Neutral Citation Number: **[2023] EWHC 1360 (Comm)**

Case No: CL-2020-000850

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

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

Date: 09/06/2023

Before :

DAME CLARE MOULDER DBE
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

PA (GI) LIMITED	**Claimant**
- and -	
CIGNA INSURANCE SERVICES (EUROPE) LIMITED	**Defendant**

- -
- -

Sonia Tolaney KC and Nehali Shah (instructed by **Herbert Smith Freehills LLP**) for the **Claimant**
Adam Tolley KC and Angus Rodger (instructed by **Steptoe & Johnson UK LLP**) for the **Defendant**

Hearing dates: 25 – 27 April and 02 May 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Dame Clare Moulder DBE :

Introduction

1. This is the reserved judgment following a four-day trial on the construction of two contractual indemnities given by the Defendant, Cigna Insurance Services (Europe) Limited ("Cigna") in a Business Transfer Agreement dated 3 April 2003 (the "BTA") and a Deed of Warranty and Indemnity dated 31 May 2006 (the "DWI").

2. The claim by the Claimant, PA (GI) Limited ("PAGI") is in respect of amounts paid out by it to customers by way of redress in respect of the mis-selling of payment protection insurance policies (also known as "Creditor insurance policies" but commonly referred to as "PPI") as well as costs associated with this redress. The PPI policies were sold to customers between 1991 and 2004 by Next plc ("Next") acting as agent for PAGI as the insurer. It should be noted that the Claimant has accepted responsibility for handling complaints and offering redress to customers including where customers had not made complaints to the Financial Ombudsman Service ("FOS") as discussed below. In this judgment the term "PPI Liabilities" is used to refer to the amounts claimed by the Claimant in these proceedings and since it extends to amounts which were paid out where PAGI assumed responsibility for the payments, is not intended to connote legal liability.

3. Cigna resists the claim in full.

4. This judgment deals only with questions of principle and contractual interpretation (Issues 28-44 in the List of Common Ground and Issues). The remaining issues (Issues 45-52) including quantum and relief will be determined subsequently (if not agreed). This judgment addresses the principal submissions and authorities which were raised at the hearing and which in my view were material to explain the Court's decision. It is neither proportionate nor necessary for the Court to address expressly in the judgment each and every submission made, or authority referred to. The Court had the benefit of daily transcripts of the hearing as well as the written submissions and has reviewed these in the course of preparing this judgment. Accordingly, a failure to refer to a particular authority or submission does not mean that it has not been considered by the Court.

Background

5. The background is taken largely from the agreed list of issues.

6. At all material times, PAGI was an insurer.

7. In 1996, as a result of the merger between the Sun Alliance and Royal insurance groups, PAGI became an indirect subsidiary of Royal & Sun Alliance Insurance plc ("R&SA").

8. In September 2004, PAGI (along with the principal UK life insurance operating companies within R&SA's corporate group) was sold to the Resolution Life Group (a then new insurance business, created to run off closed books of life insurance) by an agreement (the "2004 Agreement"). PAGI's immediate parent became Resolution Life Limited ("Resolution Life").

9. Cigna was established as part of a management buy-out from R&SA in 2003. Cigna was previously known as Oxfordspring Limited ("Oxfordspring") and subsequently FirstAssist Insurance Services Limited ("FirstAssist").

10. Since 1991, PAGI was the insurer under relevant master insurance policies with Next, the retailer. Next sold individual PPI policies to certain of its customers as the agent for PAGI. The last sale of PPI by Next to its customers was in 2004.

11. Under an agreement for the sale and purchase of healthcare insurance operations of R&SA dated 3 April 2003 (the "BTA"), between R&SA (as Seller), Cigna (then Oxfordspring, as Buyer) and FirstAssist Group Limited, R&SA sold certain insurance operations (including marketing, underwriting and servicing Creditor Insurance products, in addition to several other business lines including private medical and travel insurance) to Oxfordspring as part of a management buy-out from R&SA.

12. It is common ground that at the time of the BTA, Cigna was not an authorised insurer and so could not itself immediately either (a) be an insurer of any master policies which might transfer or be replaced or (b) renew any existing individual policies. R&SA and Cigna entered into a Risk Carrying and Underwriting Agreement dated 22 April 2003 (the "RCUA").

13. Pursuant to a Treaty Quota Share Reinsurance Agreement dated 22 April 2003 made between R&SA (as Reinsured), Münchener Rückversicherungs-Gesellschaft Aktiengesellschaft ("Munich Re") (as Reinsurer), and Cigna (as Buyer) (the "Reinsurance Agreement"), the Reinsurer agreed to reinsure and indemnify R&SA and any other insurance company member of the Seller's Group who had issued any of the Existing Products and Interim Products in respect of 100% of all Reinsured Losses (all as defined in the Reinsurance Agreement).

14. In 2005, PAGI's life insurance business was transferred to a company within the Resolution Life Group which was then called Royal & Sun Alliance Linked Insurances Limited ("RSALI") and became known as Phoenix Life Limited ("Phoenix Life"), pursuant to a scheme (the "2005 Scheme") under Part VII of the Financial Services and Markets Act 2002 ("FSMA"), sanctioned by the order of Evans-Lombe J dated 31 October 2005 (the "2005 Order").

15. In May 2006, PAGI's creditor insurance business (comprising only the non-life components of such business) was transferred to Groupama Insurance Company

Limited ("Groupama"), pursuant to a Part VII transfer (the "2006 Scheme"). The 2006 Scheme transferred to Groupama various insurance policies and liabilities "*under or attaching to the Transferred Policies*". There was also a further Part VII transfer scheme in 2006, pursuant to which R&SA transferred to Groupama its creditor insurance business (the "R&SA 2006 Scheme").

16. In connection with the 2006 Scheme, R&SA, Cigna (then FirstAssist) and First Assist Group Limited entered into a Deed of Warranty and Indemnity dated 31 May 2006 (the "DWI").

17. In 2011, PAGI obtained High Court approval for another insurance business transfer to R&SA, pursuant to Part VII of FSMA (the "2011 Scheme").

18. Complaints of mis-selling by Next customers in respect of PPI were first made to the FOS after the DWI. In relation to at least one complaint, the FOS made a decision designating PAGI as the respondent to the complaint.

19. PAGI contended to the FOS that, by the 2006 Scheme, it had transferred mis-selling liabilities to Groupama, and that the FOS should treat Groupama as the responsible insurer and correct respondent to the complaints. In a provisional decision dated 16 December 2013, the FOS stated that Groupama was the correct respondent. However, in a provisional decision dated 17 September 2014, the FOS stated that (subject to any further submissions being received) it was minded to conclude that PAGI was the correct respondent to the complaints.

20. In January 2015, PAGI issued an application (the "2015 Application") in the High Court seeking the Court's determination of the question whether liabilities for PPI mis-selling were liabilities "*under or attaching to the Transferred Policies*" for the purposes of the 2006 Scheme. Cigna was joined as a party to the 2015 Application. Andrews J (as she was) held that liability for PPI mis-selling in respect of policies underwritten by PAGI was not a liability "*under or attaching to the Transferred Policies*" and thus had not transferred to Groupama under the terms of the 2006 Scheme.

21. In a decision dated 27 August 2015, the FOS noted that PAGI had, in light of the decision of the High Court, accepted responsibility for handling the complaint, and as a formality stated that PAGI was the correct respondent to the complaint.

Legal principles of contractual construction

22. There are two issues to be addressed. The first is the general principles of contractual construction as to which there was little difference between the parties other than a matter of emphasis from the various leading authorities. The second issue is the more contentious issue of the line of authority from *Canada Steamship Lines Ltd v The King [1952] AC 192* and its significance to the issue of contractual construction in the light of recent authority.

General principles of contractual construction

23. The principles of contractual construction can be taken from the judgment of the Supreme Court in *Wood v Capita Insurance* [2017] UKSC 24. They were summarised by Popplewell J in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* [2018] EWHC 163 (Comm) but I see no reason not to take the test directly from the key passages of the judgment of Lord Hodge in *Wood*. Counsel for PAGI also referred me to the cases on construction which preceded the decision in *Wood* but given the judgment of Lord Hodge reviews the key authorities I see no need to consider those separately.

> "*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 Hofmann 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. …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…*" [emphasis added]

24. The relative weight to be given to the context will vary according to the circumstances: *Wood* at [13]:

> "*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.*" [emphasis added]

25. PAGI stressed the following from the authorities:

    a. the contracts have clearly been drafted by skilled professionals and are at the high end of sophistication. It was submitted that textual analysis is therefore likely to be the principal method of analysis*: Wood* at [13].
    b. the Court must be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; 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: *Lukoil.*
    c. commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. *Arnold v Britton; Wood*

26. My only observation on these submissions is that, as was submitted by Mr Tolley KC, it is clear from *Wood* that whilst some professionally drafted contracts can be interpreted successfully by textual analysis, as Lord Hodge said:

> "*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*."

