Neutral Citation Number**: [2019] EWHC 3376 (Comm)**

Claim No CL-2017-000795

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 6th December 2019

Before :

THE HONOURABLE MR JUSTICE BRYAN

- -

Between :

AXA S.A.

Claimant

-and-

(1) GENWORTH FINANCIAL INTERNATIONAL HOLDINGS, INC.
(2) GENWORTH FINANCIAL, INC.

Defendants

(1) AXA FRANCE IARD (as transferee of the business of FINANCIAL INSURANCE COMPANY LIMITED)
(2) AXA FRANCE VIE (as transferee of the business of FINANCIAL ASSURANCE COMPANY LIMITED)

(3) SANTANDER CARDS UK LIMITED
(4) SANTANDER INSURANCE SERVICES UK LIMITED

Named Third Parties

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Andrew Green QC and **Fraser Campbell**
(instructed by **Clifford Chance LLP**) for the **Claimant** and by Pinsent Masons LLP for the **First and Second Named Parties**
Jonathan Nash QC and **James Potts**
(instructed by **Sidley Austin LLP**) for the **Defendants**
Adam Zellick QC and **David Murray**
(instructed by **Reed Smith LLP**) for the **Third and Fourth Named Third Parties**

Hearing dates: 4, 5, 6, 7, 11 and 12 November 2019

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39a para 61.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HONOURABLE MR JUSTICE BRYAN

MR JUSTICE BRYAN:

A. INTRODUCTION

1. This is the first of two hearings that have been directed in these proceedings. This first hearing has been directed to determine various points of principle on liability in respect of:

(1) The claim of the Claimant ("AXA") against the First Defendant ("GFIH") for specific performance of an alleged obligation to make payment of £264,953,912.18, under Clause 10.8 of a sale and purchase agreement dated 17 September 2015 ("the SPA");

(2) AXA's claim in debt against the Second Defendant ("GFI") (together with GFIH "Genworth") under a guarantee for the same amount under Clause 15.1 of the SPA, or damages for the same;

(3) Genworth's counterclaim against AXA for a declaration that its liability under Clause 10.8 does not extend to: (i) settlements with customers entered into without Genworth's consent, in breach of Schedule 5, Paragraph 7.2 of the SPA; (ii) charges payable under a Complaints Handling Agreement dated 7 December 2017 ("CHA"); and/or (iii) claims subject to a Standstill Agreement dated 7 December 2017 ("the Standstill Agreement"). Alternatively, Genworth seeks damages for breach of contract in respect of the same; and

(4) Genworth's counterclaim against AXA, the First and Second Additional Parties, AXA France IARD and AXA France Vie (as transferees of the businesses of Financial Insurance Company Limited and Financial Assurance Company Limited ("FICL/FACL") and the Third and Fourth Additional Parties (together, "Santander"), that in the event Genworth makes any payment to AXA, FICL and/or FACL under Clause 10.8 of the SPA, Genworth will be subrogated to FICL and FACL's claims against Santander in respect of the mis-selling of the relevant payment protection insurance ("PPI") products.

2. The second hearing directed in these proceedings is a quantum hearing listed for 9-12 March 2020.

B. FACTUAL BACKGROUND

B.1 The Parties

3. AXA is a French insurance company. It is now the owner of AXA France IARD, which is the transferee of the business of FICL and AXA France VIE, which is the transferee of the business of FACL. Until 1 December 2015, FICL and FACL had been indirectly owned by GFIH. GFIH is a US company, whose ultimate parent company is GFI.

4. Between 1988 and 2011, FICL and FACL were engaged in the business of underwriting PPI for store cards. During that period, the Third Additional Party, Santander Cards UK Limited ("SCUK"), and the Fourth Additional Party,

Santander Insurance Services UK Limited ("SISUK") (collectively "Santander") marketed and sold PPI on behalf of FICL/FACL, principally through retail stores.

5. The PPI policies were sold in connection with store credit cards, which were offered by Santander to customers of high street retailers, either via point of sale retail staff or Santander call centre staff. PPI premiums would be collected by Santander from customers' accounts and remitted to FICL/FACL, net of a commission retained by Santander.

6. On 1 December 2000, FICL/FACL and SCUK's predecessor, GE Capital Bank, ("GECB") entered into an Agency Agreement ("the Agency Agreement"), under which GECB marketed and sold PPI products underwritten by FICL/FACL

/FACL.

B.2 PPI Mis-selling

7. The marketing and sale by Santander of PPI underwritten by FICL and FACL has given rise to extensive PPI mis-selling complaints by customers against FICL/FACL. Since around 2005, there has been a developing realisation of the scale of PPI mis-selling to consumers. On 1 August 2010, the FSA sent a letter to the relevant industry participants which identified common "point of sale" failings concerning PPI sales, including inappropriate pressuring of customers, failing to provide accurate information about the policy, failing to ensure that the customer was in fact eligible for the policy bought, and failing to disclose accurate price information. Customer complaints about PPI mis-selling have been, and are continuing to be made in respect of PPI policies underwritten by FICL/FACL and marketed by Santander, including following determinations made by the Financial Ombudsman Service (the "FOS").

8. Broadly speaking the regulatory redress system for consumers is as follows. A consumer can make a regulatory complaint relating to PPI mis-selling against a regulated financial services company ("Direct Redress"). If that complaint is rejected by the company, or the customer disputes the amount of redress offered, the customer can then refer the complaint to the FOS, which may order the firm to pay redress to the customer ("FOS Redress"). The FOS was established in 2000 and given statutory powers in 2001 pursuant to the Financial Services and Markets Act 2000 ("FSMA"). If the FOS has jurisdiction to consider the complaint it may order the company to pay redress. Regardless of the outcome, the company is required to pay a flat fee to the FOS for each referral, which is currently £550 ("FOS Fees").

9. The scale of PPI mis-selling has led to an industry of claims management companies which specialise in presenting regulatory complaints on behalf of customers against regulated companies, in return for which they take a portion of any redress paid to the customer.

B.3 The Regulatory Context

10. At all material times FICL and FACL have been subject to various regulatory regimes in their capacity as issuers of insurance policies. From 1989 until 2005,

FICL and FACL were members of the Association of British Insurers ("ABI"), the Insurance Ombudsman Scheme ("IOS") and/or the General Insurance Standards Council ("GISC"). FICL and FACL became regulated by the FSA for the purpose of underwriting insurance from 1 December 2001, pursuant to the FSMA (Regulated Activities) Order 2001. And from 14 January 2005, the marketing and sale of insurance policies became regulated by the FSA.

11. The upshot of this is that FICL and FACL have at all relevant times been subject to regulations which require them to have in place systems for handling consumer complaints and, where appropriate, to pay redress in relation to the historic mis-selling of PPI. The FOS generally has jurisdiction to consider complaints against FICL and FACL for policies sold during the period when FICL and FACL were members of the IOS and the GISC. This has led to them being exposed to customer complaints regarding alleged PPI mis-selling by their distributors (i.e. in this context).

12. By contrast, Santander itself contends that it only became subject to the FOS regime on 14 January 2005, when the marketing and sale of consumer insurance policies of the type carried out by Santander became regulated by the FSA. Santander contends that before that, the Santander entities had not been members of the ABI or GISC. As such, Santander argues that any regulatory complaint to the PPI Mis-selling prior to 14 January 2005 could succeed only against FICL/FACL and not Santander.

13. 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. In support of that submission, it relied on a number of the rules relating to the required complaints-handling and redress procedures as set out in the Handbook, in the Dispute Resolution: Complaints Sourcebook section ("DISP"). The following were the most relevant DISP provisions to which I was referred:

(1) Complaints procedures for handling complaints should (i) allow complaints to be made by any reasonable means; and (ii) recognise complaints as requiring resolution. (DISP 1, 1.3.2).

(2) Complaints procedures should, taking into account the nature, scale and complexity of the respondent's business, ensure that lessons learned as a result of determinations by the Ombudsman are effectively applied in future complaint handling, for example by: (i) relaying a determination by the Ombudsman to the individuals in the respondent who handled the complaint and using it in their training and development; (ii) analysing any patterns in determinations by the Ombudsman concerning complaints received by the respondent and using this in training and development of the individuals dealing with complaints in the respondent; and (iii) analysing guidance produced by the FCA, other relevant regulators and the FOS and communicating it to the individuals dealing with complaints in the respondent. (DISP 1, 1.3.2A)

(3) Once a complaint has been received by a respondent, it must: (i) investigate the complaint competently, diligently and impartially, obtaining additional information as necessary; (ii) assess fairly, consistently and promptly: (a) the subject matter of the complaint; (b) whether the complaint should be upheld; (c) what remedial action or redress (or both) may be appropriate; (d) if appropriate, whether it has reasonable grounds to be satisfied that another respondent may be solely or jointly responsible for the matter alleged in the complaint, taking into account all relevant factors; (iii) offer redress or remedial action when it decides this is appropriate; (iv) explain to the complainant promptly and, in a way that is fair, clear and not misleading, its assessment of the complaint, its decision on it, and any offer of remedial action or redress; and (v) comply promptly with any offer of remedial action or redress accepted by the complainant. (DISP 1, 1.4.1)

(4) Where the firm determines that there was a breach or failing, the firm should consider whether the complainant would have bought the payment protection contract in the absence of that breach or failing. DISP Appendix 3 establishes presumptions for the firm to apply about how the complainant would have acted if there had instead been no breach or failing by the firm. The presumptions are: (i) for some breaches or failings (see DISP App 3.6.2 E), the firm should presume that the complainant would not have bought the payment protection contract he bought; and (ii) for certain of those breaches or failings (see DISP App 3.7.7 E), where the complainant bought a single premium payment protection contract, the firm may presume that the complainant would have bought a regular premium payment protection contract instead of the payment protection contract he bought. (DISP App 3, 3.1.3)

(5) The firm should consider, in the light of all the information provided by the complainant and otherwise already held by or available to the firm, whether there was a breach or failing by the firm. (DISP App 3, 3.2.1)

(6) A firm may need to contact a complainant directly to understand fully the issues raised, even where the firm received the complaint from a third party acting on the complainant's behalf. The firm should not use this contact to delay the assessment of the complaint. (DISP App 3, 3.2.3)

(7) Where a complaint raises (expressly or otherwise) issues that may relate to the original sale or a subsequently rejected claim then, irrespective of the main focus of the complaint, the firm should pro-actively consider whether the issues relate to both the sale and the claim, and assess the complaint and determine redress accordingly. (DISP App 3, 3.2.4)

(8) If, during the assessment of the complaint, the firm uncovers evidence of a breach or failing not raised in the complaint, the firm should consider those other aspects as if they were part of the complaint. (DISP App 3, 3.2.5)

(9) Where a complaint is made, the firm should assess the complaint fairly, giving appropriate weight and balanced consideration to all available evidence, including what the complainant says and other information about the sale that the firm identifies. The firm is not expected automatically to assume that there has been a breach or failing. (DISP App 3, 3.3.1)

(10) The firm should not rely solely on the detail within the wording of a policy's terms and conditions to reject what a complainant recalls was said during the sale. (DISP App 3, 3.3.2)

(11) The firm should recognise that oral evidence may be sufficient evidence and not dismiss evidence from the complainant solely because it is not supported by documentary proof. The firm should take account of a complainant's limited ability fully to articulate his complaint or to explain his actions or decisions made at the time of the sale. (DISP App 3, 3.3.3)

(12) Where the complainant's account of events conflicts with the firm's own records or leaves doubt, the firm should assess the reliability of the complainant's account fairly and in good faith. The firm should make all reasonable efforts (including by contact with the complainant where necessary) to clarify ambiguous issues or conflicts of evidence before making any finding against the complainant. (DISP App 3, 3.3.4)

(13) The firm should not consider that a successful claim by the complainant is, in itself, sufficient evidence that the complainant had a need for the policy or had understood its terms or would have bought it regardless of any breach or failing by the firm. (DISP App 3, 3.3.7)

(14) Where the firm determines that there was a breach or failing, the firm should consider whether the complainant would have bought the payment protection contract in the absence of that breach or failing. (DISP App 3, 3.6.1)

(15) In the absence of evidence to the contrary, the firm should presume that the complainant would not have bought the payment protection contract he bought if the sale was substantially flawed, (DISP App 3, 3.6.2)

(16) Where the firm concludes that the complainant would not have bought the payment protection contract he bought, and the firm is not using the alternative approach to redress (set out in DISP App 3.7.7 E to 3.7.15 E) or other appropriate redress (see DISP App 3.8), the firm should, as far as practicable, put the complainant in the position he would have been if he had not bought any payment protection contract. (DISP App 3, 3.7.2)

(17) The Ombudsman will determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case. (DISP 3, 3.6.1)

14. AXA submitted that this regime is specifically designed to ensure that regulated entities such as FICL and FACL do not adopt the type of adversarial approach to customer complaints that might be appropriate in the context of handling normal civil claims set against the backdrop of potential adversarial civil litigation.

B.4 Events leading up to the SPA

15. Up until July 2014, Santander reimbursed FICL/FACL in respect of redress payments, FOS Fees, and administrative costs in relation to the determination of

such complaints. However, on 6 May 2014, Santander informed Genworth that its previous policy of reimbursing them for PPI liabilities had been conducted on a "goodwill" basis. Further, Santander took the stance that GECB (now SCUK) was not a member of the ABI, IOS or GISC, and only became regulated by the FSA from 14 January 2005. As such, Santander contended that it was not subject to the FOS jurisdiction in respect of PPI sold before that date and would no longer reimburse Genworth for administrative costs or FOS Fees. The last such reimbursement payment by Santander was in July 2014. Then, by a letter dated 7 August 2014, Santander stated that it would no longer reimburse Genworth for any redress, FOS Fees, or administrative costs except where it had made a decision on a complaint prior to 1 May 2013.

16. As addressed in more detail in due course below, it was clear, in advance of the entering into of the SPA, that FICL and FACL faced significant liabilities arising from the historic mis-selling of PPI policies, although the exact scope of those liabilities was uncertain. What was clear was that AXA was not prepared to assume those responsibilities other than to a limited extent which led to the inclusion of Clause 10.8 of the SPA, the construction of which is at the heart of the issues for determination.

17. In this regard in July 2015, Genworth disclosed to AXA a compliance monitoring report dated 11 May 2015. I address that report in more detail in due course below, but in summary it raised very serious concerns, in particular that FICL/FACL's PPI complaints handling processes were not up to scratch. The report noted that the FOS and the FCA considered the complaints to be FICL/FACL's responsibility, and that it was required to have arrangements in place for handling them.

18. As at the date of the SPA, it was anticipated by Axa and Genworth that Santander would shortly enter into an agreement (referred to in Clause 10.8 as the "Relevant Distributor Agreement") accepting liability for all mis-selling complaints in respect of PPI underwritten by FICL/FACL and distributed by Santander. On entering into that agreement, Genworth's payment obligation under Clause 10.8(a) was to cease.

19. The anticipated Relevant Distributor Agreement is an important aspect of the factual matrix to the SPA and Clause 10.8 as it meant that such liability as would arise under Clause 10.8 was likely to be short-lived. Accordingly Clause 10.8 was not anticipated to be a long-term payment mechanism (albeit it was capable of being such). Its interim purpose was clear – to allocate 90% of the Relevant Distributor Mis-selling Losses to Genworth the previous owner of FICL and FACL, with AXA having a 10% share which, as Mr Torres (who gave evidence for Genworth) put it during his cross-examination, was to *"give [AXA] some skin in the game for the redress itself".*

20. It was against that background, by the SPA, that AXA indirectly acquired the entire issued share capital of FICL and FACL from GFIH. The SPA terms were agreed on 22 July 2015, the SPA was signed on 17 September 2015, and completion took place on 1 December 2015.

B.5 Events after the entering into of the SPA

21. However, and contrary to the parties' expectations, after completion of the SPA, the Relevant Distributor Agreement was **not** entered into with Santander. The result is that not only did Clause 10.8 allocate, but it continues to allocate to this day, responsibility for 90% of the Relevant Distributor Mis-selling Losses to Genworth. In consequence Genworth not only bore at the time of contracting with AXA, but continues to bear, the lion's share of the Relevant Distributor Mis-selling losses. Nevertheless, and as appears below, Genworth has not made payment to AXA in respect of those losses when the same has been demanded under Clause 10.8.

22. In due course on 3 July 2017, Santander informed FICL/FACL that it did not accept that it was liable for any losses flowing from PPI customer complaints in respect of policies sold prior to 14 January 2005, and that it would no longer handle or pay redress in respect of any such complaints.

23. Santander followed through with that intention, the result of which was that pre-2005 complaints began to be directed solely at FICL/FACL. But FICL/FACL did not have sufficient in-house complaints handling capacity to deal with the many thousands of complaints it was receiving each month. Accordingly, a Claims Handling Agreement (the CHA) was entered into on 7 December 2017 between FICL, FACL, and Santander UK PLC (the parent company of the Santander group) ("SUKPLC").

24. At the same time as the CHA was entered into, the latent dispute between FICL/FACL and Santander was made subject to the Standstill Agreement. By the Standstill Agreement, the parties agreed not to take any steps to refer a dispute to dispute resolution in connection with claims arising out of the selling of PPI policies, terminable on 30 days' notice.

25. At present, Santander continues to provide complaints handling services to FICL and FACL under the CHA and the Standstill Agreement remains in force.

C. PROCEDURAL HISTORY

26. By a letter dated 13 October 2017, AXA demanded a total sum of £28,487,783.39 from GFIH under Clause 10.8(a) of the SPA. AXA demanded that amount as representing 90% of the Relevant Distributor Mis-selling Losses incurred by FICL and FACL up to 30 September 2017, comprised of (1) sums paid to customers as redress following a FOS determination; (2) fees paid to the FOS following the referral of complaints; and (3) the administration costs of handling complaints. Genworth did not pay the sums (or any of the sums) demanded.

27. In consequence, on 22 December 2017, AXA issued its Claim Form and Particulars against Genworth, seeking: (1) specific performance of GFIH's obligation to pay the amount demanded under Clause 10.8 of the SPA; or (2), in the alternative, to enforce the guarantee given to it by GFI. In making that claim, AXA gave notice that it intended in due course to amend its claim so as to claim further Relevant Distributor Mis-selling Losses.

28. On 2 February 2018, Genworth served its Defence and Counterclaim, and its Part 20 Claim Form and Part 20 Particulars of Claim. In its Defence, Genworth put AXA to proof as to whether the losses claimed fell within the scope of the obligations under Clauses 10.8 and 15.1 of the SPA. Further, Genworth alleged that AXA had breached paragraph 7 of Schedule 5 of the SPA, by reason of which Genworth's liability under Clause 10.8 did not include (alternatively, that Genworth has a counterclaim for the value of) any loss in respect of claims where Genworth's potential right of subrogation had been prejudiced by the Standstill Agreement, and the CHA, and any loss in respect of claims by PPI purchasers that AXA, FICL or FACL had settled without Genworth's consent.

