXA's analysis thus rests on the unremarkable proposition that Party A is

[1] As it so relied before the Judge: see J/290 [**CB/9/168**], J/337 [**CB/9/177**].

'liable' to pay Party B, if a failure to pay would entitle Party B to a court order requiring payment.

2. This supplementary skeleton argument responds to the assertions, in Santander's skeleton argument on the cross-appeal, that such analysis involves an "*expansive and unjustified construction of the statute … unsupported … by any decision, dicta, or even commentary*" (para. 19 [**CB/5/69**]); that "*AXA points to not a single authority that supports its novel interpretation"* (para. 30 [**CB/5/72**]); and that AXA invites the Court to trespass on divisions of responsibility established by "*Parliament and the regulator"* (para. 34 [**CB/5/74**]).

3. In fact, Santander's implicit position – *viz.* that the Contribution Act will only avail a contribution claimant where he compensates the person who suffered the damage upon being sued in court – would be a novel and unjustified restriction of the statutory scheme, in light of the following three matters.

4. **First**, it is trite that a contribution claimant need not even have received a request for payment from the person who suffered the damage, before making a payment in respect of which contribution is then sought. Per *BDW Trading Ltd v URS Corporation Ltd* [2025] 2 WLR 1095 at [237], a contribution claimant's right to seek contribution arises when he is "*ordered (by a judgment or arbitration award) to make, or makes or agrees to make, a payment to [the person who suffered damage] in compensation for the damage*" (emphasis added). The relevant question is not, therefore, on what basis the payment was made, but instead whether the underlying victim could have sued the contribution claimant, for the relevant damage, absent payment.

5. **Second**, if the Court (contrary to AXA's position) considers that there is any ambiguity in the statutory language – e.g. as to whether "*could be established"* in s. 1(6) encompasses a situation where the private law liability could be established absent a payment made pursuant to regulatory obligation – the Court should interpret the statute in accordance with its purpose. See e.g. *R (Andrews) v Secretary of State* [2016] P.T.S.R. 112 (CA) at [33]: "*… the courts adopt a purposive (in preference to a literal) interpretation so as to give effect to what is taken to have been intended by*

Parliament … The court presumes that Parliament does not intend to legislate so as to produce a result which (i) is inconsistent with the statutory purpose or (ii) makes no sense or is anomalous or illogical". The result of Santander's position is that AXA could have sought contribution if it had failed to make payment to consumers pursuant to regulatory duty, and such consumers had instead been forced to obtain a court order under s. 138D FSMA; but that it cannot seek contribution having complied with its regulatory duty. That result would be inconsistent with the statutory purpose, anomalous and illogical. It is readily avoided by an orthodox exercise in statutory interpretation, i.e. reading "*could be established*" as meaning "*could be established absent payment in accordance with the regulatory regime*" (AXA's reading) rather than "*could immediately be established, without first allowing an opportunity to pay in accordance with the regulatory regime*" (Santander's reading).

6. **Third**, to the extent that the Court perceives any ambiguity in the statutory language, the statutory purpose is apparent from the legislative record.

   6.1. The Act represented Parliament's acceptance (with some drafting changes, which are not relevant for present purposes) of the proposals in the Law Commission's Report No. 79 of 1977. At paras. 45 and 54, the Commission emphasised the importance of not deterring putative contribution claimants from compromising claims by underlying victims.

   6.2. During Second Reading stage in the House of Lords (which was the only substantive debate on the floor of either House), Lord Scarman introduced the Bill and referred to the definition of 'liable' in (what are now) ss. 1 and 6(1). His Lordship emphasised the breadth of the parenthesis in the latter provision – "*(whatever the legal basis of his liability …")* – describing it as "*perhaps the fundamental clause in the whole Bill*". He said that the other provisions of clause 1 (now s. 1) were "*designed to ensure that persons who would otherwise be liable to contribute to a loss do not escape through some technicality*".

7. Santander's approach is inconsistent with those purposes. It would incentivise a contribution claimant in AXA's position to refuse to provide compensation for

damage by complying with the regulatory regime, thus effectively settling the private law liability that would otherwise inevitably arise. It would allow Santander to "*escape*" contribution based on the "*technicality*" that such compliance had – by providing compensation for the damage suffered – forestalled an otherwise unanswerable private law claim for such compensation.

8. None of that is undermined by anything in the specific statutory regime for mis-selling complaints. In particular, there is no hint of any suggestion that "*Parliament and the regulator*" intended to render an insurer worse off, in terms of contribution against a selling agent, as a result of complying with regulatory obligations to make good the damage suffered by a consumer. The statutory redress regime was designed to provide a quick and cheap redress procedure for consumers, as an alternative to civil litigation: as explained in *Andrew v Barclays Bank plc* [2012] C.T.L.C. 115 at [7]-[18]. It was not concerned with follow-on claims by entities which faced consumer claims, against other parties who had contributed to the damage being compensated. If consumers could alternatively have sought compensation for the same damage from Santander (per AXA's third and fourth grounds of cross-appeal), contribution should follow.

ANDREW GREEN KC
FRASER CAMPBELL KC
Blackstone Chambers, 10 April 2026