27. For its part whilst stating that the general principles were not in dispute Cigna stressed the following additional points:

    a. the factual matrix includes both knowledge which was available to the contracting parties, and knowledge which was reasonably available to them at the time of the contract.
    b. if contractual words are capable of more than one meaning, then one should prefer the interpretation which is most consistent with business common sense.

28. My observation on these submissions is that whilst Lord Hodge did say that the court can "*give weight*" to the implications of the rival constructions and take a view as to which construction is more consistent with business common sense, as Lord Hodge also said in that passage, the court has to be alive to the fact that:

> "*one side may have agreed to something which with hindsight did not serve his interest*".

Canada steamship

29. Turning then to the line of authority from *Canada Steamship*. Cigna submitted that there is an underlying principle based on what is regarded as the "inherent improbability" of one party agreeing to assume liability for another party's wrongdoing, and that inherent improbability calls for clearly expressed words to convince one that is what the parties actually intended, notwithstanding the inherent improbability. [Day 3 109]

30. Mr Tolley KC submitted that the Court is undertaking the task of ascertaining the objective intention of the parties, in the particular commercial context and in accordance with the general principles of interpretation. But this "*inherent improbability*" point is treated as a "useful guide" to the correct approach of interpretation where the commercial context makes it improbable that without clear plain words that one party would have agreed to assume responsibility for the wrongdoing of the other. He submitted that this is especially true in relation to intentional or dishonest wrongdoing, but the principle is not confined to that type of the most serious wrongdoing, but it is nonetheless still relevant in the

present case. Mr Tolley rejected the proposition advanced for PAGI that these principles are essentially out of date and that they are in effect to be disregarded. [Day 3 p110]

31. Cigna relied on the decision of Popplewell J (as he then was) in *Capita (Banstead 2011) Ltd v RFIB Group Ltd* [2014] EWHC 2197 (Comm) where the principles Popplewell J summarised in this regard were approved by the Court of Appeal [2015] EWCA Civ 1310 at [10]. Those principles were as follows:

> "*1. A clear intention must appear from the words used before the court will reach the conclusion that one party has agreed to exempt the other from the consequences of his own negligence or indemnify him against losses so caused. The underlying rationale is that clear words are needed because it is inherently improbable that one party should agree to assume responsibility for the consequences of the other's negligence*: *Smith, p 168D—E; Ailsa Craig, p 970; HIH, paras 11, 63; Lictor, para 36.*
>
> *2. The Canada Steamship principles are not to be applied mechanistically and ought to be considered as no more than guidelines; the task is always to ascertain what the parties intended in their particular commercial context in accordance with the established principles of construction: Smith at p 177; Ailsa Craig at p 970; HIH at paras 11, 61—63, 116; Lictor, para 35. They nevertheless form a useful guide to the approach where the commercial context makes it improbable that in the absence of clear words one party would have agreed to assume responsibility for the relevant negligence of the other.*
>
> *3. These principles apply with even greater force to dishonest wrongdoing, because of the inherent improbability of one party assuming responsibility for the consequences of dishonest wrongdoing by the other. The law, on public policy grounds, does not permit a party to exclude liability for the consequences of his own fraud; and if the consequences of fraudulent or dishonest misrepresentation or deceit by his agent are to be excluded, such intention must be expressed in clear and unmistakeable terms on the face of the contract. General words will not serve. The language must be such as will alert a commercial party to the extraordinary bargain he is invited to make because in the absence of words which expressly refer to dishonesty the common assumption is that the parties will act honestly: HIH, paras 16, 68—75, 97.*" [emphasis added]

32. Although Mr Tolley took the Court to *Canada Steamship* and the other authorities referred to in the summary by Popplewell J above (*Smith v South Wales Switchgear Co Ltd [1978] 1 WLR 165, Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd [1983] 1 WLR 964, HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] 1 All ER (Comm) 349) I see no need to trace the

development of the principles prior to *Capita (Banstead 2011)* given the summary above approved by the Court of Appeal.

33. The issue is whether, as was submitted for PAGI, the more recent authority indicates that the law has "*moved on*".

34. Cigna referred to *Taberna Europe CDO plc* [2016] EWCA Civ 1262 at [25] and submitted that "*on no view could it be said that the principles to be derived from this line of authority have been consigned to some kind of contractual history.*" [Day 3 p124]

35. The passages of the judgment which in my view are relevant to this issue are as follows:

> "*24 Mr Lord sought to rely, if necessary, on the principle enunciated in Canada Steamship Lines Ltd v The King [1952] AC 192 that a clause will not be construed as excluding liability for negligence unless it specifically purports to do so or there is no other basis of liability on which it could operate. However, as Mr Bear submitted, the law has moved on since that decision. In HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] 1 All ER (Comm) 349, para 11 Lord Bingham of Cornhill observed: "There can be no doubting the general authority of these principles, which have been applied in many cases, and the approach indicated is sound. The courts should not ordinarily infer that a contracting party has given up rights which the law confers upon him to an extent greater than the contract terms indicate he has chosen to do; and if the contract terms can take legal and practical effect without denying him the rights he would ordinarily enjoy if the other party is negligent, they will be read as not denying him those rights unless they are so expressed as to make clear that they do. But, as the insurers in argument fully recognised, Lord Morton was giving helpful guidance on the proper approach to interpretation and not laying down a code. The passage does not provide a litmus test which, applied to the terms of the contract, yields a certain and predictable result.* ***The courts' task of ascertaining what the particular parties intended, in their particular commercial context, remains****." (Emphasis added in judgement.)*
>
> *25 Lord Hofmann, having adverted to the distinction drawn by Lord Fraser of Tullybelton in Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd [1983] 1 WLR 964, 970 between exclusion clauses and limitation clauses, said, at para 63: "Lord Fraser of Tullybelton said that the Canada Steamship guidelines were based upon the 'inherent improbability that the other party to a contract including such a clause intended to release the proferens from a liability that would otherwise fall upon him'. For this reason, Lord Fraser said that the guidelines were not 'applicable in their full rigour' to clauses which limited rather than excluded liability. I doubt,*

> *however, whether Lord Fraser intended to introduce one mechanistic rule (a distinction between limiting and excluding liability) to mitigate the rigour of another.* ***The question, as it seems to me, is whether the language used by the parties, construed in the context of the whole instrument and against the admissible background, leads to the conclusion that they must have thought it went without saying that the words, although literally wide enough to cover negligence, did not do so.*** *This in turn depends upon the precise language they have used and how inherently improbable it is in all the circumstances that they would have intended to exclude such liability." (Emphasis added in judgment.)*
>
> *26 The authorities show that there has been an increasing willingness in recent years to recognise that parties to commercial contracts are entitled to determine for themselves the terms on which they will do business. In my view Roskilde was entitled to include in the investor presentation a disclaimer of liability for the statements contained in it. The disclaimer may, of course, be overridden by the dealings between the parties, but the judge's findings do not go far enough for that to assist Taberna in this case. Taberna was in my view in no better position than the investors to whom the document was originally addressed and Roskilde is therefore entitled to rely on the disclaimer as an answer to its claim.*"

36. Further clarification of the approach has been given by Lord Leggatt in the Supreme Court in the more recent case of *Triple Point Technology Inc v PTT Public Co Ltd* [2021] UKSC 29.