29. Genworth's position is that FICL/FACL have good claims against Santander to recover losses as a result of alleged mis-selling of PPI by Santander, both before and after 1 December 2000, for breach of various clauses under the Agency Agreement. However, such claims are not for determination in these proceedings. By its Part 20 claim, Genworth sought to join FICL and FACL and Santander to the proceedings, in order to resolve the issues of liability between them for losses arising from the mis-selling of PPI both pre and post 2005. Genworth sought: (1) a declaration that as between Santander and FICL/FACL, Santander was liable for PPI Mis-selling Losses (both pre and post 2005); (2) a declaration that FICL/FACL were not liable to Santander for breaches of the Agency Agreement; and (3) a declaration that, if Genworth made payment to AXA under Clause 10.8 of the SPA, Genworth was entitled to be subrogated to FICL/FACL's rights under the Agency Agreement, and thereby an indemnity or damages from Santander.

30. On 6 March 2018, AXA served its Reply and Defence to Counterclaim and its application to strike out the Part 20 claim as an abuse of process. Strike-out applications were also made by FICL/FACL and Santander.

31. By a judgment dated 1 November 2018 ([2018] EWHC 2898 (Comm)), Andrew Baker J struck out the Part 20 claim and related parts of Genworth's defence. He held at [42] that Genworth's Part 20 Claim was an abuse of the declaratory form of relief so far as it sought to force into these proceedings the general dispute between FICL/FACL and Santander as to their respective responsibilities or liabilities *inter se* for underlying PPI customer complaints. However, Andrew Baker J added at [44] that "*Genworth will be at liberty if so advised, to seek to amend their Counterclaim …to add a claim for a declaration as to what, if any, rights of subrogation may become exercisable upon any payment under Clause 10.8 of the SPA….it may be Genworth will give consideration to whether to seek to join FICL/FACL and/or Santander as additional defendants for that limited purpose…* ".

32. In accordance with directions set by Andrew Baker J, by draft Amended Particulars served on 25 November 2018, and a second updating draft Claim Form sent on 17 January 2019, and a second draft Amended Particulars of Claim sent on 13 February 2019, AXA increased the sum claimed to a total of £264,953,912.18 to reflect further losses up to 31 December 2018. That sum is said by AXA to represent 90% of the Relevant Distributor Mis-selling Losses incurred by FICL/FACL up to 31 December 2018, comprised of (1) sums paid to customers as

redress following a FOS determination; (2) fees paid to the FOS following the referral of complaints; (3) the administration costs of handling complaints; (4) sums paid to FICL and FACL to SUKPLC, pursuant to the CHA to fund redress payments made by SUKPLC to customers; (5) sums paid by FICL and FACL to customers following determination by SUKPLC, pursuant to the terms of the CHA, that redress should be paid to them; and (6) service charges paid by FICL and FACL to SUKPLC, pursuant to the terms of the CHA.

33. By Orders sealed on 12 December 2018 in action CR-2018-003765, the Companies Court sanctioned schemes, pursuant to Part VII of FSMA for: (1) the transfer of the business of FICL to AXA France IARD; and (2) the transfer of the business of FACL to AXA France Vie, in each case with an Effective Date of 1 January 2019.

34. On 13 December 2018, taking up the invitation in the Andrew Baker J judgment, Genworth issued an application for permission: (1) to amend its Defence and Counterclaim, to seek declaratory relief regarding the subrogation rights it may be entitled to upon payment under Clause 10.8 of the SPA ("the Subrogation Declaration"); and (2) to join FICL/FACL and Santander to these proceedings. FICL/FACL and Santander ultimately consented to being joined to the proceedings for the purpose of the Subrogation Declaration.

35. At the CMC in February 2019, it was directed that the Subrogation Declaration issue be determined along with the other points of principle at this hearing.

36. I was invited by Santander to exercise a degree of caution in relation to various factual matters that might concern future issues not presently before the Court. Four particular points of sensitivity were identified. First, AXA suggested that the Agency Agreement of December 2000 was retrospective, to which Santander objected. I record here that I make no finding as to the meaning or effect (including retrospectivity) of the Agency Agreement. It has no bearing on the issues before me. The second aspect of Santander's sensitivity relates to references to Santander as claims handlers for FICL/FACL at the time of the SPA or any time before the CHA of 2017. As such, to the extent that any such references are made in this judgment, I do so only as a matter of convenient shorthand and not as a finding of fact or law. The third area of sensitivity relates to references to PPI having been mis-sold by Santander, on the basis that that terminology ignores the role of other parties in selling PPI. Again, to the extent any such references are made in this judgment, such references are again nothing more than convenient shorthand. The fourth area of sensitivity is in relation to any suggestion that Santander's position has changed. To the extent that any such references are made in this judgment, I do not make any finding or fact or law in relation to such matters still less about any alleged liability of Santander for PPI mis-selling.

37. Further, I add that it is common ground between the parties that Santander will not be bound by any determination (factual or legal) made in this trial, except in respect of the Subrogation Declaration. Similarly, there will be no issue estoppel arising against Santander, other than in respect of Genworth's claim in relation to subrogation.

D. THE ISSUES

38. A List of Issues had been agreed by the parties in advance of the PTR in October 2019. However, the parties' skeleton arguments approached the issues in the case in a different order, frequently without attempting to engage, or engage fully, with the other parties' arguments. Accordingly, on the first day of the trial, I directed that the parties draw up a new list of issues which were to be addressed by all of the parties in their written and oral closing submissions in the same order. The upshot of that exercise is that the issues are as follows.

39. **The Nature and Construction of Clause 10.8 and Reasonable Defences Issue**: on its proper construction, what is the nature of Genworth's obligation under Clause 10.8, and is Genworth's liability under Clause 10.8 limited to losses in respect of which AXA is able to demonstrate that AXA/FICL/FACL asserted all defences reasonably available to them in respect of any complaints by consumers?

40. **The Subrogation Entitlement Issue:** In the event that Genworth makes any payment to AXA/FICL/FACL pursuant to Clause 10.8 of the SPA, is Genworth entitled to be subrogated to any potential rights that FICL/FACL may have against Santander because the provisions in Clause 10.8 of the SPA constitute a contract of indemnity?

41. **The Consequences of Subrogation Issue**: If Genworth is subrogated to FICL/FACL's rights against Santander, how far and in what circumstances (if at all) will Genworth be entitled to (1) require each of FICL/FACL to lend its name to legal proceedings against Santander; (2) require each of FICL/FACL to take all steps necessary to commence and pursue such legal proceedings including terminating the Standstill Agreement; and (3) control the conduct of all such legal proceedings?

42. **The Bundling Issue**: in relation to the definition of PPI for the purposes of Clause 10.8(a) of the SPA, what is the meaning of 'Payment Protection Insurance', as such term was commonly understood in the insurance market at the time the SPA was concluded?

43. **The Persons Issue:** can Genworth's liability under Clause 10.8 of the SPA extend to losses in the form of sums paid by AXA/FICL/FACL to persons who brought claims or complaints other than against FICL or FACL?

44. **The Consent Issue**: has AXA breached the provisions of paragraph 7 of Schedule 5 of the SPA by:

(1) Paying amounts of redress to PPI customers without first obtaining the consent of Genworth;

(2) Entering into the Standstill Agreement between FICL/FACL and Santander, without first obtaining the consent of Genworth; and/or

(3) Entering into the CHA between FICL/FACL and SUKPLC without first obtaining the consent of Genworth?

45. **The Consent Unreasonably Withheld Issue**: to the extent that Genworth's consent was required for the entry into the CHA and/or the Standstill Agreement, or the payment of amounts of redress to PPI customers, was such consent unreasonably withheld? And to the extent that Genworth's consent was required for the payment of amounts of redress to PPI customers, did Genworth by its conduct waive the requirement for such consent and/or is Genworth now estopped from relying on the absence of such consent?

46. **The Grossing Up Issue:** How (if at all) are the provisions of Clause 18.5 of the SPA to be applied in grossing-up any sums payable to AXA?

47. **The Res Inter Alios Acta Issue**: Will such a payment under Clause 10.8 of the SPA extinguish, diminish or otherwise prejudice any potential rights that FICL/FACL may have against Santander?

48. **The Allocation Issue:** Is the reference to a "claim under clause 10.8" in paragraph 8.2 of Schedule 5 of the SPA a reference to the sum claimed by AXA in respect of each individual PPI Complaint and/or FOS complaint (including any associated costs, expenses and fees)?

E. THE WITNESSES

49. Each of AXA and Genworth called factual evidence (Santander did not call any factual witnesses). Each of the witnesses concerned gave oral evidence and was cross-examined. In this regard:-

(1) AXA called:
   (a) Mr Jean-Baptiste Tricot who was Head of Mergers and Acquisitions for AXA Group and as such co-led AXA's contractual negotiations in relation to the execution of the SPA. His evidence centred on the events leading up to the signing of the SPA from AXA's perspective.
   (b) Ms Catriona Healy, an Operations Manager with AXA Partners, the division of AXA that FICL and FACL operated as part of after they were acquired by AXA from Genworth. Her evidence was focussed on the handling of PPI complaints following the acquisition of FICL and FACL.

(2) Genworth called Mr Vidal Joaquin Torres Jr, the Vice President and Associate General Counsel (Regulatory Governance) at GFI. His evidence focussed, in particular, on the negotiations leading up to signing of the SPA (including passing comment on his understanding of Clause 10.8) as well as the events leading up to AXA's claim.

50. I considered that all the witnesses were honest witnesses doing their best to assist the Court albeit that much of the evidence (under the guise of admissible factual matrix evidence) actually involved evidence as to negotiations or (in the

case of Mr Torres) one party's subjective understanding of particular provisions, none of which was admissible or assisted the Court in the exercise of construction of the SPA. Where relevant, I address particular evidence of the witnesses in due course when addressing the issues that arise. However aside from admissible evidence as to factual matrix which I have borne well in mind, the issues that arise before me are ultimately essentially issues as to the proper construction of the SPA.

51. I also heard expert evidence from Brian Jackson on behalf of Genworth and David Morey on behalf of AXA, who came from very different backgrounds, in relation to the specific issue of PPI and the meaning of "payment protection insurance, as such term is commonly understood in the insurance market" (the defined term as to "PPI"). They produced a helpful Joint Memorandum, and were each cross-examined as to their opinions. I am satisfied that they each gave independent evidence and were doing their best to assist the Court. I address their evidence in due course below in the context of Issue 3A (as to the meaning of PPI as defined in the SPA).

F. THE PROPER CONSTRUCTION OF CLAUSE 10.8 AND THE REASONABLE DEFENCE ISSUE

F.1 Clause 10.8 of the SPA

52. Clause 10.8 of the SPA provides that:

> "The Sellers hereby covenant to the Purchaser and each Target Group Company that they will pay to the Purchaser or such Target Group Company on demand an amount equal to:
>
> (a) ninety percent (90%) of all Relevant Distributor Mis-selling Losses; and
>
> (b) ninety percent (90%) of the amount of all costs, claims, damages, expenses or any other losses incurred by the Purchaser or a Target Group Company after Completion resulting from the Relevant Distributor Dispute or settlement thereof including any such losses incurred pursuant to any Action which arises from such Relevant Distributor Dispute, but excluding, after the First Termination Date, the amount of all such losses resulting from a dispute described in clause (a) of the definition of "Relevant Distributor Dispute",
>
> such obligation to continue in the case of clause 10.8(a) until the date (the "First Termination Date") on which the relevant Target Group Company and the Relevant Distributor enter into the Relevant Distributor Agreement, and in the case of clause 10.8(b) until the date (the "Second Termination Date") on which both the Relevant Distributor Agreement has been entered into and the relevant Target Group Company has entered into an administration agreement with the Relevant Third Party in respect of the administration of Insurance Contracts distributed by the Relevant Distributor. The form of the Relevant Distributor Agreement and the administration agreement with the Relevant Third Party will in each case be subject to the prior approval of the Purchaser prior to Completion and the prior approval of the Sellers following Completion (in each case, such approval not to be unreasonably withheld or delayed), and in the case of the Relevant Distributor Agreement will be substantially in the Agreed Form. Prior to Completion the Sellers shall and shall cause the Target Group

Companies to use reasonable endeavours, and following Completion the Purchaser shall and shall cause the Target Group Companies to use reasonable endeavours, to procure the execution and delivery of the Relevant Distributor Agreement and the administration agreement with the Relevant Third Party. Within thirty (30) Business Days of each of the First Termination Date and the Second Termination Date the Purchaser will issue a final demand in respect of all accrued and unpaid obligations of the Sellers under clause 10.8(a) or, as applicable, (b) and upon payment of such demand the Sellers shall be released from their obligations under this clause 10.8; provided, however, if each of the First Termination Date and Second Termination Date shall occur prior to Completion, no such demand shall be required and the Sellers shall have no liability whatsoever under this clause 10.8."

53. Thus, by Clause 10.8(a) of the SPA, GFIH agreed to pay to AXA, FICL or FACL, on demand, an amount equal to 90% of all "Relevant Distributor Mis-selling Losses". This obligation was expressed to endure until the date on which FICL/FACL entered into the "Relevant Distributor Agreement" with Santander – i.e. the final agreement, following the Genworth/Santander settlement meeting of 4 June 2015 - in substantially the form agreed between AXA and Genworth at the time of signing the SPA. In the event, and as already noted, that never took place. Accordingly Clause 10.8 represented, and continues to represent, the loss distribution mechanism as between Genworth and AXA, and allocates the lion's share (90%) of such losses to Genworth.

F.2 Overview – the Parties' Submissions

54. Genworth submits that:

(1) The payment obligation under Clause 10.8 is in the nature of an indemnity obligation, and not a performance bond.

(2) It is an "inherent feature" of an indemnity obligation that the indemnified must advance reasonable defences.

(3) It is an inherent feature of an indemnity obligation that an indemnified is not entitled to recover under an indemnity for losses incurred where the indemnified has not asserted all defences reasonably available to it.

(4) To the extent that AXA did not advance reasonable defences, its losses fall to be reduced accordingly.

55. Genworth submits that a contract of indemnity has the following characteristics:

(1) The indemnifier undertakes a primary obligation which is wholly independent of any liability between the indemnified and a third party, relying on *Vossloh AG v Alpha Trains (UK) Ltd* [2010] EWHC 2443 (Ch), per Sir William Blackburne (sitting as a judge of the High Court) at [25]-[26].

(2) An indemnity is a promise of exact protection against loss, and an indemnity is therefore referable to losses incurred by the indemnified, relying on *GPP Big Field LLP v Solar EPC Solutions SL* [2018] EWHC 2866 at [126], per Richard Salter QC (sitting as a Deputy Judge of the High Court).

(3) Under an indemnity, the indemnifier is entitled to enquire into the actual loss suffered by the indemnified, relying on *Ibrahim v Barclays Bank plc* [2012] EWCA Civ 640, [2013] Ch 400 at [63], per Lewison LJ.

56. Genworth submits that indemnity obligations can be distinguished from performance bonds in law in the following respects:

(1) The words "on demand" are not determinative, rather the court approaches the task of construing an agreement by looking at the instrument as a whole, relying on *Autoridad del Canal de Panamá v Sacyr, S.A.* [2017] EWHC 2228 (Comm), per Blair J.

(2) The absence of protective clauses is an indicator that the instrument is a performance bond, relying on *Autoridad del Canal de Panamá*.

(3) There is a presumption against construing an instrument as a performance bond which is not given by a bank or other financial institution, relying on *Autoridad del Canal de Panamá*.

(4) An instrument containing an obligation to pay for losses actually sustained or incurred by the obligee is not a performance bond, even if expressed to be payable "on demand", but is instead a form of indemnity, relying on *JBE Properties Pte Ltd v Gammon Pte Ltd* [2010] SGCA 46 at [19].

(5) A performance bond is referrable to the obligee's loss but is not necessarily or solely referable to loss – the obligee may recover a sum that does not correspond to its loss or even claim where it has suffered no loss at all, relying on *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] Q.B. 159, 170E-H, per Lord Denning MR.

(6) An obligor is not entitled to inquire into the actual loss suffered by the indemnified.

(7) Non-payment by an obligee under a performance bond gives rise to a claim in debt or specific performance, not damages for breach of contract.

(8) A performance bond is autonomous of the underlying contract – liability may arise simply on a conforming demand within the validity of the instrument, relying on *Autoridad del Canal de Panamá*.

57. Genworth also refer to the Singaporean case of *JBE Properties Pte v Gammon Pte Ltd* in support of the distinction between on-demand bonds and indemnities. The question in that case was whether on a true construction of the contract, the bank was liable to pay on demand or later on proof of breach and loss. It was held to be an on demand bond because the bank was obliged to indemnify against "*all losses, damages, costs, expenses…otherwise sustained by [JBE]".* Genworth's submission was that a demand to pay in respect of a particular loss having been sustained or incurred is a pointer towards the obligation being an indemnity.

58. AXA does not dispute the propositions of law advanced by Genworth, but submits that they are not in point, and do not assist in construing Clause 10.8, which is a bespoke provision that is to be construed in accordance with its own terms, and well-established principles of contractual construction. AXA submits that, properly construed, Clause 10.8 is not an indemnity obligation, and there is in any event no obligation upon AXA to take all reasonable defences as contended for by Genworth.

59. Genworth's submission is that Clause 10.8 has defining characteristics of an indemnity and stands to be characterised as such:

(1) Payment under Clause 10.8 is directly and solely referable to losses actually incurred by AXA, FICL and/or FACL, under the definition of "PPI Mis-selling Losses".
(2) Schedule 5, para 8.2(a) refers to payment by Genworth under Clause 10.8 as a "Damages Payment" and Schedule 5, para 8.2(d) to a claim under Clause 10.8 as a "Damages Claim", which is inconsistent with what is alleged to be AXA's construction of Clause 10.8 as an on demand bond giving rise to a claim in debt or for specific performance, but consistent with Genworth's construction as an indemnity whose breach gives rise to the secondary obligation to pay damages.

60. Genworth also submits that Clause 10.8 is not to be characterised as a performance bond because:
(1) Liability does not arise simply on the basis of a conforming demand, but only where loss has been incurred by AXA, FICL and/or FACL.
(2) Clause 10.8 does not use language typically indicating a performance bond such as an agreement "unconditionally and irrevocably" to pay an amount.
(3) The words "on demand" and "covenant" are of limited value.
(4) There is no conclusive evidence provision relating to Clause 10.8 and no obligation to pay against certification or to pay on documents.
(5) The instrument was not issued by a bank or other financial institution, and
(6) AXA itself, up until the issue of the proceedings, consistently referred to Clause 10.8 of the SPA as an "indemnity".