37. In his judgment whilst Lord Leggatt did acknowledge that commercial parties are free to make their own bargains and allocate risks as they think fit, Lord Leggatt did not entirely reject the principles in *Canada Steamship* but described them as being "*subsumed within the wider Gilbert-Ash principle*". Lord Leggatt then quoted with approval the first instance judgment in *Federal Republic of Nigeria v JP Morgan Chase Bank NA [2019] 1 CLC 207:*

> "*Applying the modern approach, the force of what was the contra proferentem rule is embraced by recognising that a party is unlikely to have agreed to give up a valuable right that it would otherwise have had without clear words. And as Moore-Bick LJ put it in the Stocznia case, at para 23, 'The more valuable the right, the clearer the language will need to be'. So, for example, clear words will generally be needed before a court will conclude that the agreement excludes a party's liability for its own negligence…*"

38. The relevant passages were as follows:

> "*108 <u>The modern view is accordingly to recognise that commercial parties are free to make their own bargains and allocate risks as they think fit, and</u>*

> *that the task of the court is to interpret the words used fairly applying the ordinary methods of contractual interpretation. It also remains necessary, however, to recognise that a vital part of the setting in which parties contract is a framework of rights and obligations established by the common law (and often now codified in statute). These comprise duties imposed by the law of tort and also norms of commerce which have come to be recognised as ordinary incidents of particular types of contract or relationship and which often take the form of terms implied in the contract by law. Although its strength will vary according to the circumstances of the case, the court in construing the contract starts from the assumption that in the absence of clear words the parties did not intend the contract to derogate from these normal rights and obligations…*
>
> *111 To the extent that the process has not been completed already, old and outmoded formulas such as the three-limb test in Canada Steamship Lines Ltd v The King [1952] AC 192, 208, and the "contra proferentem" rule are steadily losing their last vestiges of independent authority and being subsumed within the wider Gilbert-Ash principle. As Andrew Burrows QC, sitting as a deputy High Court judge, said in Federal Republic of Nigeria v JP Morgan Chase Bank NA [2019] 1 CLC 207, para 34(iii):*
> *"Applying the modern approach, the force of what was the contra proferentem rule is embraced by recognising that a party is unlikely to have agreed to give up a valuable right that it would otherwise have had without clear words. And as Moore-Bick LJ put it in the Stocznia case, at para 23, 'The more valuable the right, the clearer the language will need to be'. So, for example, clear words will generally be needed before a court will conclude that the agreement excludes a party's liability for its own negligence…*"

39. It was submitted for PAGI [Day 2 p124] that the word "*negligence*" does not have to be used expressly; what the Court has to do is to look at the words used by the parties to see what was meant. PAGI relied on the decision of Picken J in *Cape Distribution Ltd v Cape Intermediate Holdings* [2016] EWHC 1119 (QB) and in particular at [89]-[94] of the judgment:

> "*89. Turning, then, to the wording of clause 5, it is obviously right to acknowledge straightaway that nowhere is there any reference to the indemnity extending to cover CDL's own negligence qua agent. This is not, however, fatal to CDL's case…*
>
> *91. Approaching the matter on this basis, in other words in not too rigid a fashion, I consider that the words "entitled to be indemnified accordingly" are words which, widely expressed as they are, and notwithstanding the absence of any mention of negligence, should be understood as covering an indemnity in respect of CDL's negligence…*

> *93. There are other reasons why I consider that the indemnity should be treated as embracing CDL's negligence. First, it seems to me that it is inherently unlikely to have been the parties' intention to leave CDL, the subsidiary, with any liabilities which it could not pass on to its parent, CIH, bearing in mind that CIH was agreeing in the Sale Agreement to take over all of CDL's "property assets and rights". ... It was, of course, clear by the time that the Sale Agreement came to be entered into that an employee could sue his employer in contract or in tort, the Matthews case having been decided several years previously. The parties would, therefore, have appreciated that it was possible that CDL could have a liability in negligence, and so it can hardly be suggested that they would not have had this possibility in mind when they agreed the indemnity which is to be found in clause 5....*". [emphasis added]

40. In submissions for Cigna, it was accepted that the overarching principle is and always has been the ascertainment of contractual intention on objective grounds. However in the light of the judgment in *Triple Point* it seems to me that Cigna puts the matter too highly when it describes the *Canada Steamship* principles as guidance and submitted that one should approach the question of contractual interpretation on the basis of what will in general be an "*inherent improbability*" that the parties should agree to allocate responsibility for one party's wrongdoing to the other. In my view the principle (at least so far as negligence is concerned) is that the Court should bear in mind that a party is "*unlikely to have agreed to give up a valuable right that it would otherwise have had without clear words*" and if and to the extent that the words "*inherent improbability*" suggest a higher threshold, it is not consistent with *Triple Point.* Further applying Lord Leggatt's approach, there is no need for express words to have been used to exclude negligence.

Issue 30 What is the scope of the indemnity under the BTA? In particular, on the true construction of the BTA: (1) Were any liabilities in respect of mis-selling the Relevant Policies within the meaning of "Liabilities" (as PAGI contends and Cigna denies)? (2) Was any liability in respect of the mis-selling of the Relevant Policies an Excluded Liability pursuant to paragraph 1 of Schedule 7 of the BTA and/or pursuant to paragraph 7 of Schedule 7 (as Cigna contends and PAGI denies)?

41. Clause 8.1 of the BTA contained the following indemnities:

> "*The Buyer shall: (a) assume liability for and indemnify and keep indemnified the Seller or any other member of the Seller's Group against the payment or performance of the Liabilities with effect from the Completion Date (or, where this agreement expressly so provides, with effect from the Effective Completion Date) and any and all actions, costs, claims, losses, liabilities, proceedings or expenses (including reasonable legal expenses) which the Seller (or other member of the Seller's Group) may suffer or incur in respect thereof;*

> *(b) use its reasonable endeavours to procure as soon as reasonably practicable after Completion the cancellation of those securities or guarantees listed in schedule 13 (if any) given in respect of the Liabilities by any member of the Seller's Group PROVIDED THAT such obligation shall not require the Buyer to provide a bank or other third party guarantee and, pending such cancellation, indemnify and keep indemnified the Seller (or the relevant member of the Seller's Group) in respect of all actions, costs, claims, losses, liabilities, proceedings or expenses (including reasonable legal expenses) which the Seller (or other member of the Seller's Group) may suffer or incur in respect thereof.*
>
> *8.2 The Seller shall pay, satisfy and discharge the Excluded Liabilities and, with effect from the Completion Date, indemnify and keep indemnified the Buyer or any other member of the Buyer's Group in respect thereof and against any and all actions, costs, claims, losses, liabilities, proceedings or expenses (including reasonable legal expenses) which the Buyer or any other member of the Buyer's Group may suffer or incur in respect thereof.*"

42. The parties have identified two sub-issues within Issue 30 of the scope of the indemnity. The first sub-issue focuses on the meaning of "Liabilities" within clause 8.1. Although the parties' List of Issues identified the factual matrix as a separate issue (Issue 28), it is a component of Issue 30 as it is part of the exercise of construction of the indemnity in Clause 8.1, as explained in *Wood* above. I will therefore deal with it in this section of the judgment and not as a standalone issue.

43. The second sub-issue focuses on whether any liability in respect of mis-selling was an Excluded Liability under or by reason of paragraph 1 or paragraph 7 of Schedule 7. I did not understand Cigna to be pursuing its case in relation to paragraph 1 of Schedule 7. In relation to paragraph 7, the issue of whether it falls within paragraph 7 leads onto Issues 31 and 32 which are dealt with under that section.

PAGI submissions

44. It was submitted for PAGI that (paragraph 43 of its skeleton):

    a. its "*liabilities*" in respect of mis-selling the Next PPI polices (and related complaint handling administration and legal costs) fell within the natural and ordinary meaning of the contractual indemnities as "*actions, costs, claims, losses, liabilities, proceedings or expenses*" in respect of the "*Liabilities*".
    b. nothing in the BTA excludes liabilities concerning mis-selling.
    c. there is no reason or basis for reading down the clauses as Cigna suggest to exclude these liabilities; the fact that the indemnities may have proven with hindsight to be more onerous than Cigna may have anticipated does not provide a licence to rewrite the contracts and given the sophistication

> of the parties and the contracts and the clarity of the language, textual analysis must be the focus of the exercise of interpretation. Neither party is submitting that something has gone wrong with the language but that the court must interpret the language used. [Day 2 p106]

45. As to the factual matrix, PAGI's case is that:

    a. Given that the BTA was part of a management buy-out from RSA, and the Business and the Assets (including Renewal Rights) which Cigna was acquiring thereunder, it would make commercial sense for Cigna to have taken on the liability forming the subject of the claim.
    b. Cigna's management (who had been running the Creditor Insurance business prior to the BTA) was well-placed to assess the risk of such liability, and it would be contrary to business sense for PAGI to retain such liability.
    c. when the BTA was entered into, the following matters were within the parties' reasonable contemplation: (i) the possibility of financial penalties, fines and compensatory payments to the FSA or to purchasers or beneficiaries of insurance products including the Existing Products (essentially the policies issued prior to Completion) in respect of mis-selling or maladministration (ii) problems with the mis-selling and maladministration of PPI, and thus the risk of liability and/or redress in relation thereto.

46. As to the witnesses from CIGNA it was submitted that they were honest professionals but that they were not involved in the negotiations. Mr Jolley for Cigna was not called for cross examination. He also was not involved in the negotiations. He did give some evidence in his witness statement which is relevant to the factual context as discussed below.

Cigna's submissions

47. Although Cigna accepted the general principles of contractual interpretation referred to above, Cigna submitted (paragraphs 35-36 of its skeleton) that the principles summarized by Popplewell J in *Capita v RFIB* are of particular importance in the present case and that PAGI's case, that all potential liabilities are included within the scope of the indemnities unless expressly excluded, is the opposite way in which one should approach the interpretation of a contractual indemnity in the present circumstances.

48. It was submitted (paragraph 37 of its skeleton) that the commercial context makes it improbable that in the absence of clear words Cigna would have agreed to assume responsibility for the relevant negligence or other wrongdoing of PAGI or its agent. The BTA does not contain any words, let alone clear words, that conveyed that Cigna was assuming responsibility for negligence or other wrongdoing of PAGI or Next in relation to the mis-selling of the PPI.

49. Cigna rejected the proposition that the more sophisticated the drafting, the greater should be the reliance on textual analysis pointing out (paragraph 38 of its skeleton) that in its submissions in relation to the court in relation to the 2006 Scheme PAGI took the view that it was "*not going to win any prizes for clarity of drafting*" in relation to the proposition that the 2006 Scheme had the effect of transferring PPI mis-selling liabilities to Groupama.

50. It was submitted that it was clear from *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] 1 All ER (Comm) 349 that the indemnity does not cover fraud.

51. It was submitted that in 2003 very little was known about PPI mis-selling and it was not realistically "*on the horizon*".

52. As to the management buyout it was submitted that Mr Ablett had been at Groupama and he had no specific experience in relation to creditor insurance and as Mr Jolley explained in his witness statement, the creditor insurance market was self-contained and management was not very familiar with it.

Discussion

53. "*The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement*." (Lord Hodge at [10] in *Wood*) As Lord Hodge stated in *Wood at [12]*:

> "*…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.*"

The language of the contract

54. Clause 8.1 provides that:

> "*The Buyer shall:*
>
> *(a) assume liability for and indemnify and keep indemnified the Seller or any other member of the Seller's Group against the payment or performance of the Liabilities with effect from the Completion Date (or, where this agreement expressly so provides, with effect from the Effective Completion Date) and any and all actions, costs, claims, losses, liabilities, proceedings or expenses (including reasonable legal expenses) which the*

Seller (or other member of the Seller's Group) may suffer or incur in respect thereof." [emphasis added]

55. On the natural meaning of the relevant defined terms it can be said to be an indemnity for "*all liabilities*" of the Business other than the Excluded Liabilities. The relevant definitions are as follows:

> "*Liabilities*" *means all liabilities of the Business (but excludes the Excluded Liabilities) and* "*Liability*" *shall mean any one of them*
>
> "*Business*" *means the business conducted by the Seller or another member of the Seller's Group prior to Completion of marketing, underwriting and servicing: (a) PMI products; (b) PA Insurance products; (c) HCP Insurance products; (d) Creditor Insurance products; (e) travel insurance products; (f) insured advice products; and (g) legal expenses insurance products written on a stand-alone basis including pursuant to any of the Distribution Contracts, but does not include the Excluded Business*;
>
> "*Creditor Insurance*" *means insurance which principally provides cover in respect of a borrower's inability to repay all or part of the amount of any credit made available to him by a lender, as a result of the occurrence of a specified event*
>
> "*Excluded Liabilities*" *means those liabilities of the Business which are identified in schedule 7 and which shall remain with the Seller.*

56. The court has to balance the indications given by the language and the context. In my view the language is broad enough to capture "liabilities" for mis-selling by PAGI's agent in that the indemnity extends to "*all liabilities*" of the Business (unless such liabilities fall within "*Excluded Liabilities*" which is addressed below). The "*Business*" extends to the business of marketing Creditor Insurance products (where the business was conducted prior to completion of the sale). Further the definition of "*Business*" makes express reference to the activities of Next through the reference to "*including pursuant to any of the Distribution Contracts*" as the "Phoenix Assurance Payments Protection Insurance: Next Plc-Master Policy" is listed as one of the Distribution Contracts in Schedule 5 to the BTA.

57. It was a professionally drafted contract and although in relation to the 2006 Scheme, PAGI submitted to Andrews J that provisions in the 2006 Scheme lacked clarity, the use of lawyers tends to support the conclusion that the language used in a document was deliberate. The BTA is a complicated document with many interlinking definitions. It is not a document apparently produced in haste or with any informality. Thus whilst lawyers may produce documents which contain provisions that on close analysis are unclear or ambiguous, the clear language must carry considerable weight in these circumstances.

The wider context

58. As stated by Lord Hodge:

> "*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.*"

The court can also consider "*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 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 other provisions of the BTA

59. PAGI submitted that the whole of the business was transferred as a going concern and therefore the allocation of risk was that Cigna would assume all the liabilities of the business going forward.

60. Cigna submitted (paragraphs 61-63 of its skeleton) that the BTA did not result in the transfer of any Existing Products and RSA was entitled to retain all the premiums paid or payable in respect of the Existing Products. Since neither contractual rights nor contractual liabilities under the Existing Products transferred to Cigna, it was submitted that it was difficult to understand why responsibility for the mis-selling of PPI (non-contractual liabilities) would transfer to Cigna.

61. However, when one stands back and considers the overall structure of the transaction as reflected in the documents entered into at the time of the sale, it was clear this was the sale of a business: for example Recital B of the BTA recorded:

> "*The Seller has agreed to sell, and the Buyer has agreed to purchase, the Business as a going concern and the Assets on the terms hereinafter set out.*"

The "*Business*" that was purchased was defined as:

> "*the business conducted by the Seller or another member of the Seller's Group prior to Completion of marketing, underwriting and servicing: (a) PMI products; (b) PA Insurance products; (c) HCP Insurance products; (d)*

> *Creditor Insurance products; (e) travel insurance products; (f) insured advice products; and (g) legal expenses insurance products written on a stand-alone basis including pursuant to any of the Distribution Contracts, but does not include the Excluded Business.*"

62. Mr Jolley's evidence was that:

> "*The most valuable thing which CISEL acquired was the "renewal rights" to the products. This means the right to approach the customers (of, for example, Next) in due course, and ask them whether they would consent to a new insurer issuing products to them on their renewal date…Renewal rights are extremely valuable and are regarded as the key to success of retail business lines.*"

63. However the definition of "*Renewal Rights*" itself refers to the Buyer "*carrying on the Business in succession to the Seller*":

> *"Renewal Rights" means, in respect of any offer to renew any of the Existing Products and/or the Interim Products made by the Buyer or any member of the Buyer's Group in its own name (or that of its nominated insurer) and for its own account after termination of the relevant Interim Period, the exclusive right for the Buyer or any member of the Group to represent itself as carrying on the Business in succession to the Seller or any other member of the Seller's Group.*" [emphasis added]

64. Although the BTA did not result in the transfer of any Existing Products, the structure of the sale arrangements reflected the fact that Cigna needed to obtain authorisation before it could write insurance on its own behalf and this meant that interim arrangements were needed.

65. The overall structure of the transaction was that it was intended to transfer the business to Cigna but that there would be an "*Interim Period*" pending Cigna obtaining the necessary authorisations to enable Cigna to issue the policies on its own account or on behalf of another insurer. Accordingly the BTA provided for an Interim Period. The relevant definition read (so far as material):

> "*(a) in relation to the Products or to a particular category of Products (and the Buyer and the Seller shall use reasonable endeavours to agree as soon as reasonably practicable following Completion what will constitute a "category" of Products for these purposes together with appropriate plans for the migration of the issue of each such category of Products from the Seller to the Buyer or its nominated insurer), the period commencing immediately after Completion and ending on whichever is the later of: (i) the tenth Business Day following receipt by the Seller of notice from the Buyer to the effect that the Buyer (or its nominated insurer) is now ready to begin issuing the Products or a particular category of Products (as the case*

> *may be) on its own account; and (ii) the tenth Business Day following receipt by the Buyer of a notice from the Seller confirming either that: (A) the Distribution Contracts, the Binding Authority Agreements and the Hospital Contracts relating to the Products or a particular category of Products (as the case may be) have been assigned, novated, replaced or terminated (as the case may be) pursuant to clauses 9.3 and/or 9.4 to the reasonable satisfaction of the Seller; or (B) that the Seller is nevertheless ready to terminate the Interim Period but shall in no circumstances exceed the period commencing immediately after Completion and ending on the date falling 18 months after the Completion Date…*" [emphasis added]

The reference to "Products" is a reference to:

> "*insurance products of the type issued by the Seller or any other member of the Seller's Group prior to Completion in the course of the Business*".