61. AXA's position on the proper construction of Clause 10.8, and the reasonable defence issue, is that:
(1) The Court should not seek to pigeonhole the clause as either an indemnity or a performance bond.
(2) Rather, the Court's task is to construe the contractual language of Clause 10.8 against the factual matrix to the SPA and the provisions of the SPA as a whole.
(3) Clause 10.8 is not an example of any particular type of contractual provision, but rather a bespoke provision pursuant to which Genworth covenants to pay identified losses on demand.
(4) Clause 10.8 is not an indemnity obligation.
(5) Accordingly, and in any event, there is no requirement under Clause 10.8 for AXA to advance all reasonable defences.
(6) Even if it were an indemnity obligation, there is no general principle that every such clause necessarily contains a reasonable defences obligation.

F.3 The Anterior Question and the Proper Approach to Contractual Construction

62. There is a logically anterior question to that which Genworth seeks to pose. Namely how should Clause 10.8 be construed? Should the Court seek to pigeonhole or classify Clause 10.8 as a particular species of contractual obligation, for example as an indemnity or a performance bond, and then identify the consequences of such classification? Or should it construe the contractual language of Clause 10.8 against the factual matrix, and in the context of the SPA as a whole, to determine its true meaning and effect applying established principles as to contractual construction? There can be no doubt that the latter is the correct approach to contractual construction.

63. As was said by Lord Reid in *Moschi v Lep Air Services Ltd* [1973] A.C. 331 at 345F as to the utility of previous authorities addressing particular types of clause:

> "I do not get much assistance from the authorities such as they are. I go by the terms of the appellant's contract. I find nothing in the authorities which in any way prevents me from reaching what appears to me to be the natural meaning and effect of this contract. It seems never to have been necessary to make a full analysis of the position in a contract of this kind, and I shall not refer in detail to such indications as there are in the cases, beyond saying that there is no magic in the word guarantee but that the authorities appear to recognise that at least most contracts of guarantee are of this nature."

64. In embarking upon a quest to classify Clause 10.8 as a particular species of contractual obligation (per Genworth either indemnity or performance bond) Genworth departs from the correct starting point which is to construe the contract without any pre-conceptions or pre-conceived starting point, or pre-conceived possible destination. In doing so Genworth deviates from the correct approach to contractual construction and risks arriving at the wrong destination. In this regard Genworth treats indemnity or performance bond as exhaustive and mutually exclusive categories of obligation and then contends that, once the clause has been assigned to the "correct" category (Genworth say "indemnity"), this will determine various matters including the existence of an obligation on the beneficiary of the clause to assert "all reasonable defences" against third parties, and the existence of a right to subrogation following payment by Genworth.

65. This approach of assigning the clause to a category of obligation first and then construing the clause amounts, I am satisfied, to the tail wagging the dog. In this regard it is plain that Genworth's approach is driven by at least two desires (1) to establish that AXA is required to take all reasonable defences and (2) to be subrogated to FICL/FACL's rights against Santander (which are dependent upon there being a relevant contract of indemnity). The issue of the proper construction of Clause 10.8 is undoubtably inter-linked with whether AXA is required to take all reasonable defences and whether Genworth is subrogated to FICL/FACL's rights against Santander through the question of whether Clause 10.8 contains an obligation in the nature of a contract of indemnity, but the potential consequences of a conclusion as to what a contract means should not drive the very construction exercise to be undertaken in the first place.

66. There is no general principle that any particular contractual term must be fitted into an existing category. Although Genworth seek to frame the question as to whether Clause 10.8 is either a performance bond or an indemnity, it is perfectly possible for Clause 10.8 to be neither. This is all the more so because the contractual clause in question is a bespoke provision in relation to a specific acquisition, designed for particular circumstances, agreed between two commercially sophisticated parties.

67. Whilst Genworth denied seeking to pigeonhole Clause 10.8 as a particular species of contractual obligation, and then to conduct the process of construction in light of that classification, I am satisfied that that is exactly what Genworth sought to do. Indeed Mr Nash QC submitted orally in terms that "*the consequences of the construction exercise [the Court] will do will be that it is either an indemnity-type obligation or a demand type obligation".*

68. However it is perfectly possible that a clause is not a "classic" example of any particular type of familiar contractual provision, but instead a "bespoke" provision, agreed by the parties in response to particular factual circumstances and particular commercial imperatives. In the present case it is common ground that it is not a guarantee, or a performance bond akin to a letter of credit issued by a financial institution. Nor, submits AXA, is it an "an ordinary indemnity clause" (cf. para. 50 of Genworth's Opening Skeleton). AXA points out that it does not purport to indemnify AXA generally against liabilities to third parties (or, indeed, FICL/FACL who are not contracting parties, as addressed further below in the context of subrogation). Instead, it imposes an obligation on Genworth to pay sums equal to various specified types of costs and losses incurred by FICL/FACL, upon demand by AXA. If ultimately it is necessary to classify Clause 10.8 (having first construed what it means) both AXA and Santander say Clause 10.8 is a "covenant to pay" (as reflected in its express language) which (contrary to Genworth's submissions) is neither synonymous with a "performance bond*"* or an "on demand bond".

69. I am satisfied that the correct starting point to the construction of Clause 10.8 is not to start with a quest for the precise nature of the clause but rather to construe such clause in accordance with its language, the other terms of the SPA and the admissible factual matrix to the SPA applying well established principles as to contractual construction. Having done so its meaning will be established, and at that stage it will be possible (if appropriate) to express any conclusions as to the nature of the obligation created thereby.

70. The correct approach to contractual construction is well established, and definitive guidance was given by the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] AC 1173. In that case Lord Hodge held at [10] – [13] that:

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this 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 and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381 , 1383H–1385D and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989 , 997, Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment *in Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle,

which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extrajudicial writing, *"A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision"* (2008) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.

11. Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the *Rainy Sky case* [2011] 1 WLR 2900 , para 21f. In the Arnold case [2015] AC 1619 all of the judgments confirmed the approach in the Rainy Sky case: Lord Neuberger of Abbotsbury PSC, paras 13–14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the *Rainy Sky* case, para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299 , paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the *Arnold* case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold case,* para 77 citing *In re Sigma Finance Corpn [*2010] 1 All ER 571 , para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and

coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn* [2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

71. In view of this, the Court's task is to ascertain the meaning of the words used in Clause 10.8 by applying an objective and contextual approach. One must ask what the relevant terms, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the SPA was entered into.

F.4 The Proper Construction of Clause 10.8

72. For ease of reference I will repeat, at this point, that part of Clause 10.8 that is of immediate relevance:-

"The Sellers **hereby covenant** to the Purchaser and each Target Group Company **that they will pay** to the Purchaser or such Target Group Company **on demand** an amount equal to:

(a) **ninety percent (90%) of all Relevant Distributor Mis-selling Losses**; and

(b) **ninety percent (90%) of the amount of all costs, claims, damages, expenses or any other losses incurred by the Purchaser or a Target Group Company after Completion resulting from the Relevant Distributor Dispute or settlement thereof** including any such losses incurred pursuant to any Action which arises from such Relevant Distributor Dispute, but excluding, after the First Termination Date, the amount of all such losses resulting from a dispute described in clause (a) of the definition of "Relevant Distributor Dispute…"

(emphasis added)

73. Thus, by Clause 10.8(a) of the SPA GFIH "covenant[ed]" (i.e. promised) to AXA, FICL and FACL (though being a contractual promise it is a promise between the contracting parties – i.e. of Genworth to AXA) that GFIH "will pay" (i.e. mandatory language in relation to what is characterised as a payment obligation, and also not the language of "will indemnify") to AXA or FICL or FACL (implicitly as AXA may direct as the contracting party entitled to so direct) "on demand" (i.e. upon AXA demanding it - which, though but one factor, is again mandatory language demanding payment against the requisite supporting information (whatever that may be, as addressed below) rather than the language of request or the language of "indemnification in respect of") an amount equal to 90% of all "Relevant Distributor Mis-selling Losses".

74. Thus it is necessary to look at what "Relevant Distributor Mis-selling Losses"

are defined as (including taking into account the embedded definitions therein) to see what has to be paid on demand, the definitions being set out in Clause 1.1 of the SPA. In what follows below I have highlighted certain defined terms in bold, and underlined particular words by way of emphasis.

75. "**Relevant Distributor Mis-selling Losses**" means "any **PPI Mis-selling Losses** which arise out of or directly relate to **PPI Selling Activity** undertaken by [Santander] or its agents or its appointed representatives (as the case may be) prior to 1 January 2005".

76. "**PPI Mis-selling Losses**" are defined to include "all damages, losses, liabilities, penalties, fines, costs, interest and expenses, including for the avoidance of doubt costs and liabilities relating to FOS fees, claim administration, complaints handling, customer notifications and redress amounts, incurred by [FICL/FACL] whether before or after Completion in respect of:

(a) defending or supporting the defence of any Action that relates to **PPI Selling Activity**;

(b) complying with any order, decision or settlement agreement in respect of such Action; and/or

(c) any **PPI Complaint**;

but excluding for the avoidance of doubt, any sums which are recovered as **Complaints-Handling Losses**".

77. **"PPI Selling Activity"** means "any activity undertaken by [Santander] or their agents or appointed representatives (as the case may be) in relation to the sales, marketing or administration of PPI products underwritten by [FICL/FACL]".

78. **"PPI Complaint"** means "any claim or complaint brought by any person against [FICL/FACL] in respect of **PPI Selling Activity** or in respect of the handling by or on behalf of a PPI Distributor or the Relevant Distributor of any claim or complaint in respect of **PPI Selling Activity**".

79. It will thus be seen from the express language of Clause 10.8(a) and the incorporated definitions embedded within it that Genworth is, by the express terms of Clause 10.8(a), obliged to pay ("will pay") "on demand" an amount equal to 90% of all Relevant Distributor Mis-Selling Losses which (as a result of the embedded definitions) means on a demand by AXA in an amount equal to a cost incurred by FICL/FACL that relates to:

(1) a claim or complaint;

(2) regarding the selling of a PPI product;

(3) underwritten by FICL/FACL;

(4) sold by Santander;

(5) prior to 1 January 2005.

80. These requirements either are (or at least at one stage have been) common ground between AXA and Genworth. In this regard in evidence submitted at an interlocutory stage in the context of disclosure and sampling, Mr Shankland in his fifth witness statement dated 21 June 2019 served on behalf of Genworth, at paragraphs 14 and 15 recognised that those five criteria are (the) necessary criteria. Whether or not so accepted, I am satisfied that these are the requirements set out in Clause 10.8 taking into account the definitions embedded within the definition of "Relevant Distributor Mis-Selling Losses". Mr Shankland, however, also added an extra requirement at paragraph 15.5 which is very much in dispute and which arises for determination.

81. Mr Shankland stated at paragraphs 14 and 15 of his fifth witness statement as follows:-

> "14. AXA and Genworth have agreed that AXA's disclosure should include a sample of the complaints files in respect of which AXA has brought a claim under the Indemnity**. <u>The purpose of the sample is to determine whether the losses claimed in respect of the complaints in the sample fall within the scope of the Indemnity</u>** and to allow such conclusions to be extrapolated to all complaints in respect of which a claim has been advanced under the Indemnity. Santander is AXA's PPI complaints handler and so certain of the sampling disclosure must first be provided by Santander to AXA before it is provided to Genworth.
>
> 15. **<u>Genworth' s position is that in order to test whether each claim within the sample falls within the scope of the Indemnity, Genworth needs to be able to determine whether</u>**:
> 15 .1 the policy concerned was underwritten by the AXA France Entities (or either one of them) - see the definition of PPI Selling Activity…;
>
> 15 .2 the policy concerned was sold or marketed by Santander before 1 January 2005 - see the definition…of Relevant Distributor Mis-selling Losses…;
>
> 15 .3 the policy concerned was in respect of payment protection insurance as such term is commonly understood in the insurance market - see the definition of PPI…
>
> 15 .4 the complaint was made against the AXA France Entities (or either one of them) rather than against Santander - see the definition of PPI Complaint…; and
>
> *15.5 whether AXA/the AXA France Entities have asserted all defences reasonably available to them, including limitation defences (i.e., to ensure that complaints handlers did not uphold complaints that they should not have upheld).*"

82. It will be noted that no reference within the SPA or justification is given by Mr Shankland in paragraph 15.5 (highlighted in italics above), in contra-distinction to paragraphs 15.1-15.4, as to why it was allegedly a term of the SPA (and so a requirement of a demand) that FICL/FACL had "asserted all defences reasonably available to them". That is, of course, one of the central issues between AXA and Genworth.

83. It is indisputable that Clause 10.8 of the SPA does not expressly so provide, and no other express term of the SPA provides that there is any such obligation. Nor does Genworth plead in their Re-Amended Defence and Counterclaim that there is any implied term of the SPA to such effect, still less the basis for any such term and whether it is implied in law or fact and in either case the basis for implication of such term (and as appears below any such alleged term would be inconsistent with the last sentence of Clause 20.1 of the SPA).

84. It is not a propitious start to Genworth's case that it has not articulated, and pleaded, in its Defence and Counterclaim, <u>any</u> contractual basis for any such obligation. Indeed all that is pleaded is a non-admission that the sums claimed in the letters of demand or any sums are due to AXA stating as follows in relevant respects:-

> "9. … No admissions are made as to whether that sum, or any sum, is due to AXA as alleged, and without prejudice to the generality of this non-admission and the burden of proof, AXA is put to strict proof of the following matters:
> …
> c. whether in respect of each cost, payment, or loss comprised within the total sum claimed, AXA and/or the Target Group Company has asserted all defences reasonably available to them so as to establish the necessary causative link between the PPI Misselling Activity and liability of AXA and/or the Target Group Company for the purposes of the indemnity".

85. Thus, it will be seen that whether or not paragraph 9, as a bare "non-admission" is a proper plea (which is questionable but irrelevant for present purposes), what is foreshadowed is (at most) an argument on causation/mitigation, but it is not suggested that there is any <u>contractual</u> obligation to take all reasonable defences as a condition precedent to obtaining payment under Clause 10.8, be that an obligation arising out of an express or an implied term (and no such term is pleaded).

86. Notwithstanding the apparent care and detail taken by the parties in relation to the drafting of the SPA with its detailed and inter-locking definitions, it is not provided in Clause 10.8, or in the embedded definitions incorporated therein, or anywhere else in the SPA, that as part of a demand AXA is required to demonstrate that it has asserted "all defences reasonably available".

87. Accordingly on the ordinary and natural meaning of the language of Clause 10.8 and the embedded definitions contained therein I am satisfied that Genworth is, by the express terms of Clause 10.8(a). obliged to pay ("will pay") "on demand" an amount equal to 90% of all Relevant Distributor Mis-Selling Losses which (as a

result of the embedded definitions) means on a demand by AXA in an amount equal to a cost incurred by FICL/FACL that relates to:

(1) a claim or complaint;

(2) regarding the selling of a PPI product;

(3) underwritten by FICL/FACL;

(4) sold by Santander;

(5) prior to 1 January 2005.

and there is no express provision of the SPA that AXA is, in addition, required to accompany the demand with evidence of, or prove that there has been taken, "all defences reasonably available to them".

88. Clause 10.8 does not require that the demand be accompanied by any particular level or quality of information in relation to the five requirements. However as I understood to be common ground, Genworth could, of course, call for further proof that the express requirements are satisfied – for example by seeking supporting spreadsheet information. Ultimately if it chose not to pay against the documentation provided it would be at risk if a Court were to find that it should have paid against the information provided.

89. I am satisfied that AXA is right that nothing more than these five criteria is needed and that there is no contractual obligation on AXA to advance all reasonable defences. Adopting the language of *Wood v Capita*, there are both "textual" and "contextual" reasons for this.

90. The key "textual" basis for this conclusion is, as already identified, that there is no express provision whether within Clause 10.8 or the embedded definitions contained therein, or indeed anywhere else in the SPA to the effect that "*AXA must advance all reasonable defences*". The worth of this point is not limited to the fact that there is no such express provision requiring that. There are two further aspects to this point which increases the weight to be given to it as matter of contractual construction:-

(1) First, the absence of such an express provision is in contradistinction to other clauses in the SPA, such as Clause 10.7(b), which provides that Complaints Handling Losses can be recovered only where they have been incurred by AXA, FICL or FACL and the relevant entity has not recovered them from Santander under the Relevant Distributor Agreement, "***having used its reasonable endeavours to pursue a claim thereunder***". Clause 10.8 imposes on Genworth the obligation to AXA for reimbursement "*on demand*", without specifying any reasonable defences requirement. If the parties had wanted to make the obligation in Clause 10.8 subject to a reasonable defences requirement, I consider that they would have done so expressly. Clause 10.7(b) shows that where the parties did want to include requirements of this type (there a "reasonable endeavours" obligation, here an alleged obligation to assert all defences "reasonably available"), they made express provision for them. Indeed, other parts of Clause 10.8, which are not relevant to the specific issue here, actually themselves contain

two references to reasonable endeavours. Given that the parties had turned their mind to adopting this type of language in the SPA generally, and in Clause 10.8 in a different context, I am satisfied that they would have used such language had it been their common intention to impose an obligation to assert all defences reasonably available as a condition precedent to payment.

(2) The language of Clause 10.8 and its embedded definitions is itself expansive and covers the widest possible range of costs and losses. See, in particular:-

(a) The definition of 'PPI Mis-selling Losses', which refers to "*all damages, losses [etc] … in respect of … any PPI Complaint*".
(b) The definition of 'PPI Selling Activity', which refers to "*any activity undertaken by [Santander] … in relation to the sales, marketing or administration of PPI products underwritten by [FICL/FACL]*".
(c) The definition of 'PPI Complaint', which refers to "*any claim or complaint brought by any person …".*

It is questionable whether such language is consistent with there being any obligation that all reasonable defences be taken, but in the context of such language one would expect (as AXA submits) that if that was the common intention of the parties these clauses would be circumscribed, or qualified, so as to limit recoverable losses by reference to the taking of reasonable defences or more specifically (for example) losses that could not reasonably have been avoided, or complaints in respect of underlying selling activity that could not reasonably have been defended, or customer complaints that could not reasonably have been resisted. That was not done yet, as already noted, the parties were well able to, and did, qualify express obligations, where they intended to do so. This further militates against Genworth's construction.

91. In fact during the course of the evidence of Mr Torres on behalf of Genworth, Mr Torres suggested that there were good commercial reasons for Genworth to have "put in" such a requirement to take "reasonable" defences to any customer complaint (seemingly on the basis of a misapprehension that the SPA so provided) – but such a requirement was not *"put in*" to the SPA (although, as already noted, it could readily have been, as similar obligations were put in elsewhere).