66. Mr Jolley's evidence provides support for this factual context where he said:

> "*After the MBO, Tim Ablett explained to staff that he hoped that CISEL would be able to become an insurer within 18 months. However, he said that it was possible that CISEL would not become an insurer, in which case it would look to find another insurer which wished to provide the insurance, with CISEL continuing to handle the administration*".

67. Accordingly, the fact that the Existing Products did not transfer to Cigna was due to the lack of authorization to underwrite the Products. Paragraph 1 of Schedule 7 thus excluded:

> "*The Seller's liabilities pursuant to and all reserves relating to the Existing Products and/or the Interim Products (which liabilities are, for the avoidance of doubt, the subject of the Reinsurance Agreement).*"

68. The "*Excluded Liabilities*" therefore excluded the liabilities "*pursuant to*" the policies (both the Existing Products and/or the Interim Products).

69. Further although certain contracts, notably in this context, the Next master policy, were not transferred at completion, it is clear from the definition of "*Interim Period*" (above) that the Interim Period was to allow the Distribution Contracts to be assigned, novated, replaced or terminated and once this had been done for a particular category of Products (and authorisation obtained) the Interim Period would end. Accordingly the fact that these contracts did not transfer on the Effective Date does not indicate that it was not the intention of the parties that the business should be transferred. It merely suggests that not all relevant contracts could be transferred by the Effective Date.

Other agreements-Reinsurance Agreement and the RCUA

70. This description of the overall structure of the transaction and in particular the analysis that it was the sale of a business as a going concern is borne out by the Recitals to the Reinsurance Agreement which provided as follows:

> "*(B) Under the terms of the Sale Agreement, the Reinsured has agreed to sell or procure the sale of, and the Buyer has agreed to purchase, the goodwill and certain other assets of the Business (in conjunction with the Reinsurer entering into this agreement with the Reinsured) with a view to carrying on the Business as a going concern in succession to the Reinsured on the terms and subject to the conditions set out in the Sale Agreement.*"

71. Recital (C) of the Reinsurance Agreement is also consistent with the purpose which lay behind the Interim Period in the BTA explained above, referring to RSA agreeing to authorise the Buyer to issue the Interim Products on its behalf during the Interim Period until the Buyer can do so on its own account:

> "*(C) The Reinsured has agreed that, notwithstanding Completion (as defined in the Sale · Agreement), it will authorise the Buyer to issue the Interim Products and the Ancillary Creditor Life Insurance Products (each as defined in the Sale Agreement) on behalf of the Reinsured (or other member of the Seller's Group) for the duration of the Interim Period (as defined in the Sale Agreement) to afford the Buyer an opportunity to take such steps as may be reasonably required to enable the Buyer to issue the Products (as defined in the Sale Agreement) on its own account or on behalf of another insurer. The Buyer has agreed to issue and administer the Interim Products and the Ancillary Creditor Life Insurance Products on behalf of the Reinsured on the terms and subject to the conditions contained in the Risk Carrying and Underwriting Agreement (as defined in the Sale Agreement).*"

72. The operative provisions of the Reinsurance Agreement then provided for Munich Re to reinsure and indemnify the Seller and members of its Group who had issued policies or who issued policies during the Interim Period:

> "*In consideration of the Reinsured's agreeing to pay the Premium and the Interim Product Premiums, the Reinsurer agrees to reinsure and indemnify the Reinsured and any other insurance company member of the Seller's Group who has at any time issued any of the Existing Products or the Interim Products with effect from the Commencement Date in respect of 100 per cent. of all Reinsured Losses.*"

73. In my view it follows that on a transfer of a business as a going concern the Seller would look to divest itself of all the assets and liabilities of that business and not to retain any liabilities (unless it was indemnified against the risk).

74. Cigna relied on the description of the role of Cigna in the RCUA which suggested that Cigna was merely providing "*the administration*" for the run-off of Existing Products. Recital G stated:

> "*Following such transfer, the Buyer has agreed with the Seller and other insurance company members of the Seller's Group to provide certain services to the Seller and other insurance company members of the Seller's Group in connection with the issue and administration of the Interim Products, with* ***the administration of the run-off of any obligations*** *which the Seller or any other insurance company member of the Seller's Group may have in relation to the Existing Products, the Interim Products and the Ancillary Creditor Life Insurance Products and with certain other legal and/or regulatory reporting requirements pertaining to the Existing Products. the Interim Products and the Ancillary Creditor Life Insurance Products.*" [emphasis added]

75. Further clause 12.2 of the RCUA provided:

> "*The Buyer shall direct all enquiries from any Regulatory Authority relating to the Administered Products or to this agreement to the Seller unless the enquiry is specifically addressed to the Buyer by a Regulatory Authority (in which case the Buyer shall procure that details or a copy of such enquiry are promptly relayed to the Seller) or unless otherwise agreed in writing by the parties and the Buyer will not send any correspondence to any Regulatory Authority relating to the Administered Products without the Seller's prior written consent. ln cases of disputes or any other dealings relating to the Administered Products or to the Services with any Regulatory Authority, the Seller shall provide the Buyer with such information as the Buyer reasonably requests and the Seller is reasonably able to provide and will, to the extent reasonably practicable taking into account the nature and urgency of the matters under consideration, consult with the Buyer relating to such disputes or dealings but the Seller shall be entitled to conduct all dealings with the relevant Regulatory Authority…*" [emphasis added]

"*Administered Products*" were defined as:

> "*the Existing Products, the Interim Products and the Ancillary Creditor Life Insurance Products*."

76. However this submission ignores the rest of the recitals which refer to the overall arrangements and to the sale of the business. Recital B of the RCUA referred to the sale of the Business to the Cigna as follows:

> "*Under the terms of the Sale Agreement, the Seller has agreed to sell or procure the sale of, and the Buyer has agreed to purchase, the goodwill and certain other assets of the Business as a going concern in succession to the Seller on the terms and subject to the conditions set out in the Sale Agreement*."

77. Further PAGI's case is not that the liabilities for mis-selling transferred to Cigna but that Cigna agreed to assume the risk and to indemnify it against those liabilities. Accordingly although the Seller controlled the dispute process pursuant to Clause 12.2, it can still be said to be not inconsistent with PAGI's case that the liability for mis-selling remained with PAGI but the risk passed to Cigna under the indemnity. To the objection that this gave no control to Cigna for the amount of its liability under the indemnity it was submitted for PAGI that any settlement would have to be reasonable in order for PAGI to have a good claim under the indemnity.

78. It is also notable that where the parties intended to exclude liability for the Seller's negligence in the RCUA this was expressly referred to. Clause 24.2 of the RCUA provided as follows:

> "*The Buyer shall discharge and hereby undertakes to indemnify the Seller for itself and on behalf of each member of the Seller's Group against all and any liabilities, obligations, costs, claims, demands, charges, damages, fines, penalties, or awards arising from the employment or engagement or the termination of such employment or engagement of any person employed or engaged (directly or indirectly) by the Buyer at any time during the duration of this agreement to provide all or any of the Services, including but not limited to any claim by any appropriate representative of any such person arising out of any failure whether of any member of the Buyer's Group or the Seller or any other member of the Seller's Group to comply with their obligations under the Regulations, save for to the extent that any such liabilities, obligations, costs, claims, demands, charges, damages, fines, penalties, or awards arise solely from the negligence of the Seller or any other member of the Seller's Group or any of its or their employees or agents…*" [emphasis added]

79. Further in the Reinsurance Agreement claims for mis-selling were expressly excluded from the definition of "*Reinsured Losses*" as follows:

> "*… means, subject to clause 6, all and any costs, claims, damages, judgements, awards, settlements, compromises, returns, third party claims handling expenses or other amounts at any time payable by or on behalf of the Reinsured or any other member of the Seller's Group including any legal or other professional adviser's fees or expenses and ex-gratia payments made by or at the direction of the Reinsurer and/or the Buyer (but excluding, for the avoidance of doubt, any ex-gratia payments or other non-*

> *contractual amounts made by or at the direction of the Reinsured in accordance with clause 9. l(b)), which arise under or in relation to any of the Existing Products or the Interim Products but excluding any financial penalty, fine or compensatory payment payable by the Reinsured or any other member of the Seller's Group to the FSA or to any purchaser or beneficiary of any Existing Product in respect of the mis-selling or the maladministration of any Existing Product prior to the Commencement Date and excluding any losses already notified, paid or agreed to be paid by the Reinsured in respect of the Existing Products on or prior to the Commencement Date to the extent that such losses are not included in the Reserves as set out in the Completion Reserves Report…*" [emphasis added]

The significance of the MBO

80. It was submitted for PAGI [Day 2 p125] that Cigna's management (who had been running the Creditor Insurance business prior to the BTA) was well-placed to assess the risk of the mis-selling liability.