92. This leads on to a further point. Clause 10.8 (and the embedded definitions contained therein) identify a short list of (5) criteria to be satisfied each of which is capable of objective proof (with supporting material if necessary), with none of those criteria being likely to give rise to controversy. There is no suggestion that there is overlaid any requirement of reasonableness or proportionality, which is entirely consistent with the language of a covenant to *"pay…on demand".* If there had been an obligation to assert all defences reasonably available one would expect the SPA to provide for a procedure as to what supporting evidence was required or how demands were to be made and verified which could easily have been done. It would surely have done so in the context of what was a professionally drafted contract, with detailed definitions, inter-locking provisions running to some 159 pages including 18 schedules. The absence of such contractual procedures itself tells against Genworth's construction.

93. The above construction emerges from the express language of Clause 10.8 and does not require any support from the surrounding factual matrix or considerations of commercial construction. However there are also contextual reasons supporting AXA's construction and against Genworth's construction, both in terms of the admissible factual matrix, and in terms of the commercial construction of Clause 10.8 set against the backdrop of such factual matrix.

94. As to the former, and as described by Mr Tricot, the issue of FICL/FACL's liability for historic mis-selling, in light of Santander's changing position, had only emerged gradually during pre-SPA due diligence, and was of an alarming but uncertain scope, the extent of which AXA was ill-placed to verify, as both AXA and Genworth were well aware. As well as the scale of the problem being undetermined, it emerged during the due diligence process that the systems in place for handling complaints were far from robust, thus presenting regulatory as well as financial risks, again as both AXA and Genworth knew. This aspect was placed in sharp relief by the disclosure to AXA of the internal Genworth Compliance Monitoring Report dated 11 May 2015 which amongst other matters: (1) featured a large red box on its front page, reading "*Control Environment Opinion: Unsatisfactory*", together with a table indicating that it contained three "*critical*" and three "*high*" risk findings; (2) stated that the review had been conducted "*as complaint handling is assessed to be an area of high regulatory risk due to its continuing status as a focus area for the FCA"*; (3) warned that "*[d]uring the course of the review it became apparent that the complaints being handled by the UK PPI Complaints Team are not being handled in accordance with regulatory requirements*", and that *"[t]he current process for handling PPI Misselling Complaints is not fit for purpose"*; while (4) observing that the *"arrangement between [Genworth] and [Santander] for the handling of [93% of customer] complaints leaves no room for [Genworth] to influence the outcome of the complaint"*.

95. Set against that backdrop it is clear that the purpose of Clause 10.8 was to provide AXA with protection in respect of the risks and inadequate systems that it was being asked to inherit. When he gave evidence Mr Tricot confirmed that this was the only basis on which AXA was prepared to proceed with the sale and purchase transaction, on which it was otherwise keen. All these problems were known to Genworth, and it is clear that Genworth's own belief, expressed strongly to AXA, was that FICL/FACL would shortly be entering into a comprehensive settlement agreement with Santander. In his oral evidence Mr Torres confirmed that Genworth was "*confident*" in this regard, and hence willing to provide AXA with "*broad protection"* (evidence that was entirely consistent with the first witness statement of Mr Shankland, for Genworth, at paragraphs 51 to 53). This was also Mr Tricot's understanding as he confirmed during the course of his oral evidence.

96. By Clause 10.8(a) of the SPA, GFIH agreed to pay to AXA, FICL or FACL, on demand, an amount equal to 90% of all "Relevant Distributor Mis-selling Losses". This obligation was expressed to endure until the date on which FICL/FACL entered into the "Relevant Distributor Agreement" with Santander – i.e. the final agreement, following the Genworth/Santander settlement meeting of 4 June 2015 - in substantially the form agreed between AXA and Genworth at the time of signing the SPA. In the event, and as already noted, that never took place. Accordingly

Clause 10.8 represented, and continues to represent, the loss distribution mechanism as between Genworth and AXA, and allocates the lion's share (90%) of such losses to Genworth.

97. It is to be borne in mind, however (as is apparent from the words of Clause 10.8) that it was contractually contemplated contemporaneously within Clause 10.8 itself, that it would cease to apply when FICL/FACL entered into the "Relevant Distributor Agreement" (and so might only apply for a short time) and indeed as is apparent from the closing words of Clause 10.8 there would be no liability whatsoever upon Genworth under Clause 10.8 if the First Termination Date and the Second Termination Date occurred before Completion. Accordingly whilst Clause 10.8 very much cast the monetary burden of Relevant Distributor Mis-selling Losses upon Genworth (as between AXA and Genworth), Clause 10.8 in and of itself, contemplated that such burden might only persist (if it ever arose) for a very short period of time. That it remains in place, and that the relevant losses are now said to run into hundreds of millions of pounds, means that Genworth has made a bad bargain, but when Genworth agreed to its terms it was perfectly possible that any liability under Clause 10.8 either would not arise at all or would only persist for a very short period of time. In such circumstances it is readily understandable why Clause 10.8 provided "broad protection" in respect of losses based on a covenant to pay on demand against five criteria, and why Genworth were willing to agree the same.

98. In such circumstances AXA's construction is also a business-like and commercial construction that makes commercial sense in contra-distinction to Genworth's construction which is neither. It would have made little, if any, commercial sense for AXA to be under an obligation to advance all reasonable defences. The regulatory complaints handling regime under DISP strongly discouraged regulated entities from taking defences against customers. For example, regulated entities were under an obligation to investigate the complaint competently, diligently and impartially (DISP 1, 1.4.1), and to recognise that oral evidence may be sufficient evidence, and not to dismiss evidence from the complainant solely because it was not supported by documentary proof, and to take account of a complainant's limited ability fully to articulate his complaint. (DISP App 3, 3.3.3). The nature of the regime was that regulated entities should adopt the position of a neutral decision maker. The FCA imposed fines on entities adopting an adversarial approach to complaints handling.

99. In *R (British Bankers' Association) v Financial Services Authority* [2011] EWHC 999 (Admin) at [79], the Court said that "*This clearly contemplates complaints leading to firms deciding to offer redress or remedial action where the complaint would not be actionable…*".

100. And more recently in *Donnelly v The Royal Bank of Scotland Plc* [2016] SC GLA 13, the Scottish Court stated that:

> *"The complaint-handling obligations of the Bank (and the adjudicatory obligation of the FOS) require that customer complaints be determined by reference to the wide and flexible text of what is 'fair and reasonable in all the circumstances of the case'. That compels the decision-maker to consider a*

much broader range of intangible considerations than simple breaches of 'black letter' rules. In contrast with the judicial function, the decision-making duties of the Bank (in the first instance) and of the FOS are not dependent upon proof of a pre-existing liability, or of the breach of a principle or rule, or otherwise confined by reference to such 'absolute factors'...Instead a complaint may be upheld because conduct fell short of 'good industry practice at the relevant time'...or, even more nebulously, 'other standards'... In my opinion, this distinguishes the regulatory adjudication or determination of a complaint from a judicial adjudication in a civil litigation."

101. In those circumstances, any obligation on AXA to "take" any category of "defences" would very much go against the grain of their regulatory duties, and would ultimately risk regulatory sanction. In this regard the Compliance Monitoring Report of 11 May 2015 recorded that Clydesdale Bank had been fined £20.6m in April 2015 for incorrect handling of PPI complaints, and Lloyds Banking Group was fined £117m in June 2015, shortly prior to the terms of the SPA being agreed on 22 July 2015.

102. Against this, Genworth submit that AXA has over-stated the regulatory constraints on taking defences. Genworth emphasise that the nature of the DISP regime is not that AXA was unable to advance all defences to complaints. It was not a strict liability regime, as Mr Morrey accepted in cross-examination, and certain defences were available to AXA/FICL/FACL, e.g. (1) DISP 1.4.1R which envisages that a complaint may be rejected where it is assessed fairly, consistently and promptly that it should not be upheld including for example where another firm is solely responsible for the matter alleged, and (2) DISP 1.8.1R, which envisages that complaints may be rejected without consideration of the merits for being outside of the time limits for referral to FOS as set out in DISP 2.8. Genworth also relies on DISP App 3.3.1G which states expressly that "*The firm is not expected automatically to assume that there has been a breach or failing".*

103. I accept, as indeed do AXA, that the DISP regime does not preclude regulated entities from advancing specific defences to complaints in defined (and limited) circumstances. However the whole tenor of the regime in relation to claims handling was not to look at matters from the perspective of legal liability, or to adopt an approach to claims that might be appropriate in adversarial litigation. The language of the regime does not sit comfortably with an obligation to take all reasonable defences, however narrowly confined.

104. In those circumstances, it is inherently improbable that the objective common intention of the parties was that AXA was under an obligation to pursue all reasonable defences to complaints. When construing contracts, commercial contracts are to be construed in a way that makes good business sense, and in the often quoted words of Lord Diplock in *Antaios Compania Naviera S.A. v Salen Rederierna A.B. ("the Antaios")* [1985] A.C. 191, 201, referred to with approval by Lord Hoffmann in *ICS v West Bromwich* at p. 913E:

> "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense".

105. This is part of the exercise of construing a contract albeit, as has been repeatedly emphasised, what are being construed are the words of the contract itself (see, for example, the analysis of Lord Neuberger PSC in *Arnold v Britton* at [14]-[23]) so that the court is [15]:

> "concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean"… That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions".

As also stressed by Lord Neuberger at [17], *"the reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed."* However, as already noted, there is no express term of the SPA, whether within Clause 10.8 or elsewhere within the SPA, expressly providing that AXA/FICL/FACL were obliged to assert all defences reasonably available to them, and such a construction jars with the regulatory regime in place.

106. In a similar vein, and as already noted above, it was known to the parties that AXA was, by the SPA, inheriting an inadequate complaints-handling system. Because Santander had, up until July 2014 been running the complaints-handling process, FICL/FACL were not equipped with the necessary resources. FICL/FACL had a limited ability to oversee and influence decisions by Santander. And, in view of the FICL/FACL Compliance Monitoring Report dated 11 May 2015, which noted that *"[t]he current process for handling PPI Misselling Complaints is not fit for purpose*", both parties were alive to this point.

107. The SPA has to be construed at the time it was entered into. Whatever the obligations of AXA and FICL/FACL under the SPA, they would have them at the moment of execution of the SPA – and at that point in time (as known to both parties at the time of contracting) FICL/FACL did not have a claims handling regime in place that would allow for all defences reasonably available to be taken. This militates against a construction that it was the common intention of the parties that they should be under such an obligation.

108. An associated point is the fact, known to both parties, that there were a vast volume of customer complaints coming through (frequently in excess of 1,000 per month), of relatively low value, and which were being dealt with substantively by the complaints-handlers at Santander. In those circumstances, it made perfect sense for the parties to agree a covenant to pay that would <u>not</u> require any detailed examination of the merits and characteristics of individual complaints. In contrast, set against such backdrop of high volume, low value claims being handled by Santander, Genworth's construction, and associated claims handling approach,

would be unworkable and uneconomic – again Genworth's construction is contrary to commercial common sense in this regard.

109. In an attempt to take the sting out of the vice of their construction, Genworth submit that AXA could have examined complaints on a sample basis or examined complaints on the basis of identifiable categories of complaint. However, this would be different to the obligation contended for (pursuant to which in every case all defences reasonably available had to be asserted), and would involve reading into Clause 10.8 yet further (and different) words which are not there, to the effect of "*AXA to advance all reasonable defences to complaints on a sampled basis*".

110. Mr Nash accepted orally that the logic of his argument is that in every case where the five criteria are satisfied, Genworth are entitled to say that AXA must prove that all reasonable defences were taken in that case before it pays out. Whilst he suggested that a pragmatic approach could be taken by adopting a sampled approach, that would not change the position as a matter of legal analysis, i.e. that on Genworth's construction, all reasonable defences would have to be advanced to each and every complaint and Genworth would be entitled to proof of the same at a claim by claim level of granularity. For the reasons already identified I am satisfied that this is an uncommercial construction that cannot have reflected the objective common intention of the parties.

F.5 The basis of AXA's construction

111. Ultimately Mr Nash, on Genworth's behalf, disowned any possibility of an implied term, and stated that Genworth's interpretation arose *"on the true and proper construction of the express terms of the contract"* stating, *"It is a construction point. We have promised to hold harmless FICL and FACL against a liability which it has incurred or may incur in the future"* (my emphasis). In essence therefore Genworth's construction depends on establishing that Clause 10.8 is a contract of indemnity which in turn relies upon certain references to losses "incurred" (including in the definition of PPI Mis-Selling Losses). That is, however, thin gruel on the basis of which to construe Clause 10.8 as a contract of indemnity and to require AXA to take all reasonable defences.

112. It is not difficult to surmise why Genworth disavows any possibility of an implied term, as it is clear that such an implied term does not, and cannot arise. Any such term would be inconsistent with the express terms of the SPA, and the final sentence of Clause 20.1, which provides, *"Except as required by statute, no terms shall be implied (whether by custom, usage or otherwise), into this Agreement"* and as such would not be implied. In this regard it could not be suggested that an implied term of the nature required on Genworth's construction would be required by statute. Equally, no such term would be implied on established principles in relation to the implication of terms in fact, as the same would not be necessary. Nor would it be implied in law. However even if the requirements had been met for the implication of such a term, the same would in any event be inconsistent with Clause 20.1 and as such would not be implied.

113. However a formidable difficulty with the suggestion that there was *"on the true and proper construction of the express terms of the contract"* an obligation to

assert all defences reasonably available is that, as already noted, that is not stated in any express terms (not in Clause 10.8 or in any clause of the SPA) and the language Genworth relies on is, I am satisfied, insufficient to support the construction it advocates when Clause 10.8 is construed having regard to the express terms of the SPA and the admissible factual matrix, and in a manner that makes commercial sense. Ultimately Genworth is left to rely on its submission that Clause 10.8 is to be construed as a contract of indemnity.

114. There can be no doubt that Genworth puts its case on the basis that the obligation it contends for arises out of its submission that Clause 10.8 is in the nature of a contract of indemnity, stating at paragraph 44 of its Closing Submissions that the obligation to take all reasonable defences is:

> *"…not an additional requirement but an inherent feature of an obligation to indemnify another party against loss (see section C above), which does not need to be expressly stated. Except where expressly provided otherwise in the indemnity, an indemnified is not entitled to recover under an indemnity for losses incurred where the indemnified has not asserted all defences reasonably available to them."* (emphasis added)

115. This can also be seen from the cases it relies upon, which all relate to an obligation to indemnify:-

(1) *Smith v Howell* (1851) 6 Ex 730, 737; 155 ER 739, 742, in which Pollock CB said: "*by a contract of indemnity, is meant that the party indemnified may recover all such charges as necessarily and reasonably arise out of the circumstances under which the party charged became responsible… As I have stated, it seems that under the contract of indemnity the party is entitled to recover those costs only which have been fairly and reasonably incurred*."

(2) *Travers v Richardson* (1920) 20 SR (NSW) 367 (SC), an Australian case in which it was said that the indemnified "*cannot claim indemnification in respect of payments made voluntarily or unnecessarily*",

(3) *Hooper v Bromet* (1904) 90 LT 234, in which it was said that the indemnified's obligation is not to "*omit in his defence any defence which, if [the indemnifier] had had the conduct of the defence himself, [the indemnifier] would have set up*".

(4) *Siemens Building Technologies FE Ltd v Supershield Ltd* [2009] EWHC 927 (TCC), in which it was said that if the indemnified party seeks to recover the amount of a settlement with a third party under the indemnity, the burden is on the indemnified party to establish that its settlement of the claim was reasonable, otherwise, the loss has been caused not by an event falling within the scope of the indemnity, but by the indemnified's "*voluntary assumption of liability under the settlement*" - *General Fees Inc Panama v Slobodna Plovidba Yugoslavia* [1999] 1 Lloyd's Rep 688.

116. There was, at one point, what Mr Nash described, rightly in my view, as something of a sideshow in the context of Genworth's assertion that Clause 10.8 is

to be construed as a contract of indemnity, namely AXA construing Genworth's argument as being that AXA had failed to mitigate its loss (by taking all reasonable defences), and by way of riposte submitting that that does not work as the obligation under a contract of indemnity is a debt obligation and not a damages obligation, relying on a passage in the judgment of Hirst LJ in *Royscot Commercial Leasing v Ismail* (CA, 29 April 1993:

> "Mr. McGuire, on behalf of the plaintiffs, first approached the case on the issue of principle, without recourse to the actual terms of the indemnity or of the lease agreement. He submitted that a claim under a contract of indemnity, such as this, is not a claim in damages at all, but is a claim in debt for a specified sum due on the happening of an event which has occurred. Accordingly, it should not be open to a person providing an indemnity to challenge his obligation to pay under the contract of indemnity by reference to principles relating to the assessment of damages for breach of contract which have no application to debts. Consequently, he submitted that the learned judge was wrong in principle in his approach as set out in the paragraph of his judgment quoted above.
>
> In my judgment this submission is correct as a matter of law though, for reasons which appear later, I do not think it carries the plaintiff home on the facts of the present case."

117. This point is a sideshow because Mr Nash made clear during the course of his oral submissions that his case was that the obligation to raise reasonable defences was about the proper construction of the (alleged) indemnity rather than a failure to mitigate. I only mention the point because, for the avoidance of doubt, I consider that the weight of authority, and the more orthodox view, is that a claim under a contract of indemnity is a claim in unliquidated damages - see the decision of the House of Lords in *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti)* [1991] 2 A.C. 1 where Lord Goff held at 35G that "I accept that, at common law, a contract of indemnity gives rise to an action for unliquidated damages, arising from the failure of the indemnifier to prevent the indemnified person from suffering damage, for example, by having to pay a third party."

F.6 Conclusion on the construction of Clause 10.8

118. I have identified why every contract must be construed in accordance with its terms and little assistance is given by seeking to pigeonhole a contract into any particular type of provisions such as whether it is in the nature of a contract of indemnity. The question of whether Clause 10.8 is in the nature of a contract of indemnity arises most acutely in the context of Issue 8 and whether Genworth is subrogated to the rights of FICL/FACL against Santander following payment (Issue 8). Due to the overlap with Issue 3 (the proper construction of Clause 8), subrogation is addressed in the next section below. The short answer, however, is that Clause 10.8 is **not** a contract of indemnity, as addressed further in section G.2 below to which reference should be made.

119. However further construction points can also be made. The language used in Clause 10.8 and associated definitions is not "to indemnify" but to "covenant to pay….on demand" i.e. to make a promise to pay on demand – the demand being the trigger to require payment. If the parties had intended the obligation to be a contractual obligation to indemnify they would have so stated. The parties were well aware of the possibility of an indemnity. Indeed there are at least nine instances in which the language of indemnity is used in the SPA, in Clauses 8.6, 8.9, 8.11, 8.15, 9.2, 10.5, 10.6 and 15.1 (two of those instances being within Clause 10 itself) but that language is not used in Clause 10.8, and if that is what the parties had intended they would surely have used such language – but they did not. They used the language of "covenant to pay…on demand".