81. There is no detailed evidence about the knowledge of Cigna's management. On the evidence of Mr Jolley, one of the two individuals who led the MBO, Mr Ablett, returned from working for another separate company, although he had previously worked for R&SA, and returned to R&SA at some point before the MBO to "*bring about the MBO*".

82. Mr Jolley's evidence in this regard was as follows:

> "*At the briefing, I learned that the management who had led the purchase were Tim Ablett and Steve Wood. Tim Ablett had, at some time in the past, headed up R&SA's personal lines broker division and had left to become the managing director of Groupama insurance company; he had returned to R&SA the year before the MBO, to bring about the MBO and lead CISEL. Steve Wood had previously managed R&SA's corporate client household business, and had moved to managing the Healthcare and Assistance Division about a year before the MBO. They were based in a different office from the creditor team, and I did not know either of them well*."

83. Mr Jolley could not provide anything other than general evidence as to the knowledge of the individuals leading the purchase. However at the very least, it can be inferred that the buyer was familiar with the insurance industry and is likely to have been aware at least in general terms of the risks which were attendant on the purchase of such a business including, having regard to the published material referred to below, the risk of mis-selling.

84. In this regard, it is also relevant to note the common ground as to what was known or reasonably capable of being known to all parties at the time of the BTA (April 2003). It is common ground that at that time, the FSA did not regulate general

insurance mediation. However it was also common ground that it was known or reasonably capable of being known to all parties at the time of the BTA that:

(a) Pursuant to FSMA, the FSA had the power to impose various sanctions upon regulated firms which committed misconduct, including public censure, suspension or restriction of regulatory permissions, and fines.

(b) The FOS operated a scheme whereby, subject to limits of jurisdiction and other rules, an Ombudsman could make a decision that it would be fair and reasonable for a regulated person to return premiums or provide other redress to a complainant whether or not, as a matter of law, the complaint gave rise to any liability.

The mis-selling risk

85. It was submitted for Cigna that there is no possible suggestion that the parties to the BTA knew that there were pending claims in respect of the mis-selling of PPI or, that there were facts which would or might give rise to such claims. [Day 4 p74]

86. Whilst there is no evidence before this Court which would justify a finding that the parties knew there were pending PPI claims or knew of the facts that would give rise to such PPI claims, there is evidence that would justify a finding that the risk of such claims was known to the parties or at the very least, in the reasonable contemplation of the parties.

87. Although the FSA did not regulate general insurance mediation at the time, the warranties in the BTA provide contextual support for the proposition that the parties were aware of the mis-selling risk at least in general terms. The BTA contained the following warranties in paragraph 15 of Schedule 2:

> *15.1 Save as disclosed, no complaints have been made in the last three years against or addressed to the Seller by the FSA, nor have any material complaints been made against the Seller by any customer, in respect of the Business. So far as the Seller is aware, there are no disputes, investigations or disciplinary proceedings in operation or dispute which has been or is to be referred to the Financial Ombudsman Service.*
>
> *15.2 No complaints or allegations that advice given by the Seller (or any other member of the Seller's Group) in respect of any of the Products was unsuitable or constituted a misrepresentation have been received by the Seller or any other member of the Seller's Group during the three-year period ending on the date of this agreement.* [emphasis added]

88. It was submitted for Cigna [Day 4 p81] that:

a. the warranties do not cover every possible way in which a complaint or allegation of mis-selling might be framed.
b. the warranties do not tell you whether the BTA would cover any particular matter.

89. Whilst I accept these submissions for Cigna, the significance of the warranties is that they provide context for the interpretation of the language in Clause 8.1. In particular they indicate that at the time of entering into the BTA, the parties were aware (or it was within the parties' reasonable contemplation) that complaints to the FSA were possible and investigations being referred to the FOS and in particular that complaints or claims (allegations) could be made in respect of advice given in respect of the Products being alleged to have been "*unsuitable*" or to have amounted to a "*misrepresentation*". This is sufficient to infer that the parties were aware (or that it was within the parties' reasonable contemplation) that there was a risk of claims or complaints within the scope of what is broadly referred to as "mis-selling" of PPI even if the warranties did not amount to an exhaustive description of the possible heads of liability or grounds for complaint.

90. PAGI also relied on the context of the Reinsurance Agreement. As referred to above, under this Agreement, Munich Re agreed (in summary) to pay all claims (and associated losses, costs and expenses) arising out of the Existing Products or the Interim Products. This was subject to certain exclusions including:

> "*any financial penalty, fine or compensatory payment payable by the Reinsured or any other member of the Seller's Group to the FSA or to any purchaser or beneficiary of any Existing Product in respect of the mis-selling or the maladministration of any Existing Product prior to the Commencement Date.*" [emphasis added]

PAGI submitted that this shows both that the parties had in mind mis-selling and that the intention cannot have been for exposure to fall between the two agreements.

91. I accept the submission that these express provisions in the Reinsurance Agreement support PAGI's case that the parties had in mind the risk of mis-selling of PPI, or that it was within the reasonable contemplation of the parties.

92. PAGI also relied on what it termed "*problems with the mis-selling and maladministration of PPI, and thus the risk of liability and/or redress in relation thereto*" as being within the parties' reasonable contemplation when the BTA was entered into.

93. Mr Jolley's evidence was that:

> "*43 Before the MBO, R&SA had a serious problem with the mis-selling of its mortgage and endowment products.*
>
> *44. However, the creditor insurance team (in which I worked) did not perceive mis-selling to be a significant concern until around 2010, when it became a focus for regulators.*"

94. Mr Jolley accepted in his witness statement that he was not involved in the negotiations for the sale. However his evidence that mis-selling was not perceived as a "*significant concern*" at that time is supported to an extent by the materials in the public domain discussed below.

95. Cigna relied on a letter in September 2014 to PAGI setting out its provisional decision in relation to an individual complaint and referring to the position at the time of the 2006 Scheme, in which the FOS wrote:

> "*It seems unlikely that, at the time of this transfer of undertakings, liability for the mis-selling of PPI was in the reasonable contemplation of either insurer because it was long before such matters became the subject of the regulatory action and/or widespread publicity that is now a well-known historical fact.*" [emphasis added]

96. Whilst on the materials before this Court I accept that in 2006 it was long before liability for PPI mis-selling became the subject of regulatory action and/or "*widespread*" publicity, that letter from the FOS was not considering the documentation in 2003 and thus in expressing a view on what was in the reasonable contemplation of the parties to the 2006 Scheme, the FOS was not and could not express a considered view on the position at the time of the BTA in 2003 in that it had not considered the references in the warranties in the BTA and the references to mis-selling in the Reinsurance Agreement discussed above and the other public materials now before this Court which date from the period immediately before the BTA was entered into.

97. Those public materials included the following:

    a. In August 2002 the Guardian newspaper reported that RSA had been fined by the FSA for failing to compensate customers who had been mis-sold pensions. It was also reported in the Independent newspaper which referred to the wide-ranging investigation into pensions mis-selling.
    b. In December 2002 and in February 2003 there were newspaper reports criticising the practice of selling insurance on taking out personal loans from banks.
    c. In March 2003 the FSA imposed a further fine on RSA this time for mis-selling mortgage endowments.

d. Also in March 2003 the Guardian published the results of their investigation into the mis-selling of PPI in relation to loans, credit cards and mortgages by Barclays.

98. These and other materials before the Court taken from published sources suggest that whilst the particular form of "mis-selling" was not being raised widely at least in relation to R&SA (and/or its agents) and credit cards, mis-selling was a significant issue in other parts of the business and was beginning to be of concern in relation to PPI.

The need for RSA to sell

99. It would appear from newspaper articles that RSA wanted to raise cash and divest itself of the business. However although the evidence is that RSA was keen to raise cash at this time through the divestment, there is no evidence that this clause was intended to be limited in the way that Cigna contend as a result of any inequality of bargaining position. Had Cigna been using its position of strength in the negotiations, one might have expected an express carve out for mis-selling (as was included in the Reinsurance Agreement, albeit for the benefit of Munich Re) rather than having to rely on any inference from the factual/commercial context to limit an indemnity which on its face is expressed in broad terms.

Business common sense

100. It was submitted for PAGI that given that the BTA was part of a management buy-out from RSA, and the Business and the Assets (including Renewal Rights) which Cigna was acquiring thereunder, it would make commercial sense for Cigna to have taken on the liability forming the subject of the claim and it would be contrary to business sense for PAGI to retain such liability.