120. Genworth refer to the use of the word "incurred", for example in the definition of "PPI Mis-selling Losses" which is a defined term within "Relevant Distributor Mis-selling Losses" the definition of "PPI Mis-selling Losses" referring to *"all damages, losses, liabilities, penalties, fines, costs, interest and expenses, including for the avoidance of doubt costs and liabilities relating to FOS fees, claim administration, complaints handling, customer notifications and redress amounts, incurred by [FICAL/FACL] whether before or after Completion in respect of"* (the matters set out in (a) to (c) that follow) (emphasis added).

121. However Genworth's reliance on the use of the word "incurred" submitting that it is indicative of the obligation being one of indemnification is thin gruel indeed for its construction argument, and is in any event misplaced as a matter of language and meaning, in the context in which it is used. It is clear that in this context "incurred" simply bears its ordinary English language meaning – i.e. sustained, albeit that "incurred" is the factual word that best fits linguistically for all the various type of matters specified. Additionally, some of them - for example FOS fees - are simply sustained/incurred as a matter of fact and could not possibly carry with them an obligation to assert all defences reasonably available in relation thereto. It is clear that, in context, the word "incurred" is not being used to connote an indemnification obligation still less to carry with it an (implicit) obligation to assert all reasonable defences. Genworth's construction of the word "incurred" ignores its meaning set in the context of what is being referred to, and requires that word to do far more work than is justified or appropriate, in the context of this particular bespoke clause and what it is directed at having regard to the SPA's express terms and the admissible factual matrix as already identified and addressed. "Incurred" is being used in precisely the same sense when addressing the five conditions that must be satisfied.

122. The reality is that if the parties had intended that the obligation under Clause 10.8 was to be one of indemnification they would have said so, and if they had intended there to be an obligation to take all reasonable defences they would also have said so – in each case as an express term. Equally such matters cannot be implied, as any such implied term is neither necessary nor consistent with Clause 20. Applying the language of Clause 10.8 and construing it against the backdrop of the admissible factual matrix thereto, leaves no room for the obligation to be one of indemnification "on the proper construction of the contract" as Genworth contends.

123. I am satisfied that on its true and proper construction Clause 10.8 is a bespoke clause with the meaning contended for by AXA, for the textual and contextual reasons I have identified. I am satisfied and find that that there is no reasonable defences requirement in Clause 10.8 or on the proper construction of the SPA as a whole. Rather, as already identified, on the ordinary and natural meaning of the language of Clause 10.8 and the embedded definitions contained therein, Genworth is, by the express terms of Clause 10.8(a), obliged to pay ("will pay") "on demand" an amount equal to 90% of all Relevant Distributor Mis-Selling Losses which (as a result of the embedded definitions) means on a demand by AXA in an amount equal to a cost incurred by FICL/FACL that relates to:

(1) a claim or complaint;

(2) regarding the selling of a PPI product;

(3) underwritten by FICL/FACL;

(4) sold by Santander;

(5) prior to 1 January 2005,

and there is no requirement of the SPA, on its proper construction, that AXA is, in addition, required to accompany the demand with evidence of, or prove that there has been taken, "all defences reasonably available to them."

124. Accordingly Issue 3, *"Is Genworth's liability under Clause 10.8 limited to losses in respect of which AXA is able to demonstrate that AXA/FICL/FACL… asserted all defences reasonably available to them in respect of any complaints by consumers"* is to be answered in the negative.

G. ENTITLEMENT TO SUBROGATION (ISSUE 8)

125. This issue arises principally between Genworth and Santander (albeit it is also of relevance to Issue 3 and the proper construction of Clause 10.8 as noted above). Genworth's position is that if it is obliged to make any payment to AXA/FICL/FACL pursuant to Clause 10.8 of the SPA (which I have held that it is), Genworth is entitled to be subrogated to any potential rights that FICL/FACL may have against Santander. It submits that Clause 10.8 is an indemnity clause giving rise in equity and/or as a matter of common law to a right of subrogation, which it says is neither expressly nor impliedly excluded under the SPA.

126. Santander's case in outline is that Clause 10.8 is not a contract of indemnity and so is incapable of giving rise to rights of subrogation; alternatively even if clause 10.8 could be characterised as a contract of indemnity, the express provisions of the SPA are inconsistent with rights of subrogation, such that no subrogation rights arise following payment under Clause 10.8.

127. In order to establish its alleged rights to subrogation upon payment under Clause 10.8 of the SPA, it is common ground that Genworth must establish that Clause 10.8 is a contract of indemnity for the purposes of the subrogation doctrine.

If Clause 10.8 is not an indemnity obligation, that is sufficient to dispose of Genworth's claim in respect of the Subrogation Declaration.

128. Accordingly, the following questions arise:

(1) Is Clause 10.8 an indemnity?

(2) If so, are rights of subrogation inconsistent with the terms of the SPA so as to be excluded?

129. Before addressing those questions, I will first consider the juridical basis of subrogation.

G.1 Subrogation: Applicable Legal Principles

130. There are two types of subrogation recognised by the law: contractual subrogation and equitable subrogation. In *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 AC 221, Lord Hoffman at 231-2 described the two types of subrogation as *"radically different institutions. One is part of the law of contract and the other part of the law of restitution."* Equitable subrogation, whose foundation is to reverse unjust enrichment caused by defective transactions, has no application to the present dispute; this case is concerned only with contractual subrogation. The following discussion relates only to contractual subrogation, and where the term 'subrogation' is used, it is to be taken as shorthand for "contractual subrogation".

131. What is the juridical basis of contractual subrogation? Santander submit that it is a creature of contract which arises by virtue of an implied term. Genworth, by contrast, submit that an exclusively contractual analysis of subrogation has been expressly disavowed by the courts.

132. The starting point is the judgment of Diplock J (as he then was) in *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd* [1962] 2 QB 330, in which he said at 339-40:

> "The expression "subrogation" in relation to a contract of marine insurance is thus no more than a convenient way of referring to those terms which are to be implied in the contract between the assured and the insurer to give business efficacy to an agreement whereby the assured in the case of a loss against which the policy has been made shall be fully indemnified, and never more than fully indemnified."

133. Lord Diplock, then in the House of Lords, reiterated his view in *Hobbs v Marlowe* [1978] AC 16, where at 39 (and referring back to his judgment in *Yorkshire Insurance Co Ltd v Nisbet Shipping*) he stated that:

> "For my own part I prefer to regard the doctrine of subrogation in relation to contracts of insurance as having its origin at common law in the implied terms of the contract and calling for the aid of a court of equity only where its auxiliary jurisdiction was needed to compel the assured to lend his name to his

insurer for the enforcement of rights and remedies to which his insurer was subrogated".

134. Lord Diplock's analysis was therefore that subrogation is contractual in origin. Equity comes into play where there is a need for equity to assist with remedies – for example lending the indemnified's name.

135. The juridical basis of subrogation rights was subsequently considered in *Lord Napier and Ettrick v Hunter* [1993] AC 713. The majority of the House of Lords endorsed Lord Diplock's view that insurers' subrogation rights arise as a result of a contractual implied term, and that the right of subrogation itself is conferred by and derives from the relevant contract of indemnity.

136. Lord Templeman (with whom Lords Jauncey, Browne-Wilkinson and Slynn agreed) said at 736:

> "It may be that the common law invented and implied in contracts of insurance a promise by the insured person to take proceedings to reduce his loss, a promise by the insured person to account to the insurer for moneys recovered from a third party in respect of the insured loss and a promise by the insured person to allow the insurer to exercise in the name of the insured person rights of action vested in the insured person against third parties for the recovery of the insured loss if the insured person refuses or neglects to enforce those rights of action. There must also be implied a promise by the insured person that in exercising his rights of action against third parties he will act in good faith for the benefit of the insured person so far as he has borne the loss and for the benefit of the insurer so far as he has indemnified the insured person against the insured loss. My Lords, contractual promises may create equitable interests. An express promise by a vendor to convey land on payment of the purchase price confers on the purchaser an equitable interest in the land. In my opinion promises implied in a contract of insurance with regard to rights of action vested in the insured person for the recovery of an insured loss from a third party responsible for the loss confer on the insurer an equitable interest in those rights of action to the extent necessary to recoup the insurer who has indemnified the insured person against the insured loss."

137. Lord Browne-Wilkinson (with whom Lords Templeman and Jauncey agreed) said at 752:

> "In my judgment, the correct analysis is as follows. The contract of insurance contains an implied term that the assured will pay to the insurer out of the moneys received in reduction of the loss the amount to which the insurer is entitled by way of subrogation. That contractual obligation is specifically enforceable in equity against the defined fund (i.e., the damages) in just the same way as are other contracts to assign or charge specific property e.g. equitable assignments and equitable charges. Since equity regards as done that which ought to be done under a contract, this specifically enforceable

> right gives rise to an immediate proprietary interest in the moneys recovered from the third party. In my judgment, this proprietary interest is adequately satisfied in the circumstances of subrogation under an insurance contract by granting the insurers a lien over the moneys recovered by the assured from the third party."

138. However, Lord Goff took a different view. At 743 he said:

> "I am unable to agree with Lord Diplock that subrogation is in this context concerned **solely** with the mutual rights and obligations of the parties under the contract. this connection, I observe from the report of *Yorkshire Insurance Co. Ltd. v. Nisbet Shipping Co. Ltd.* [1962] 2 Q.B. 330 that the important case of *White v. Dobinson*, 14 Sim. 273; 116 L.T.O.S. 233 was not cited in argument, and indeed the existence of an equitable proprietary right was not in issue in that case. In these circumstances I cannot derive from Lord Diplock's judgment any justification for sweeping the line of equity cases under the carpet as though it did not exist…"
>
> (emphasis added)

139. Nevertheless, Lord Goff continued at 743, noting that:

> "Even so, an important feature of these cases is that the principle of subrogation in the law of insurance arises in a contractual context… Furthermore, it has not been usual to express the principle of subrogation as arising from an implied term in the contract. Even so it has been regarded, both at law and in equity, as giving effect to the underlying nature of a contract of insurance, which is that it is intended to provide an indemnity but no more than an indemnity."

140. Subsequently, in *Banque Financière de la Cité SA v Parc (Battersea) Ltd*, Lord Hoffmann summarised the position at 231 and said:

> "Lord Diplock, for example, was of the view that the doctrine of subrogation in contracts of insurance operated entirely by virtue of an implied term of the contract of insurance (*Hobbs v Marlowe* [1978] AC 16, 39) and although in *Lord Napier and Ettrick v Hunter* [1993] AC 713 your Lordships rejected the exclusivity of this claim for the common law and assigned a larger role to equitable principles, **there was no dispute that the doctrine of subrogation in insurance rests upon the common intention of the parties and gives effect to the principle of indemnity embodied in the contract**. […] **Subrogation in this sense is a contractual arrangement for the transfer of rights against third parties and is founded upon the common intention of the parties**."
>
> (emphasis added)

141. I am satisfied that Lord Hoffmann's summary in *Banque Financière de la Cité SA v Parc (Battersea) Ltd* accurately states the true position, that the type of subrogation under consideration is based on the common intention of the parties to a contract and as such where subrogation rights are not conferred expressly (by an

express term of a contract) any subrogation rights are to be implied (by an implied term) so as to reflect the (objective) common intention of the parties. The House of Lords in *Lord Napier and Ettrick* rejected the exclusivity of the contractual analysis, (because equity also has a role to play), but maintained that the doctrine derives from the common intention of the parties embodied by the contract. A right of subrogation is conferred by the contract pursuant to which the relevant indemnity is paid, either as an express or implied term reflecting the common intention of the parties. The role of equity is supplemental. Equity gives effect to rights by providing remedies for their enforcement, but the rights themselves stem from the common intention of the parties reflected in the contract.

142. Genworth's precise position as to the nature of subrogation was, at times, difficult to tie down. On the one hand, Genworth said that the House of Lords in *Lord Napier and Ettrick* found the basis of the doctrine of subrogation to be equitable (which as appears above was not entirely accurate). On the other, it also cited the subsequent decision of Lord Hoffmann in *Banque Financière de la Cité SA v Parc (Battersea) Ltd* that "*The doctrine of subrogation in insurance… gives effect to the principle of indemnity embodied in the contract*", and also submitted that subrogation rights are an inherent part of the contract of indemnity from the moment of formation of the contract. I am satisfied that Lord Hoffmann's summary in *Banque Financière de la Cité SA v Parc (Battersea) Ltd* accurately states the true position.

G.2 Is Clause 10.8 an indemnity?

143. The first question is whether Clause 10.8 is an indemnity. Genworth's position is that it is. Santander's position is that is it not, and should instead be characterised as a covenant to pay. I am satisfied that on its true and proper construction, Clause 10.8 is not an indemnity, and can properly be characterised as a "covenant to pay" though there is no necessity that it be given any particular label, and labels do not assist in ascertaining the proper construction of an obligation in a contract.

144. Whilst Clause 10.8 provides for Genworth to make payment "*to the Purchaser and each Target group Company*" (i.e. AXA and FICL/FACL), FICL and FACL were **not** themselves parties to the SPA. Only AXA and Genworth were parties to the SPA, and only AXA is capable of claiming under the SPA. That is why it alone is the Claimant in these proceedings. AXA has no relevant rights against Santander to which Genworth could be subrogated. Those rights belong to FICL/FACL, which are not parties to the SPA.

145. The availability of contractual subrogation rights depends on the paying party having indemnified the receiving party in respect of a loss suffered by the receiving party. The foundation of the doctrine is that the party in receipt of the relevant payment obtains an indemnity for a loss which it itself has incurred. This is evident from a long line of established authorities.

146. In *Castellain v Preston* (1883) 11 QBD 380, Bowen LJ said at 401-2:

> "What is the principle which must be applied? It is a corollary of the great law of indemnity, and is to the following effect: That a person who wishes to recover for and is paid by the insurers as for a total loss, cannot take with both hands. If he has a means of diminishing the loss, the result of the use of those means belongs to the underwriters. If he does diminish the loss, he must account for the diminution to the underwriters."

147. In *Simpson v Thomson* (1877) 3 App Cas 279 Lord Cairns LC said at 284:

> "I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss."

148. And in *Edwards (John) and Co v Motor Union Insurance Co Ltd* [1922] 2 KB 249, at 254-5, McCardie J said:

> "It will be observed that the whole basis of the subrogative doctrine is founded on a binding and operative contract of indemnity, and that it is from such a contract only that the equitable results and rights as indicated above derive their origin. […] [Subrogation] does not become operative or enforceable until actual payment be made by the insurer. It derives its life from the original contract. It gains its operative force from payment under that contract. Not till payment is made does the equity, hitherto held in suspense, grasp and operate upon the assured's choses in action. In my view the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity."

149. Clause 19.10 of the SPA excludes the operation of the Contracts (Rights of Third Parties) Act 1999, save where expressly conferred in the SPA. It provides that "*Except as expressly stated in this Agreement, a person who is not a party to this Agreement may not enforce any of its terms under the UK Contracts (Rights of Third parties) Act 1999."*

150. Third party rights are expressly given in the SPA, for example in Clause 9.2, which provides that:

> "The Purchaser shall, as soon as reasonably practicable after Completion, and in any case no later than five (5) Business Days after Completion, procure that the relevant member of the Sellers' Group is released from the guarantees and indemnities given by that member in respect of any liability or obligation of the Target Group as listed in Part II of Schedule 8, and pending such release the Purchaser shall indemnify that member against all liabilities under those guarantees and indemnities.

Clause 9.2 may be enforced by each relevant member of the Sellers' Group against the Purchaser under the UK Contracts (Rights of Third Parties) Act 1999. The provisions of clause 9.2 may be varied by agreement between the Sellers and the Purchaser (and the Sellers may also release or compromise in whole or in part any liability in respect of rights or claims contemplated by clause 9.2) without the consent of any other member of the Sellers' Group."

(emphasis added)

151. Where the parties wished to expressly grant third party rights, they did so expressly. Clause 10.8 contains no such express conferral, the result of which is that FICL and FACL have no third-party rights to enforce Clause 10.8. Clause 10.8 is enforceable exclusively by AXA, the only counterparty thereto.

152. Mr Nash sought to counter this difficulty by submitting that what he characterised as the principle in *Beswick v Beswick* [1968] AC 58 (HL) could be relied upon to suggest that FICL/FACL could compel AXA to sue to enforce rights on their behalf. I do not see how they could do that when third parties are expressly denied rights by the terms of the SPA, nor do I consider that there is anything that was said in *Beswick v Beswick* that has any application on the facts of the present case, or that would get around the lack of privity or third party rights in the present case. I also do not consider that FICL/FACL could compel AXA to sue to enforce rights on their behalf if AXA was unwilling or uncooperative – see *Gurtner v Circuit* [1968] 2 Q.B. 587.

153. Contractual subrogation, by its very nature as a creature of contract, requires that the indemnified and the person who has the relevant rights against the third party are the same legal entity. Mr Zellick QC, in Santander's Opening Skeleton Argument, threw down the gauntlet to Genworth pointing out that Genworth has not been able to identify a single case (spanning the period of some 300 years since the doctrine of subrogation was identified) in which anyone has ever been found to be entitled to exercise subrogated rights where such rights belong to someone other than the counterparty to the contract pursuant to which the "indemnity" was paid. Yet, as is rightly pointed out, that is what Genworth's case is on the present facts. It is claiming to be entitled to be subrogated to FICL/FACL's rights against Santander, by reason of meeting an obligation to AXA, under Clause 10.8 of the SPA. Genworth's case would therefore, in my view, amount to an unchartered and inappropriate extension of the subrogation doctrine.

154. Mr Nash submits, on behalf of Genworth, that it is not uncommon for two parties to contract for a non-party to receive an indemnity, giving as examples the case of a D&O insurance policy taken out by a company or a vehicle accident policy with cover for named insureds and/or passengers. In this regard, in an attempt to take up the gauntlet thrown down by Mr Zellick, Mr Nash referred in closing to the case of *CSE Aviation Ltd v Cardale Doors Ltd* (unreported, 13 April 2000), which it was submitted provides an example of an insurer under a contract being entitled to be subrogated to rights belonging to someone who was not a party to the relevant contract of indemnity.