101. It was submitted for Cigna that nothing was paid for assuming the liability for mis-selling. However the absence of evidence of a specific apportionment of the consideration for the sale to this liability does not indicate in my view whether the mis-selling risk was included within the indemnity.

102. As referred to above, it was submitted for Cigna (paragraph 37 of its skeleton) that the commercial context makes it improbable that in the absence of clear words Cigna would have agreed to assume responsibility for the relevant negligence or other wrongdoing of PAGI or its agent. It was submitted that the BTA does not contain any words, let alone clear words, which conveyed that Cigna was assuming responsibility for negligence or other wrongdoing of PAGI or Next in relation to the mis-selling of the PPI.

103. It was submitted for Cigna that the indemnity clearly would not cover a criminal liability such as a health and safety offence committed by RSA or PAGI and in the context of this agreement equally it does not cover a tort liability because it is

"*self-evidently*" improbable that it should be included. It was submitted that what is needed is:

> "*something positively and clearly to indicate that, notwithstanding that improbability, it should be treated as included*."

And that whilst this does not require:

> "*some magic formula … what one needs is an objectively identifiable factor, such as in Lictor. This was a warts and all transaction, eyes wide open. There's no such factor in the present case*." [Day 4 p86]

104. As discussed above, there is no need for express words to be used in order to conclude that the language of the indemnity extended to liability for negligent mis-selling.

105. The position in relation to fraud or dishonesty was summed up by Popplewell J in *Capita* as follows:

> "*These principles apply with even greater force to dishonest wrongdoing, because of the inherent improbability of one party assuming responsibility for the consequences of dishonest wrongdoing by the other. The law, on public policy grounds, does not permit a party to exclude liability for the consequences of his own fraud; and if the consequences of fraudulent or dishonest misrepresentation or deceit by his agent are to be excluded, such intention must be expressed in clear and unmistakeable terms on the face of the contract. General words will not serve. The language must be such as will alert a commercial party to the extraordinary bargain he is invited to make because in the absence of words which expressly refer to dishonesty the common assumption is that the parties will act honestly: HIH, paras 16, 68—75, 97.*" [emphasis added]

106. On the current state of the authorities, as stated in *Taberna Europe* (quoted above):

> "*The courts' task of ascertaining what the particular parties intended, in their particular commercial context, remains*".

As Lord Leggatt said in *Triple Point:*

> "*108 The modern view is accordingly to recognise that commercial parties are free to make their own bargains and allocate risks as they think fit, and that the task of the court is to interpret the words used fairly applying the ordinary methods of contractual interpretation…*"

107. Dealing firstly with the issue of whether the BTA indemnity extends to the fraud or dishonesty of the Seller's agent, this argument did not seem to be pressed by counsel for PAGI who accepted that fraud is a "*different category*". [Day 3p20]. This may have been on the basis that in the view of PAGI, it is not likely to be relevant to the mis-selling claims in this case, although this was disputed by Mr Tolley KC who submitted that fraudulent conduct would include a recklessly inaccurate communication about the scope of coverage or, if limitation was in issue, fraud or deliberate concealment to overcome limitation periods or as a consequence of the nature of the allegations if what is, as a matter of substance, alleged is dishonest.

108. It seems to me that even though the language of the indemnity is broad and unlimited, an interpretation that it extended to liabilities incurred as a result of the fraud or dishonesty or deceit of the agent would be contrary to business common sense and beyond what the parties reasonably contemplated having regard to the factual matrix discussed above. It would be an "*extraordinary bargain*" and there is nothing in the language or the context to support such an interpretation. I note that the warranties in the BTA refer to the Products being unsuitable or the subject of a misrepresentation. I infer that the warranties were directed at negligence or breach of regulatory/statutory duties rather than fraud or dishonesty and I see nothing to suggest that it was intended to indemnify the Seller against the fraud or dishonest conduct of its agent in relation to the Existing Products.

109. However if the liabilities arise other than as a result of fraud or dishonesty (including deceit) on the part of the agent, then in my view, it cannot be said that it was unlikely or even, if contrary to my findings above, the test is one of "inherent improbability", that negligence and/or breach of regulatory/statutory duty was to be excluded from the scope of the indemnity when the language of the clause is considered in its factual context. As discussed above:

    a. this was a sale of a business where the Seller (and its group) transferred all liabilities of the business unless specifically excluded.
    b. there was a warranty in the BTA that there had been no complaints of unsuitable advice or misrepresentations in respect of the Products.
    c. no express exclusion for mis-selling was included even though such an express exclusion was included (for the benefit of Munich Re) in the Reinsurance Agreement.
    d. it was in the reasonable contemplation of the parties that complaints could be made to the regulator and/or the FOS.
    e. in the RCUA where the parties wished to exclude liability for negligence by the Seller, any other member of the Seller's Group and their agents it was expressly excluded.

110. I note that PAGI relied on *Comyn Ching v Oriental Tube* a decision of the Court of Appeal from 1979 where the Court applied the rule in *Canada Steamship* but found that the parties intended to cover negligence even where the word was not

used. Cigna submitted that the circumstances of the case were very similar to *Lictor Anstalt v Mir Steel UK Ltd* [2012] EWCA Civ 1397 where an indemnity was offered in the context of a "*known issue*". To the extent that the authorities can provide any assistance in this regard on what is essentially a question of construction, then it seems to me that the factual context, as discussed above, is that the risk of mis-selling of PPI was within the reasonable contemplation of the parties even if it was not something which was actually appreciated to be a serious risk at the time.

111. It was submitted for Cigna that it was not possible to verify or quantify the liability for mis-selling and thus any liability would be open-ended.

112. However as referred to above, given that the potential risk was not a "significant concern", it may well be the case that with the benefit of hindsight Cigna would not have accepted the risk but the Court cannot rewrite a contract in the light of subsequent events. The task of the court is to interpret the words used fairly applying the ordinary methods of contractual interpretation and the fact that the liabilities with hindsight have proved to be very significant may only indicate that with hindsight it was a bad bargain.

Excluded Liabilities

113. In relation to the *Excluded Liabilities* and Schedule 7 of the BTA, Cigna submitted that the PPI Liabilities fell within paragraph 7:

> "*Any liabilities <u>in relation to</u> the Excluded Business*". [emphasis added]

114. Cigna submitted that since "*Excluded Business*" excludes the creditor life business and liability in relation to underwriting those products, a liability for mis-selling is a liability "*in relation to*" the Excluded Business as underwriting is just part of the process by which the products came to be underwritten. [Day 4 p84]

115. The definition of *Excluded Business* expressly refers only to "*underwriting*"*:*

> *"Excluded Business" means the business conducted by the Seller or another member of the Seller's Group (whether before or after Completion) <u>of underwriting</u>: (i) any Group PA Insurance products; (ii) any Business-Related Travel Insurance products; (iii) any Add-on Legal Expenses Insurance products excluding any that are reflected or reported in the Accounts; (iv) <u>any Creditor Life Insurance products</u> including the Ancillary Creditor Life Insurance Products; and (v) any other insurance business which is not reflected or reported in the Accounts;*

116. This is to be contrasted with the definition of "*Business*" from which certain business (defined as the *Excluded Business*) is excluded. "*Business*" is defined as

"*the business… of* marketing, underwriting and servicing" the various products. Thus it reads

> "*Business*" *means the business conducted by the Seller or another member of the Seller's Group prior to Completion of marketing, underwriting and servicing: (a) PMI products; (b) PA Insurance products; (c) HCP Insurance products; (d) Creditor Insurance products; (e) travel insurance products; (f) insured advice products; and (g) legal expenses insurance products written on a stand-alone basis including pursuant to any of the Distribution Contracts, but does not include the Excluded Business*;

117. In my view therefore the language of the definitions is clear that the only exclusion from the Business which is transferred under the BTA is the underwriting of the relevant products (including Creditor Life Insurance Products) and the exclusion does not extend to the marketing or servicing of such products. There is no ambiguity in that language and no reason to place a broad meaning on the words "*in relation to*" to contradict the clear distinction in the definition between "*marketing, underwriting and servicing*" on the one hand and "*underwriting*" on the other.

118. The defined term "*Liabilities*" refers to "*all liabilities of the Business (but excludes the Excluded Liabilities) …*". It therefore flows from the definition of *Business* that if marketing and servicing is part of the Business, liabilities for mis-selling are liabilities "*of*" the Business. The distinction to be drawn on the wording of the BTA is not as Cigna submitted, between "*insurance liabilities*" and "*non-insurance liabilities*" but between "*marketing and servicing*" and "*underwriting*".