155. However, I consider that such reliance is misplaced as the pilot in that case was a party to the contract of insurance. The facts in that case were as follows. The claimant operated a flight training school and chartered the defendant's helicopter for use in its operations. A pilot engaged by the claimant negligently crashed the helicopter, injuring two passengers. The passengers sued the claimant and the pilot for their injuries, and judgment was entered against the pilot but not the claimant. The insurers then satisfied the judgment pursuant to the indemnity contained in the policy. The insurers then commenced proceedings against the defendant seeking to recover the sums that they had paid. They claimed to be subrogated to the claimant's rights. Morison J dismissed the action on the basis that the claimant had incurred no loss because judgment on the passengers' claims had succeeded only against the pilot and not the claimant. The claimant had suffered no loss, and subrogation could not arise.

156. At [15], Morison J said, *obiter*:

> "This is not an attractive result since the proceedings would probably have taken a different course had Captain Warren been the Claimant, with Skandia being subrogated to him. Then there would be substance to the claim"

157. However, it was clear from the words of the policy that the pilot was insured (see the definition of the word "INSURED" at [7]) as Morison J found at [8]. He would have been able to enforce the policy in his own name because he was, as a matter of law, a party to the contract. Morrison J so found at [13]:

> "Subrogation does not look to the person who paid the premium, it identifies the assured upon whose shoulders liability rests and on whose behalf the compensation payments have been made. No liability upon the Claimant has been established, no compensation has been paid on their behalf, and the principle of subrogation simply does not arise in their case. I do not consider that Mr Philip Shepherd, on behalf of the Claimant, presented the Court with any answer to this point. He suggested that Captain Warren was not an Insured within the Skandia policy, but the words make it clear, I think, that he was".

158. That is quite different to the present case, where FICL/FACL are not parties to the SPA and accordingly could not bring proceedings to enforce Clause 10.8. Nor do I consider there to be any merit in Genworth's analogy by reference to D&O policies, because under a D&O policy, directors will be named as assured parties: see *Colinvaux's Law of Insurance*, 12th Ed., 2019, at paragraph 21-253.

159. Furthermore, Genworth's case is premised on disregarding the separate legal personalities of AXA and FICL/FACL, which is of course, a fundamental aspect of company law, subject only to limited and well defined exceptions. Wholly owned subsidiary companies are distinct legal entities from their parents. The mere fact that AXA has acquired FICL/FACL does not mean that AXA incurred the loss. On the contrary, it was FICL/FACL who incurred the losses. AXA have merely purchased an entity with a substantial liability. It is only by eliding together AXA and FICL/FACL, and disregarding their separate corporate personality, that Genworth can say that the party entitled to an alleged indemnity (AXA) is the same entity which has incurred the losses and which has the claim to which Genworth

wishes to be subrogated against Santander (FICL/FACL). That is simply wrong. They are separate entities, only AXA is party to the contract, and only FICL/FACL has any claim against Santander.

160. Genworth submits that under Clause 10.8, it agreed to indemnify both AXA and FICL/FACL. However, on its true construction, Clause 10.8 imposes an obligation on Genworth to pay AXA or at AXA's direction. The fact that the demand for payment was, as a matter of fact, directed to FICL is irrelevant for two reasons. First, it is post-contractual conduct which is inadmissible as an aid to construction. Second, it is in any event an indicator only of the payment mechanics, and not the nature of the obligation itself. AXA was free to direct payment wherever it so pleased, including to FICL.

161. In the above circumstances, and for the reasons identified above, Clause 10.8 is not to be regarded as a contract of indemnity, and no rights of subrogation arise in favour of Genworth if and when Genworth makes a payment under Clause 10.8 upon the demand of AXA. Accordingly Issue 8 is answered in the negative.

K.3 If Clause 10.8 is an indemnity, do any rights of subrogation arise or are rights of subrogation inconsistent with the terms of the SPA (and as such excluded)?

162. If, contrary to my findings as aforesaid, Clause 10.8 were properly to be construed as an indemnity, the question would arise as to whether or not Clause 10.8 in any event gave rise to subrogation rights. It would not do so if such rights would be inconsistent with the terms of the SPA.

163. It follows from the contractual basis of rights of subrogation that no rights of subrogation can arise where a contract expressly excludes such rights. It also follows that subrogation rights will not arise where they are impliedly excluded by a contract. That is merely an extension of the general principle that a term will not be implied into a contract where it is inconsistent with the express terms of the contract, even if not expressly excluded by them: *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, at [28] per Lord Neuberger.

164. The starting point is that the SPA contains no express subrogation rights in respect of Clause 10.8. The question is therefore whether any such term is implied so as to reflect the parties' common (but unexpressed) intention. I consider that there are numerous provisions of the SPA which militate against the existence of any such subrogation rights.

165. First, Clause 20.1 of the SPA excludes implied terms save those implied by statute. It provides that:

> "This Agreement and the other Transaction Documents contain the whole agreement between the parties relating to the transactions contemplated by the Transaction Documents and supersede all previous agreements, whether oral or in writing, between the parties relating to these transactions, provided that, the confidentiality agreement between the Sellers' Guarantor and the

Purchaser dated 9 February 2015 shall remain in full force and effect to the extent required under clause 14.7 above. **Except as required by statute, no terms shall be implied (whether by custom, usage or otherwise) into this Agreement**."

(emphasis added)

166. Genworth submits that Clause 20.1 is not to be construed as excluding terms implied by law. I do not consider that there is any warrant for so construing Clause 20.1. It is clear on its face and excludes all implied terms except as required by statute. There is no ambiguity. There is no reason to construe it as not extending to terms implied in law. Indeed given the specific carve out of terms implied by statute, as a matter of language, the objective common intention of the parties is that there was to be no other carve out.

167. Genworth also submit that Clause 20.1 does not have the effect of excluding a right of subrogation because *"the right of subrogation does not depend on an implied term*". However it is clear from the authorities, as addressed above, that a right of subrogation (whether or not it arises by way of implied term) on any view arises out of the "common intention of the parties" and I can see no scope for it reflecting the common intention of the parties given the terms of Clause 20.1, or more significantly Paragraph 8.2 of Schedule 5 of the SPA, as addressed below.

168. Genworth also submits that subrogation rights will only be excluded where there are clear words to that effect, in circumstances where the contract is concluded between experienced commercial parties. It says that if such parties have addressed subrogation but not chosen to exclude it, the courts should be very slow to conclude that they intended to exclude it, citing *Liberty Mutual Insurance Co UK v HSBC Bank plc* [2002] EWCA Civ 691 at [41]-[42], [49]-[51], [56] and [59] per Rix LJ, and [102] per Arden LJ (as she then was). The difficulty with that submission is that the parties have not expressly addressed subrogation in the SPA (though see paragraph 8.2 of Schedule 5 of the SPA, as addressed below).

169. Finally, Genworth refers to the fact that Clause 19.9 makes clear that rights under the SPA are "*not exclusive of rights and remedies provided by law"*. There is nothing in this point. Clause 19.9 is subject to the exception "*except as otherwise expressly provided by this Agreement*", and Clause 20.1 does expressly provide otherwise. In any event, the form of subrogation under consideration is a creature of contract, and the right of subrogation that is sought to be relied upon is not properly characterisable as a right or remedy provided by law (albeit that equity will assist where a right does exist).

170. I am satisfied that no implied right of subrogation could arise given the terms of Clause 20.1, any such right either being inconsistent with, or excluded by, such express term. In any event, and as addressed below, I consider that on the true and proper construction of paragraph 8.2 of Schedule 5 of the SPA, there is no scope for any implied right of subrogation. Paragraph 8.2 of Schedule 5 of the SPA makes provision for the circumstances in which Genworth is entitled to take advantage of FICL/FACL's claims against Santander. It provides that:

"If:
(a) the Sellers make a payment in respect of a Warranty Claim (other than a Tax Claim), a Clause 10.7 Covenant Claim or a claim under clauses 10.8 or 10.9 (the "Damages Payment");

(b) at any time after the making of such payment the Target Group or the Purchaser receives any sum which would not have been received but for the matter or circumstance giving rise to that Warranty Claim, a Clause 10.7 Covenant Claim or a claim under clauses 10.8 or 10.9 (the "Third Party Sum");

(c) the receipt of the Third Party Sum was not taken into account in calculating the Damages Payment; and

(d) the aggregate of the Third Party Sum and the Damages Payment less all unreimbursed costs incurred by the Target Group or the Purchaser in recovering such Damages Claim and Third Party Sum exceeds the amount required to compensate the Purchaser in full for the loss or liability which gave rise to the Warranty Claim, Clause 10.7 Covenant Claim or claim under clauses 10.8 or 10.9 in question (such excess being the "Excess Recovery"),

the Purchaser shall, promptly following receipt of the Third Party Sum by it or the Target Group, repay to the Sellers an amount equal to the lower of (i) the Excess Recovery and (ii) the Damages Payment."

171. Paragraph 8.2 of Schedule 5 operates as follows. If (1) Genworth makes payment under Clause 10.8; and (2) FICL/FACL later recover from Santander in respect of the matter which gave rise to the claim under Clause 10.8; and (3) that amount recovered from Santander was not taken into account when Genworth made its payment under Clause 10.8; and (4) the amounts received from Genworth pursuant to Clause 10.8, and the amounts received from Santander, exceed FICL/FACL's actual loss for the relevant matter, then AXA is under an obligation to repay to Genworth an amount equal to the lower of the excess recovery and the amount received from Santander.

172. As such, the regime by which the parties intended that Genworth would be able to recover from third parties is provided for in Schedule 5 paragraph 8.2. It would be inconsistent with that regime to imply another method by which Genworth could recover from third parties (i.e. by exercising rights of subrogation). As Santander put the point in their closing submissions, "*paragraph 8.2 of Schedule 5 occupies the field; there is no room and no justification for Genworth to be given subrogation rights in addition to the express rights for which it bargained",*

173. Thus, even if, contrary to my findings, Clause 10.8 were to be construed as an indemnity, and Clause 20.1 did not expressly exclude rights of subrogation, any such rights are impliedly excluded under paragraph 8.2 of Schedule 5 of the SPA. Put another way, the existence of any such rights would be inconsistent with Clause 20.1 and/or the express contractual regime in paragraph 8.2 of Schedule 5.

H. RES INTER ALIOS ACTA (ISSUE 9)

174. In oral closings, all of the parties agreed that a payment under Clause 10.8 will be *res inter alios acta* for the purposes of FICL/FACL's claims against Santander. Accordingly Issue 9 is to be answered in the negative.

I. CONSEQUENCES OF SUBROGATION (ISSUE 10)

175. If, contrary to my findings, a right of subrogation would arise in favour of Genworth following payment under Clause 10.8, a number of ancillary issues would arise as to the operation of such rights: specifically whether Genworth would be entitled:
(1) to require FICL/FACL to lend their name to legal proceedings against Santander for the benefit of Genworth (and if so when);
(2) to require FICL/FACL to take all steps necessary to commence and pursue those proceedings, including giving notice under the Standstill Agreement between FICL/FACL and Santander; and
(3) to control the conduct of all such legal proceedings and to give all instructions as may reasonably be required to FICL/FACL for the conduct of such legal proceedings.

I.1 Lending Their Name

176. If, contrary to my findings, Genworth were entitled to rights of subrogation it is common ground that it would be entitled to require FICL and FACL to lend their name to proceedings against Santander. An issue that arises, however, is that Genworth submits that its subrogation rights would crystallise on a complaint-by-complaint basis once payment has been made of 90% of the losses resulting from an individual "PPI Complaint" or an "Action" relating to PPI "Selling Activity" and payment of any sums will be sufficient.

177. I do not consider that that submission is well-founded. First, there is a well-established rule that subrogation cannot arise until an indemnifier has fully performed his obligations: *Page v Scottish Insurance Corp Ltd* (1929) 33 Ll L Rep. 134, per Scrutton LJ at 137. Genworth would not have fully performed its obligations by meeting a single claim. Secondly, Clause 10.8 requires payment of 90% of **all** Relevant Distributor Mis-Selling Losses. It would only be once Genworth had paid 90% of all Relevant Distributor Mis-Selling Losses that Genworth had fully performed its obligations. I would also add that it is inherently improbable that the objective common intention of the parties was that if there had been any subrogation rights, they would be exercisable on a complaint-by-complaint basis. That would lead to a major, and costly, administrative burden upon AXA and its subsidiaries (not least in the context of the *dominus litis* issue addressed below).

I.2 Termination of the Standstill Agreement

178. Genworth's position is that, if it were entitled to rights of subrogation (contrary to my findings), it would be entitled, following Clause 10.8 payments, to force FICL/FACL to terminate the Standstill Agreement. Neither party identified any authority on whether an indemnifying party exercising rights of contractual

subrogation may oblige the indemnified to terminate its prior contractual agreements, including a standstill agreement with a third party. The issue is both hypothetical and premature in the present case. It is hypothetical as I have found that no subrogation rights arise, and it is premature as no payments have been made under Clause 10.8 and so the precise factual context is also unknown. Whether or not the rights of a subrogated party extend to the right to override, renegotiate or terminate wider commercial and contractual arrangements is a novel point, which has the potential to have far-reaching implications (not least in a scenario such as the present where AXA is bearing 10% of the losses and there might also be good reasons why termination would not be in the best commercial interests of AXA (or of FICL/FACL)). Also if an injunction was being sought to force AXA to undertake such a course (assuming that Genworth had a right in principle to force such a course) then equitable, and discretionary, considerations could arise impacting upon whether relief should be granted. I consider that such an issue would best be determined not on a hypothetical basis but based on actual facts where a right of subrogation existed and a party had been indemnified. Accordingly I do not consider that it would be appropriate for me to opine on this hypothetical, and premature, question, and in such circumstances I do not do so.

I.3 Dominus Litis

179. Genworth's position is that were it entitled to be subrogated, it would be entitled to control the litigation. Santander's position is that Genworth is not so entitled, and that there is clear authority on this point. Where an insurer has satisfied the full extent of his liability under the policy but it is insufficient to cover the insured's entire loss, the insurer is still entitled to rights of subrogation and may insist that the insured claims against the third party. However, until the insured has received a full indemnity for his loss, the insured retains the exclusive right to control the proceedings against the third party: *Commercial Union Assurance Co v Lister* (1874) LR 9 Ch App 483.

180. Genworth accept that *Commercial Union* decision represents the English law position and that it has done so for at least 145 years. However, it asks the Court to depart from this long-established approach and instead follow an approach that was potentially foreshadowed in a decision of a Canadian Court, in *Zurich Insurance Company Ltd v Ison TH Auto Sales Inc* [2011] ONSC 1870. However, upon examination of that case, it would appear that the law in Canada, at the present time, is no different to English law, and it would take a great deal to displace a rule that has stood for so long and makes obvious sense, not least because it provides certainty as to who should have control of litigation. It may in fact be that I am bound by the decision in *Commercial Union*, but whether I am or not I consider it is rightly decided, and would follow it.

181. Clause 10.8 of the SPA requires Genworth to pay 90% of the Relevant Distributor Mis-selling Losses, from which it follows that FICL and FACL will never be fully indemnified in respect of their losses. As such, FICL and FACL would in any event retain their rights to control any litigation against Santander even if, contrary to my findings, Genworth might acquire any rights of subrogation.

J. THE BUNDLING ISSUE (ISSUE 3B)

182. This issue raises a short point of construction, also relating to the scope of Clause 10.8. The insurance products that were mis-sold by Santander on behalf of FICL/FACL were 'bundles' of products, which included 'pure' payment protection insurance (i.e. insurance against the risk of the customer not being able to meet credit payment through unemployment, sickness, death etc.), along with bolted-on policies of purchase protection (i.e. insurance against purchased goods being damaged, stolen etc.) and price protection (i.e. insurance against the price of purchased goods subsequently being reduced, e.g. in a seasonal sale). The bolted-on policies were not charged for separately in terms of premium, and could neither be purchased separately nor severed from the pure payment protection element.

183. Genworth's liability under Clause 10.8(a) is to pay 90% of "*Relevant Distributor Mis-selling Losses*", which are defined in Clause 1.1 as "*any PPI Mis-selling Losses which arise out of or directly relate to PPI Selling Activity undertaken by the Relevant Distributor [i.e. Santander], its agents, or its appointed representatives (as the case may be) prior to 1 January 2005*."

184. *"PPI Selling Activity"* is defined in Clause 1.1 as *"any activity undertaken by a PPI Distributor or the Relevant Distributor (as the case may be) or their agents or appointed representatives (as the case may be) in relation to the sales, marketing or administration of PPI products underwritten by any Target Group Company".* And *"PPI"* is defined as *"payment protection insurance, as such term is commonly understood in the insurance market"*.

185. Genworth's position on the bundling issue is that any sums claimed by AXA in respect of losses arising out of the selling of a product bundle that includes price protection cover and/or purchase protection cover falls to be reduced to reflect the fact that some of the losses are not pure PPI losses, within the meaning of Relevant Distributor Mis-selling Losses. It says that the common understanding of PPI in the insurance market is 'pure' PPI.

186. AXA's position on the bundling issue is that the common understanding of PPI in the insurance market extended to bundled PPI products, including purchase protection insurance and price protection insurance.

187. The key question is: how was PPI commonly understood in the insurance market at the time of the SPA?

188. Expert reports were adduced on behalf of AXA and Genworth to assist in answering this question: David Morrey for AXA and Brian Jackson for Genworth. The experts agreed in the Joint Memorandum that they come from different backgrounds. Mr Jackson has a long history in underwriting PPI in the Lloyd's market going back to the 1980s, whereas Mr Morrey is a partner in a leading professional services firm with 30 years of experience managing risk and regulatory issues, including working on major PPI remediation projects.

189. The experts agreed that the starting point for the definition of PPI was the definition in the Competition Commission Market Investigation Report on PPI, namely that:

> *"Insurance for the purpose of protecting a borrower's ability to maintain credit repayments in the event that the borrower becomes unable to maintain the repayments due to accident and/or sickness and/or unemployment and, under some policies, death."*

190. Also agreed in the experts' Joint Memorandum was (1) that the volume of PPI policies being underwritten at the time of the SPA was relatively low, albeit that there was still a market to some degree; (2) that in September 2015, there was significant remediation activity for past mis-selling of PPI across a large number of market participants; and (3) that redress was always calculated on the basis of the premium on the entire policy.

191. In my judgment, AXA's construction is the correct construction and for the following reasons. By the time of the SPA, PPI (in whatever form) was not being sold in any material quantities because it was instead the subject of a substantial customer complaints industry and regulatory redress regime. This too was the specific context of the SPA and Clause 10.8, which was concerned with PPI mis-selling losses and complaints arising therefrom. It was a payment obligation arising out of liabilities for PPI. Every time PPI is used in the context of the SPA it is in the context of providing remediation for AXA. Clause 10.8 and all of the definitions relating to it, viz, PPI Selling, PPI Mis-selling Losses, are all for the purposes of providing remediation. There is no aspect of Clause 10.8, or the SPA that is in relation to future underwriting.

192. It follows that the insurance market in this context accordingly included those more intimately involved with the redress scheme, i.e. complaints-handlers, CMCs and regulators. Mr Morrey explained in his expert evidence that these entities did not draw any distinction between 'pure' PPI and bundled products. PPI was used as a shorthand for the types of policies which were the subject of the complaints industry and regulatory redress regime. By contrast, Mr Jackson's evidence was based on the understanding of those underwriting PPI at the time of the SPA, which I do not view as the relevant market. He admitted that he did not know what those involved in remediation activities in 2015 would have understood by "payment protection insurance", and he acknowledged that, by the time of the SPA, remediation was the dominant activity in the marketplace. Ultimately the whole surrounding factual matrix to the SPA was remediation territory not underwriting territory.

193. It is also significant that the regulatory redress for a product bundle was not awarded to customers on the basis of the 'pure' PPI element of the policy, but was awarded on the basis of the total policy cost. Regulatory redress could not be sliced and diced by reference to some elements of a product bundle, but not others. There was no evidence that redress was ever paid in respect of one part of a product bundle. The approach under DISP App 3.7.2E requires mis-selling redress to put the customer in the position he would have been in, but for the mis-selling. In the FOS template, which is a questionnaire for consumers to bring a complaint about

the sale of PPI, there is no reference to the fact that you might have bought a 'pure' product or a 'bundled' product. Redress was paid in respect of the entire premium.

194. There is a second basis on which AXA's construction is to be preferred. Clause 10.8 provides for a payment obligation in respect of all Relevant Distributor Mis-selling Losses. Relevant Distributor Mis-selling Losses is defined in Clause 1.1 to include "*any PPI Mis-selling Losses which arise out of or directly relate to PPI Selling Activity undertaken by [Santander] or its agents or its appointed representatives (as the case may be) prior to 1 January 2005*".

195. Clause 1.1 further defines "PPI Mis-selling Losses" as:

> "all damages, losses, liabilities, penalties, fines, costs, interest and expenses, including for the avoidance of doubt costs and liabilities relating to FOS fees, claim administration, complaints handling, customer notifications and redress amounts, incurred by any Target Group Company whether before or after Completion in respect of:
>
> (a) defending or supporting the defence of any Action that relates to PPI Selling Activity;
>
> (b) complying with any order, decision or settlement agreement in respect of such Action; and/or
>
> (c) any PPI Complaint;
>
> but excluding for the avoidance of doubt, any sums which are recovered as Complaints-Handling Losses*."*

196. It is clear that this wording covers the totality of the redress payments flowing from the sale of a product containing PPI, and there is nothing in that language to justify a pro rata reduction, as contended for by Genworth.

K.THE PERSONS ISSUE (ISSUE 3C)

197. In the event, this issue has fallen away. Para. 9(b) of Genworth's Re-Amended Defence said: "*For the avoidance of doubt, any claim which represents a claim for an indemnity in respect of payments to a person who brought a claim or complaint other than against FICL or FACL does not fall within the scope of the indemnity provided by clause 10.8 of the SPA*".

198. Genworth accepts that relevant losses are within the scope of Clause 10.8 notwithstanding that they take the form of redress paid by Santander, in respect of complaints directed at it, and then recouped from AXA/FICL/FACL – provided that complaints were made after 7 August 2014 (when Santander disclaimed regulatory responsibility for complaints about pre-2005 mis-selling).

199. However, Genworth does assert that the position will be different insofar as Santander: (1) paid such redress prior to 7 August 2014; and (2) subsequently seeks to recoup it from AXA/FICL/FACL on the basis that it was not in fact responsible

for making such payments. Genworth submits that this latter type of losses would not fall within the scope of Clause 10.8 because Santander had already assumed regulatory and financial responsibility for the complaints in question.

200. AXA submitted that this point was in fact entirely hypothetical because no relevant claim to recoup pre-August 2014 payments has in fact been made by Santander, and therefore no corresponding claim under Clause 10.8 has been made by AXA in these proceedings to date, or is likely to be made before the quantum trial. Genworth agreed in its oral closing submissions with AXA. Accordingly, this issue has, at least at the present time, fallen away and I make no finding in respect of it.

L.THE CONSENT ISSUE (ISSUE 4)

201. Schedule 5, paragraph 7.1 provides that:

> "If a Warranty Claim (other than a Tax Warranty Claim), a claim under clause 10.5, a Clause 10.7 Covenant Claim or a claim under clause 10.8 arises as a result of, or in connection with, a liability or alleged liability of the Target Group or Purchaser's Group to a third party (a "Third Party Claim"), then the Sellers may (subject to Applicable Law), at any time before any final compromise, agreement, expert determination or non- appealable decision of a court or tribunal of competent jurisdiction is made in respect of the Third Party Claim or the Third Party Claim is otherwise disposed of, give notice to the Purchaser that it elects to assume the conduct of any dispute, compromise, defence or appeal of the Third Party Claim and of any incidental negotiations on the following
> terms:
>
> (a) the Purchaser shall use its reasonable endeavours to procure that the Target Group make available to the Sellers (at the cost of the Sellers) such persons and all such information as the Sellers may reasonably request for assessing, contesting, disputing, defending, appealing or compromising the Third Party Claim;
>
> (b) the Purchaser shall use its reasonable endeavours to procure that the Target Group take such action to assess, contest, dispute, defend, appeal or compromise the Third Party Claim as the Sellers may reasonably request (subject to the Sellers bearing the costs thereof) and will not make any admission of liability, agreement, settlement or compromise in relation to the Third Party Claim without the prior written approval of the Sellers (such approval not be reasonably withheld or delayed);
>
> (c) the Sellers shall keep the Purchaser promptly informed of the progress of the Third Party Claim and promptly provide the Purchaser with copies of all relevant documents and such other information in its possession as may be requested by the Purchaser (acting reasonably); and

(d) the Sellers shall consult with the Purchaser and take account of the reasonable requests of the Purchaser including with respect to any reputational concerns of the Purchaser in relation to the conduct of such Third Party Claim,

provided that the Sellers shall not take any action under this paragraph 7.1 in respect of a Third Party Claim relating to a claim under clause 10.8 that will, in the Purchaser's reasonable opinion, delay or materially adversely affect the finalisation and execution of the Relevant Distributor Agreement."

202. Schedule 5, paragraph 7.2 provides that:

"If a Warranty Claim (other than a Tax Warranty Claim), a claim under clause 10.5, a Clause 10.7 Covenant Claim or a claim under clause 10.8 arises as a result of, or in connection with, a Third Party Claim, the Purchaser shall, until the earlier of such time as the Sellers shall give any notice as contemplated by subparagraph 7.1 and such time as any final compromise, agreement, expert determination or non-appealable decision of a court or tribunal of competent jurisdiction is made in respect of the Third Party Claim or the Third Party Claim is otherwise finally disposed of:

(a) procure that the Target Group consult with the Sellers, and take account of the reasonable requirements of the Sellers, in relation to the conduct of any dispute, defence, compromise or appeal of the Third Party Claim;

(b) keep, or procure that the Target Group keep, the Sellers promptly informed of the progress of the Third Party Claim and provide, or procure that the Target Group provides, the Sellers with copies of all relevant documents and such other information in the Purchaser's or the Target Group's possession as may be
requested by the Sellers (acting reasonably); and

(c) procure that the Target Group shall not cease to defend the Third Party Claim or make any admission of liability, agreement or compromise in relation to the Third Party Claim without the prior written consent of the Sellers (such consent not to be unreasonably withheld or delayed)."

203. Genworth's position is that (1) pursuant to paragraph 7.2(c) of Schedule 5 of the SPA, AXA agreed to not enter into any agreement or compromise in relation to, or cease to defend, any "*Third Party Claim*" without Genworth's prior written consent, "*such consent not to be unreasonably withheld*"; (2) "*Third Party Claim*" is defined in paragraph 7.1 of Schedule 5 as "*a liability or alleged liability of the Target Group or Purchaser's Group to a third party*"; (3) redress payments made to customers in relation to mis-selling claims or complaints, the CHA, and the Standstill Agreement, were all agreements or compromises in relation to, or decisions not to defend "*Third Party Claims*" without its consent, accordingly (4) AXA is in breach of paragraph 7.2(c) of Schedule 5.

204. AXA's position is that consumer complaints under the regulatory regime are not "*Third Party Claims*", and that no consent was necessary in respect of the CHA

or the Standstill Agreement. Accordingly, there was no breach of paragraph 7.2(c) of Schedule 5.

205. I take consumer complaints, the CHA, and the Standstill Agreement in turn.

L.1 Consumer Complaints: Analysis

206. In my judgment, properly construed, the regime in paragraph 7 of Schedule 5 in respect of "*Third Party Complaints*" is directed at actual or threatened civil claims by customers, as opposed to regulatory complaints. It follows that there has been no breach of Schedule 5 paragraph 7 of the SPA. Again, there are both "textual" and "contextual" reasons for this conclusion.

207. First, the kind of consumer complaint of mis-selling under the DISP regulatory regime is distinct from a "*Third Party Claim*". The opening lines of paragraph 7.1 make clear that "*Third Party Claim*" refers to a liability, or alleged liability to a third party. The rights conferred on Genworth under paragraphs 7.1 and 7.2 are expressed in language whose context is that of an adversarial process. Paragraph 7.1 refers to "*dispute, compromise, defence or appeal of the Third Party Claim*", and the rights conferred in paragraph 7.1(a) to (d) are very much targeted at civil claims where one party is alleging liability. The same is true for paragraphs 7.2 (a) to (c) – they are geared at claims of legal liability.

208. However, the tenor of the DISP regulatory regime is not concerned with legal liability, but is instead determined according to standards of fairness and reasonableness. That is clear from the terms of the DISP regime itself, and is clarified in the authorities' treatment of the DISP regime. The language of paragraphs 7.1 and 7.2 is therefore not apt to deal with consumer redress under DISP.

209. Against this, Genworth emphasizes that where complaints are rejected by the regulated entity and the FOS, consumers have a right to bring court action under various causes of action, including misrepresentation, breach of statutory duty, negligence, breach of contract, breach of fiduciary duty, and/or under the unfair relationships provisions in ss 140A-140C of the Consumer Credit Act 1974. The thrust of this submission is that such claims are decided on the basis of legal liability. However, this submission does not advance Genworth's position. AXA accepts that if a customer brought a court claim against FICL/FACL in respect of historic mis-selling, that would be a "*Third Party Claim*", because at that point it would be a claim in respect of "liability or alleged liability", and the provisions of paragraph 7 would apply to it. Nevertheless, complaints which do not reach that stage, but instead which are resolved through the DISP regime do not relate to legal liability and so are not caught by Schedule 5 paragraph 7.

210. Second, paragraph 7.1 defines the time period within which Genworth can exercise its step-in rights in respect of a Third Party Claim. It provides that such rights can be exercised "*at any time before any final compromise, agreement, expert determination or non-appealable decision of a court or tribunal of competent jurisdiction is made in respect of the Third Party Claim or the Third Party Claim is otherwise disposed of*". I consider that the language of "the decision of a court or

tribunal of competent jurisdiction" is apt to describe the determination of a civil claim in damages by a court or tribunal, and not to the determination of regulatory redress by FOS.

211. Against this, Genworth submit that a decision of the FOS is a judicial decision to which the doctrine of res judicata is applicable and that the FOS is a "court or tribunal" which determines civil rights for the purposes of Article 6 of the ECHR. Genworth says this means that the language of paragraph 7.1 is apt to cover consumer redress complaints. However whether or not a decision of FOS is a judicial decision to which the doctrine of res judicata is applicable, this does not mean that FOS is a "court or tribunal" within the meaning of the clause. There is no express reference in paragraph 7.1 to the FOS despite the fact that the SPA elsewhere makes frequent express reference to FOS (itself a defined term in the SPA) when it is the intention of the parties to refer to the FOS. If the parties had meant for paragraph 7.1 to apply to decisions of the FOS, I consider that they would have said so in terms. This militates against Genworth's construction and in favour of AXA's construction that the parties intended the paragraph 7 regime to apply to ordinary civil claims, and not to regulatory complaints.

212. It is also clear that it would have been commercially unworkable for the parties to include consumer mis-selling complaints within the scope of the various provisions of paragraphs 7.1 and 7.2 of Schedule 5. At the time of the SPA, such complaints were very high in volume and low in value, in the region of 1,300 a month. In those circumstances, it would have been an enormous administrative task for AXA to comply with any such notification requirements of paragraph 7.1 in respect of each individual complaint and equally an enormous task for Genworth to review or take over each individual complaint properly, in circumstances where they did not have the infrastructure to undertake such tasks. Had the objective common intention of the parties been for paragraph 7.1 to have had such a broad, and burdensome scope I am satisfied that the parties would have made express provision for the same, and would have prepared for, and in due course put in place, the infrastructure to facilitate the same. There is no evidence of that. In contrast, if paragraph 7.1 and 7.2 of Schedule 5 relate to actual or threatened civil claims by customers it is both commercially understandable, and not administratively burdensome for either party, to have such a regime in place.

213. Genworth submits that AXA could have sought Genworth's consent by reference to particular categories of case or proposed redress. This is no more than a sticking plaster, not provided for in the SPA, and deployed to ameliorate the logic and consequences of Genworth's construction which, taken to its logical end-point, entitled it to insist on reviewing or taking over each individual complaint (whether or not it chose to do so). That is an uncommercial construction and one that cannot possibly represent the objective common intention of the parties.

L.2 CHA and Standstill Agreement: Analysis

214. The question of whether consent was required for the CHA or the Standstill Agreement is distinct from the question of whether consent was required for the payment of customer redress. Nevertheless, it follows from my conclusion above that customer complaints are not "*Third Party Claims*" for the purposes of

paragraph 7 of Schedule 5, that neither the Standstill Agreement nor the CHA constituted an "*agreement or compromise in relation to the Third Party Claim*", for the purposes of paragraph 7.2(c), and no consent from Genworth was required.

215. However even if, contrary to my findings above, customer complaints were to be regarded as "*Third Party Claims*" for the purposes of paragraph 7, I do not consider that the Standstill Agreement and the CHA were within the scope of paragraph 7.2(c). The reason for this is that paragraph 7.2(c), which refers to "*any admission of liability, agreement, or compromise in relation to the Third Party Claim*", is concerned with agreements that settle specific third party claims against FICL/FACL, such as individual consumer redress complaints. Neither the CHA nor the Standstill Agreement settle third party claims. Genworth submits that the CHA and the Standstill Agreement were agreements in relation to potential claims by Santander against FICL/FACL, and in relation to customer mis-selling claims or complaints because they were closely connected with the conduct and settlement of those third party claims. However paragraph 7.2 is concerned with agreements and settlements of the claims themselves, not the associated logistics of such claims, which is what the CHA and Standstill Agreement were concerned with.

M. CONSENT UNREASONABLY WITHHELD (ISSUE 5)

216. It is common ground that Genworth did not provide its prior consent to the redress payments, or to the CHA or the Standstill Agreement. On the basis of my findings above, AXA did not need the consent of Genworth in relation to consumer complaints under the regulatory regime, the CHA and the Standstill Agreement and so this point does not arise. However if, contrary to my findings, AXA did need the consent of Genworth in relation to consumer complaints under the regulatory regime, the CHA and the Standstill Agreement, I consider briefly below whether Genworth is entitled to rely on the absence of such consent.

M.1Consumer Complaints: Analysis

217. In relation to the period between entry into the SPA and the Defence and Counterclaim, AXA's position is that if (which it denies) it was obliged to obtain Genworth's consent to settlements in the form of redress payments: (1) Genworth waived this obligation and/or is estopped by acquiescence from relying on it; and (2) during that period, the parties operated on a common understanding that prior consent was not required; (3) at no point after AXA began issuing demands under Clause 10.8 did Genworth complain of any failure to procure consent; and (4) if it had wished to rely on the interpretation of Schedule 5 that it now does, it had a duty to speak by informing AXA. In respect of the duty to speak, it relies on what was said in *Ted Baker PLC v AXA Insurance UK PLC* [2017] EWCA Civ 4097 at [72]-[76]:

> "72. In relation to commercial contracts generally there is authority supporting a duty to speak in certain circumstances. In *The Lutetian* [1982] 2 Lloyd's Rep 140 , 157 Bingham J, as he then was, regarded the dissenting speech of Lord Wilberforce in *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890 at 903 as having provided persuasive authority for the proposition that the duty necessary to found an estoppel by silence or

acquiescence arose where a reasonable man would expect the person against whom the estoppel was raised acting honestly and responsibly to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations. In Moorgate Mercantile Lord Wilberforce said that the question whether there was an estoppel had to be asked " having regard to the situation in which the relevant transaction occurred, as known to both parties " and the reasonable man was to be one in the position of the party asserting the estoppel. His formulation has found favour subsequently: see the *Indian Endurance* [1998] AC 878 , 913 where Lord Steyn said:
"Lord Wilberforce said, at p 903, that the question is whether, having regard to the situation in which the relevant transaction occurred, as known to both parties, a reasonable man, in the position of the "acquirer" of the property, would expect the "owner" acting honestly and responsibly, if he claimed any title in the property to take such steps to make that claim known…' at p 903. Making due allowance for the proprietary context in which Lord Wilberforce spoke, the observation is helpful as indicating the general principle underlying estoppel by acquiescence"
and the cases cited below.

73. In *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 252 Rix LJ observed obiter that a duty to speak might arise pursuant to either contractual obligations involving collaboration and co-ordination with other business advisors or obligations as an honest business partner. He adopted the general principle contained in *Moorgate Mercantile* and *The Indian Grace* . In that case the question arose in circumstances where ING Bank failed to disclose what it knew to be a difference between it and Ros Roca on the calculation of its fee.

74. Blair J considered this line of authority in *Starbev GP Ltd v Interbrew Central European Holdings BV* [2014] EWHC 1311 . In essence he held that a duty to speak, failure to fulfil which would give rise to estoppel by acquiescence, may arise on the particular facts where one party is proceeding on the assumption that something is agreed, whereas the other party knows that it is in dispute. In such a case the duty to speak may arise because a reasonable man would have the expectation referred to by Bingham J and set out in paragraph 72 above.

75. The reference to " acting honestly " did not, he held, mean that the party against whom the estoppel was asserted had to be guilty of actual dishonesty in the sense of acting fraudulently. He accepted [133] the submission that, absent a relationship of good faith or partnership or something akin to a joint enterprise the courts would not impose a duty to speak in the absence of impropriety of some description by the person alleged to be estopped. That impropriety might, however, come from the act of staying silent itself, as where a reasonable person would expect the person who is alleged to be estopped, acting honestly and responsibly, to bring the true facts to the attention of the other party known to him to be under a mistake as to their respective rights and obligations.

> Andrew Smith J adopted this statement in *Kaupthing Singer & Friedlander Ltd v UBS AG* [2014] EWHC 2450 (Comm) , where he held that a bank would not be acting honestly (in the sense explained by Blair J) or responsibly if it knew about or even seriously suspected a mistake of the kind then in question.
>
> 76. In the present case, which does involve a relationship of good faith, impropriety in the sense identified by Blair J is, a fortiori, sufficient to give rise to an estoppel. I would add that in the paragraphs preceding [133] Blair J appears to have been resolving the question as to whether it was necessary, in a case not involving a good faith obligation, to show that the person estopped was acting both dishonestly and irresponsibly; and to have answered that question in the affirmative [132]; but then [133] to have given " dishonesty " a limited meaning: "dishonesty" in an equitable sense ". This seems to me, with respect, a misreading of the phraseology used by Lord Wilberforce, Bingham J and Rix LJ. The question is what a reasonable person in the position of the person asserting the estoppel would expect of a person acting " honestly and responsibly " so that irresponsible but not dishonest behaviour could itself give rise to an estoppel. The reasoning in Starbev ends up by identifying that as the question; but by a somewhat circuitous route. I would, however, adopt his approach to what could amount to dishonesty in this context."

218. Genworth's position in relation to the redress payments is that (1) there is no evidence of a common understanding having been adduced that prior consent was not required; (2) no evidence has been adduced of any unequivocal representation; (3) there is no duty to speak because the SPA is not a contract involving a relationship of good faith; (4) Clause 19.9(c) of the SPA provides that rights may only be waived in writing; (5) AXA did not in fact request Genworth's consent and cannot complain that consent was withheld when it had not sought such consent.

219. I consider that Genworth is indeed estopped from relying on any right to consent to customer redress payments on the applicable principles I have identified. Although Genworth says there was no unequivocal representation, at no point after AXA began issuing demands under Clause 10.8, and indeed after AXA had indicated that it would issue the present proceedings, did Genworth raise with AXA any failure to notify customer complaints under paragraph 1 of Schedule 5. Neither the pre-payment to AXA under Clause 10.8 of US$3.69m in October 2016, nor a later demand in the sum of £28m in October 2017 prompted Genworth to complain of a failure by AXA to obtain its consent. I consider that Genworth acting as a reasonable commercial party should not have stayed silent about this objection until AXA actually litigated to enforce Clause 10.8. In the *Ted Baker* case, it was not held that the duty to speak arises only in contracts of good faith. Rather, it was said that absent a relationship of good faith, impropriety needs to be established, and that such impropriety can be established from the act of staying silent itself, as where a reasonable person would expect the person who is alleged to be estopped, acting honestly and responsibly, to bring the true facts to the attention of the other party known to him to be under a mistake as to their respective rights and obligations. I consider that that situation applied on the facts of the present case.

220. Nor am I persuaded by Genworth's reliance on Clause 19.9(c) of the SPA, which provides that rights under the SPA "*may be waived only in writing and*

specifically", and further that "*[d]elay in exercising or non exercise of any such right is not a waiver of that right*". Estoppel by acquiescence operates as a matter of equity to prevent one party enforcing his legal rights, including Clause 19.9(c).

221. However if, contrary to my finding above, Genworth were not estopped from relying on an entitlement to consent to the redress payments, I consider that withholding such consent in the period since the point was first raised in the Defence and Counterclaim was in any event unreasonable.

222. In response to the Defence and Counterclaim served on 2 February 2018, AXA wrote to Genworth on 22 February 2018. That letter referred to the issue of withholding consent and stated that:

> "If, however, Genworth now wishes to adopt the position that its consent should be sought in advance of any payments being made (which AXA does not accept is justified) please would you now provide its detailed proposals as to the arrangements Genworth intends to put in place in order to receive and respond to requests for such consent on a case by case basis? As FICL/FACL advised in their letter of 28 September 2017, since January 2017 Santander has been receiving approximately 26,000 complaints a month and upholding approximately 43% of the new complaints. If it is Genworth's position that its consent is required on a case by case basis before any of these complaints can be upheld, Genworth must provide full details as to how this will be provided in an accurate and timely manner which will not impede compliance with FICL and FACL's regulatory obligations which, as you will be aware, impose strict obligations on FICL and FACL in both of these aspects".

223. Genworth replied by letter dated 27 February 2018, in which it was stated that:

> "In circumstances where AXA has, on the one hand, stated expressly that it does not agree with Genworth's position as regards consent and will formally plead as such in due course, it cannot, on the other, call on Genworth to provide details of its proposals for how it will assess whether consent will be given to future claims. Unless AXA, FICL and FACL are prepared to concede, as they should, that Genworth's position is correct, they must bear the risk of continuing to compromise claims without obtaining Genworth's consent in advance".

224. Genworth's position was therefore that unless AXA made a concession as to the interpretation of the SPA in relation to "Third Party Claims", Genworth would not provide consent to any settlements. As Mr Green put it, that amounted to an attempt to get a litigation advantage by holding AXA over a barrel. Such conduct was, self-evidently, unreasonable. There was a total failure to engage with the consent regime that it was itself asserting represented the contractual regime in place. That is inherently unreasonable.

M.2 The Standstill Agreement: Analysis

225. In relation to the Standstill Agreement, AXA's position is that if it was obliged to obtain the consent of Genworth to enter into the Standstill Agreement, such

consent was unreasonably withheld in circumstances where Genworth's basis for such withholding was Genworth's insistence that the Part 20 issues be resolved as part of the main action, which was struck out as an abuse of process.

226. In his first witness statement, prepared at an interlocutory stage, Mr Shankland (on behalf of Genworth) said that "*Genworth refused its consent [to the Standstill Agreement] on the basis that the issues between AXA and Santander must be resolved in order that any remaining dispute between AXA and Genworth could be resolved*". That position was repeated by Genworth's solicitors in correspondence on 22 November 2017, where it was said that: *"…it is entirely reasonable for Genworth to refuse to consent to execution of the SSA. The issues between AXA and Santander must be resolved in order that any remaining dispute between AXA and Genworth can be resolved."*

227. Genworth's insistence that the issues between AXA and Santander be resolved in the proceedings between AXA and Genworth (which were in due course struck out as an abuse of process by Andrew Baker J) was unreasonable.

228. Nor has Genworth identified any valid reason for withholding consent. For example, Genworth contends that AXA was proposing to claim against Genworth under Clause 10.8 of the SPA and at the same time enter into a Standstill Agreement with Santander which it says would prevent Genworth from pursuing a subrogated claim against Santander to recover the same loss, thus prejudicing Genworth's subrogation rights in equity and/or at common law (and at the very least by materially delaying the exercise of those rights). However, the effect of the Standstill Agreement is to preserve the rights of FICL/FACL against Santander, in relation to the same losses that AXA claims pursuant to Clause 10.8. If Genworth are subrogated to such rights, the Standstill Agreement will have acted to its benefit by preserving such rights and maintaining the status quo. In any event such Standstill Agreement is terminable on short notice. It is difficult to see what prejudice could be suffered in such circumstances.

229. Genworth also submit they withheld consent reasonably because insofar as Santander has any prospective claim against FICL/FACL, the Standstill Agreement prejudiced any limitation defence that might otherwise have arisen in FICL's or FACL's favour during the standstill period. However no limitation defences are lost – the effect of a standstill agreement is simply to freeze the position and stop time continuing to run. If claims are already time barred they are time barred – if they are not yet time barred, they are not yet time barred. Mere passage of time does not cause prejudice in limitation terms. Steps can also be taken to ensure documentation etc is preserved so that the mere passage of time does not, itself, cause prejudice.

M.3 CHA: Analysis

230. In relation to the CHA, Genworth's position is that under Clause 5.1 of the CHA, FICL and FACL agreed that Service Charges would be unrecoverable from Santander, but AXA nevertheless proposed to claim them from Genworth under Clause 10.8 and that it would be reasonable to withhold consent in such circumstances as it was not appropriate for AXA to agree to such a clause. Clause 5.1 of the CHA provides that:

"In consideration of the provision of the Services by the Service Provider, the Service Recipients shall pay the Charges monthly in advance in accordance with this clause 5. The Charges shall include certain costs incurred by the Service Provider prior to the Commencement Date as detailed in the first Invoice. The Service Recipients acknowledge and agree that any payment or liability in respect of the Charges due to the Services Provider payable hereunder shall, subject to the execution of the Standstill Agreement (if so requested by the Service Recipients) and clause 5.2, be irrecoverable from the Service Provider in any circumstances whatsoever and the Services Recipients release the Service Provider and undertake not to seek to recover from the Service Provider any liability the Service Provider may have to compensate the Service Recipients for the cost or loss represented by the amount of the Charges which the Service Recipients pay or are liable to pay the Service Provider."

231. I do not regard there being anything unreasonable or inappropriate about this clause. First, it was entirely understandable that a service provider providing valuable ongoing services (that it was not obliged to provide and which would result in it incurring significant ongoing future expenses) would not be willing to do so if in the future there was any possibility of the counterparty being able to claw back the payments for valuable services actually rendered in the future on the basis that it had a claim for alleged historic defaults. Secondly, the evidence before me is that this was the case, and the provision for non-recoverability was a non-negotiable requirement for both the 2017 and 2018 CHAs and Clause 5.1 of the CHA had to be accepted by FICL/FACL in order to agree a complaints-handling service with Santander, which itself was highly necessary given Santander's position as of July 2017 and FICL/FACL's regulatory obligations. In such circumstances it would not be reasonable for Genworth to withhold consent to the CHA in such circumstances.

N. EFFECT OF BREACH

232. If, contrary to what I have found, AXA were under an obligation to obtain consent from Genworth prior to the redress payments, the CHA, and the Standstill Agreement and if, contrary to what I have found, such consent was reasonably withheld by Genworth, such that AXA was in breach of Schedule 5 paragraph 7.2, the question would arise as to the effect of any such breach.

233. AXA's position is that breach would (only) give rise to a right to claim damages in respect of any loss it could prove it had suffered as a result. Genworth's position is that it would disentitle AXA from advancing a claim under Clause 10.8 – in effect Genworth would be saying that compliance was a condition precedent to the making of a claim under Clause 10.8. Genworth points out that this question (Question 6 on the List of Issues), is not for determination at this hearing, and is instead an issue for the quantum hearing. In such circumstances Mr Nash accordingly says that Genworth has not come prepared, in terms of any adducing any relevant and admissible evidence, or researching any relevant case law, that it is submitted would be required to address the question of whether any breach simply gives rise to a claim in damages or would disentitle AXA from advancing a claim under Clause 10.8.

234. I have to say that for my own part I consider that it is a short point that is unlikely to be capable of extended debate, and with hindsight it would have been appropriate to include it within the current trial. However given that it is right that Issue 6 was not ordered to be determined at this trial, fairness to Genworth dictates that the issue cannot be determined at this time. However, on my findings, the point is academic. If an answer were to be needed on the point I see no reason why it could not be addressed either at the consequentials hearing upon the handing down of judgment, or at a short hearing thereafter.

O. GROSSING UP (ISSUE 7)

235. Issue 7 of the List of Issues, is as follows:

> "How (if at all) are the provisions of cl 18.5 of the SPA to be applied in grossing-up any sums payable to AXA/AXA France IARD/AXA France Vie?"

236. Clause 18.5 of the SPA provides that:

> "If any sum payable by a party under this Agreement (other than the Consideration or interest under clause 18.3) shall be subject to Taxation in the hands of the receiving party, the paying party shall be under the same obligation, as under clause 18.4 above, to pay an additional amount in relation to that Taxation as if the liability were a deduction of withholding required by law".

237. The application of Clause 18.5 requires the identification (and thereafter determination) of the following matters: (1) what taxation regime applies; (2) whether and why grossing up is required under that regime to ensure that AXA, FICL and FACL recover a full indemnity; (3) what is the applicable rate or rates under the relevant regime; and (4) how the grossing up calculation is to be performed.

238. Genworth's position is that AXA has failed to serve any evidence in support of its claim to grossed up sums, or evidence as to what tax regime FICL and FACL are subject to, why grossing up is required, or what the applicable rates are to any such calculation. It says that in such circumstances AXA has failed to prove its case, and the issue should be answered that the grossing up provisions do not fall to be applied to any sums payable to AXA, FICL or FACL. AXA submits that such matters are matters to be addressed at the quantum hearing.

239. It is apparent that the parties have been at cross-purposes in relation to what needs to be addressed at which hearing in relation to this issue, and in particular that AXA has misunderstood what would need to be addressed at this hearing as opposed to at the quantum hearing if Issue 7 were to be determined at this hearing. Put another way, there has been no conscious decision not to adduce evidence in respect of such matters and AXA would wish to do so to facilitate the Court's determination of the issue. AXA submits that it would be unjust to resolve the issue against it without the benefit of evidence and supporting argument which it is not in a position to provide at this hearing, and that ultimately therefore that in the

interests of justice the trial of this Issue should be adjourned and determined at the quantum hearing.

240. I do not consider that it would be either satisfactory or in accordance with the overriding objective, in circumstances where it has always been contemplated that there will be a quantum hearing in any event, that the matter is determined not on the merits but (in effect) by default which is the logical consequence of Genworth's submission not least in circumstances where it is not suggested that evidence will not be available which will shed light on, and illustrate the operation of the clause, to the assistance of the Court in construing it set against its objective purpose. If the matter is adjourned Genworth will suffer no prejudice other than in costs (and given that the point has not been argued it is difficult to see what costs have been thrown away). In such circumstances, and as a matter of case management in circumstances where a further trial of issues has already been ordered, I consider that the appropriate course is to adjourn the trial of Issue 7 to the quantum trial to allow for relevant evidence and calculations to be adduced in advance of that trial.

P. THE ALLOCATION ISSUE

241. This supplementary point, in relation to the proper construction of paragraph 8.2 of Schedule 5, asks the question "Is the reference to a "claim under clause 10.8" in paragraph 8.2 of Schedule 5 of the SPA a reference to the sum claimed by AXA in respect of each individual PPI Complaint and/or FOS complaint (including any associated costs, expenses and fees)?"

242. The issue is whether, under paragraph 8.2 of Schedule 5 of the SPA, AXA must account to Genworth for "excess" recoveries from Santander calculated by reference to: (1) the amount recovered from Santander, over and above the 90% paid by Genworth under Clause 10.8 of the SPA, in relation to each sub-set of amounts referable to individual customer complaints and directly associated administrative costs and other costs (referred to by the parties as the "claim by claim approach"); or (2) only for the total excess once AXA has been made whole, across all claims, by a combination of recoveries from Genworth under Clause 10.8 and from Santander (referred to by the parties as the "aggregated approach").

243. Genworth contends for the claim by claim approach; AXA contends for the aggregated approach. In my judgment, the aggregated approach is the correct construction for the following reasons.

244. First, the aggregated approach reflects the language of the SPA. Clause 10.8(a) is expressed as imposing an obligation on Genworth to pay 90% of "*all*" Relevant Distributor Mis-selling Losses. Accordingly, when paragraph 8.2 refers to "*a payment in respect of … a claim under clauses 10.8 or 10.9 (the 'Damages Payment')"*, the 'Damages Payment' means the total amount recovered from Genworth under Clause 10.8. It is that total which is combined with the recovery from Santander in order to determine whether there is an excess. In this regard it matters not whether as a matter of form there have been multiple demands over time or multiple sets of court proceedings to enforce those demands.

245. This is consistent with the purpose of paragraph 8.2 of Schedule 5. Its purpose is to deal with the allocation of excess recoveries from Santander after AXA/FICL/FACL have been made whole, through a combination of claims under Clause 10.8 against Genworth and subsequent claims against Santander, and so as to avoid AXA being over-compensated by recovering under both Clause 10.8, and in a subsequent claim against Santander.

246. Paragraph 8.2 of Schedule 5 anticipates the situation where the Relevant Distributor Mis-Selling Losses had been paid by Genworth under Clause 10.8, and then recoveries were also made in respect of the same losses from Santander. As Mr Green put the point in his oral closing submissions, if the parties had asked themselves in September 2015 whether their concern was in respect of an individual customer complaint or the aggregated position, their clear answer would have been that they were concerned with the latter.

247. Further, at the time the SPA was entered into, Genworth were operating on the basis that the Relevant Distributor Agreement would shortly be concluded, in which case FICL/FACL's recoveries under Clause 10.8 would be limited in terms of time and amount which takes the sting out of the fact that paragraph 8.2 of Schedule 5 of the SPA involved an aggregated approach.

248. In contrast, the "claim by claim approach" could result in leaving AXA significantly under-compensated which is an uncommercial construction that I am satisfied cannot have represented the objective common intention of the parties. This can be tested by the example given by AXA in their Closing Submissions. Suppose that Genworth pays FICL/FACL all amounts that have been demanded to date, under Clause 10.8. FICL/FACL will thereby have been compensated for Relevant Distributor Mis-selling Losses, but only as to 90%. Suppose, then, that FICL/FACL sue Santander for 100% of those losses (under the Agency Agreement or otherwise), but only succeed in recovering 50% (because, simply for the sake of argument, Santander has good limitation defences in respect of historic mis-selling). On Genworth's case, AXA would be required to account to it, under para. 8.2, for 90% of the amount recovered from Santander (i.e. the equivalent of 45% of the Relevant Distributor Mis-selling Losses). This would mean that FICL/FACL would be left with an effective recovery, from a combination of Genworth and Santander, of only 95%.

249. I am satisfied that that example itself demonstrates the erroneous nature of Genworth's construction. The correct construction is that there is only an 'Excess Recovery' for the purposes of para 8.2 if the total amount of the 90% of Relevant Distributor Mis-selling Losses paid by Genworth under Clause 10.8, plus the total amount of those same losses recovered from Santander, exceeds 100% of the total Relevant Distributor Mis-selling Losses incurred by AXA. So, using the example above, if AXA were to recover from Santander 50% of the Relevant Distributor Mis-selling Losses that had been paid by Genworth, AXA would retain an amount equivalent to 10% (thus making up the shortfall under Clause 10.8), and then the 'Excess Recovery' in the amount of 40% (net of relevant expenses of the claim against Santander) would be paid to Genworth. Genworth would still receive a significant sum, but at the same time AXA would have been made whole.

250. Accordingly, and for the reasons given, I find that AXA's construction (the "aggregated approach"), is the correct construction.

Q. CONCLUSION

251. For the reasons that I have given, AXA succeeds on its construction of the SPA, and Genworth fails on its Subrogation Declaration, and I make the further findings set out herein on the further issues that arose for determination.

252. I trust that the parties will be able to agree an Order reflecting the findings I have made, but in the event of any disagreement, and in relation to any consequential matters, I will hear argument at the time of hand-down of the judgment.