119. Cigna submitted (paragraphs 85 and 86 of its skeleton) that if a liability for mis-selling the PPI is included by the definition of *Liabilities* it follows that it is excluded by the definition of *Excluded Liabilities* on the basis that the word "*liabilities*" in paragraph 7 must mean the same as it does in the definition of "*Liabilities*".

120. In my view that construction is not correct. The indemnity is in respect of "*Liabilities*" which is defined as (i) *all liabilities of the Business but* (ii) *excludes the Excluded Liabilities* (numbering added)

121. The relevant definitions for limb (i) are "*Business*" *means the business … of marketing, underwriting and servicing… but does not include the Excluded Business (underwriting of Creditor Life products)* so a liability of that business would be the business of marketing and servicing but not underwriting Creditor Life products. Limb (i) would therefore capture liabilities in respect of PPI.

122. In limb (ii) "*Excluded Liabilities*" *means those liabilities of the Business which are identified in schedule 7...[* "*Any liabilities* *in relation to* *the Excluded Business*"*.]*

123. In my view there is a distinction between the first and second limbs of the definition of *Liabilities*: the first limb catches the pool of liabilities "*of*" the Business which is transferred (and encompasses liabilities in respect of PPI because it is not the underwriting of Creditor Life products); the second limb is the pool of Excluded Liabilities and only excludes liabilities if they "*relate*" to the business of underwriting the Creditor Life products. In my view the PPI Liabilities do not "relate" to the business of underwriting.

124. Issues 31 *(Was any liability in respect of the life component of the Relevant Policies transferred to Cigna under the BTA?)* and 32 *(whether Cigna is not in any event liable to indemnify PA(GI) in respect of any element of the redress referable to the mis-selling of the life component of the Relevant Policies)* follow from this conclusion and must be answered in favour of PAGI. Cigna is liable to indemnify PAGI in respect of the mis-selling of a policy even where any element of the redress is referable to the mis-selling of the life component of the policy (Issue 32). Liability in respect of the mis-selling of the life component of the policies was transferred to Cigna under the BTA together with liability for mis-selling of the non-life components and thus the issue of whether it is legally possible to transfer part of the liability for mis-selling of a PPI policy does not arise in relation to the BTA.

Conclusion on Issue 30

125. For the reasons discussed above I find that liabilities in respect of the PPI mis-selling were within the meaning of "Liabilities" other than where such liabilities arose as a result of fraud or dishonesty (including deceit) on the part of the agent.

Issue 29. Is PAGI entitled to claim under the indemnity in clause 8.1(a) of the BTA even though it is not a member of the Seller's Group (and has not been such a member since 30 September 2004)?

126. Issue 29 is as follows:

> "*Is PAGI entitled to claim under the indemnity in clause 8.1(a) of the BTA even though it is not a member of the Seller's Group (and has not been such a member since 30 September 2004)?*"

127. Clause 8.1 provides (so far as relevant):

> *8.1 The Buyer shall: (a) assume liability for and indemnify and keep indemnified* *the Seller or any other member of the Seller's Group* *against the payment or performance of the Liabilities with effect from the*

Completion Date (or, where this agreement expressly so provides, with effect from the Effective Completion Date) …"

128. Clause 29.1 of the BTA provides:

"*Any member of the Seller's Group (other than the Seller) and any member of the Buyer's Group (other than the Buyer) or any Buyer's Permitted Assignees who is given any rights or benefits pursuant to this agreement (a "Third Party") shall be entitled to enforce those rights or benefits against the Buyer or the Seller, as the case may be, in accordance with the Contracts (Rights of Third Parties) Act 1999.*"

129. The relevant definition of Seller's Group is as follows:

"Seller's Group" means the Seller, its subsidiary undertakings, its holding companies as at the date of this agreement and the subsidiary undertakings from time to time of such holding companies, all of them and each of them as the context admits but excludes FGL and R&SA Healthcare".

130. It is common ground that PAGI was a member of the Seller's Group when the BTA was entered into. PAGI has not been a member of the Seller's Group since 30 September 2004, when it was acquired by Resolution Life.

131. PAGI contends that it is entitled to make a claim under the indemnity in circumstances where it was a member of the Seller's Group on the date when the BTA was entered into.

132. Cigna contends that PAGI is unable to make a claim under the indemnity because it is no longer a member of the Seller's Group and/or because the actions, costs, claims, losses, liabilities, proceedings and/or expenses in question were incurred when it was not a member of the Seller's Group.

PAGI Submissions

133. It was submitted for PAGI that:

a. It is an ongoing indemnity to keep the Seller and members of its Group indemnified against all actions and losses which it may suffer or incur, and the natural interpretation is that the indemnity was being provided to members of the Seller's Group at the date of the BTA. It would be contrary to commercial common sense to have excluded the operation of the indemnity in the event of a departure of a member from the Seller's Group.
b. Cigna's contention that it means that the entity has to be member at the time of the claim or the time claim accrued means that it is

"*happenstance*" as to who can enforce the indemnity even if the liability sits with them.

c. It is an indemnity against the liabilities of "*the Business*" which is defined by reference to business conducted by the Seller or another member of the group-i.e. liabilities of the business conducted prior to completion; it relates to the business which was conducted i.e. it is time limited and covers a set pool of liabilities.
d. The Court would have to rewrite the clause to add in provisions limiting it to current subsidiaries.

Cigna's submissions

134. It was submitted for Cigna that:

a. PAGI does not fall within the definition of Seller's Group because although it was a subsidiary undertaking of the Seller it ceased to be so in September 2004. The point in time for membership is the time when the right arises or at time of claim.
b. The cause of action accrues when the indemnified party suffers loss – *Crampton v Walker* (1860) 3 El& El 321. PAGI did not have a cause of action whilst it was a member of the Seller's Group.
c. In *Enviroco Ltd v Farstad Supply A/S [2011] UKSC 16* the Supreme Court's decision was premised on the fact that that the relevant time for the purpose of analysing whether there was a right to claim under the indemnity was the time of the indemnified event and at no stage was it suggested that it would have been sufficient that the claimant company was a subsidiary at the time of the contract in which the indemnity was given.
d. Under Clause 19.2 it was not open to the Seller to assign its rights to PAGI once it had ceased to be a member of the group and it is consistent with that approach that PAGI when it ceased to be a member of the Seller's Group ceased to benefit from the indemnity.

Discussion

135. Starting with the language of the definition it is expressed to cover the following entities (my numbering):

i. the Seller,
ii. its subsidiary undertakings,
iii. its holding companies "*as at the date of [the BTA]*" and
iv. the subsidiary undertakings "*from time to time*" of such holding companies.

136. It is therefore notable, and I infer significant in this professionally drafted contract that in relation to holding companies it is expressly stated that it is those holding

companies "*at the date of the agreement*" and for subsidiary undertakings of the holding companies that it is the entities "*from time to time*".

137. Given the absence in [ii] of the words "*from time to time*" used in [iv] to limit the subsidiaries of holding companies, the more natural interpretation in my view of the language used is that it means those subsidiaries of the Seller at the date of the BTA irrespective of whether it remained a subsidiary at the time of the claim or loss.

138. When the language is considered against the context of the other provisions of the BTA, the wording of the indemnity can be contrasted with clause 19.2 of the BTA dealing with assignment:

> "*The Seller may assign any of its Rights in whole or in part to one or more members of the Seller's Group from time to time and the Buyer may assign any of its Rights in whole or in part to any other member of the Buyer's Group from time to time provided however that such assignment shall not be absolute but shall in the case of any assignment to another member of the assignor's group be expressed to have effect only for so long as the assignee remains a member of the Seller's Group or the Buyer's Group (as the case maybe) and that immediately before ceasing to be a member of such Group the assignee shall assign the benefit to another member of the Group of such assignee and the provisions of this clause 19 shall apply mutatis mutandis to any such Group member*." [emphasis added]

139. There are two striking distinctions:

    a. Clause 19.2 includes the words "*from time to time*" after the phrase "*The Seller may assign any of its Rights in whole or in part to one or more members of the Seller's Group*" thus clearly limiting the right of assignment to members of the Seller's Group at the relevant time. Such a qualification would not be necessary if Cigna's interpretation of the defined term "*Seller's Group*" was correct that it was implicitly limited to subsidiaries who were members of the Group at the time of the loss or claim.
    b. There is an express limitation which provides that the assignment shall have effect only for so long as the assignee remains a member of the relevant Group.

140. This is a professionally drafted contract and the additional express words in Clause 19.2 suggest that the parties had in mind when entering into the BTA that the composition of the Group may change over time and in this context have added express words to limit assignments to only those subsidiaries which is a subsidiary at the relevant time. This therefore supports an inference that had the parties wished to limit the operation of the indemnity in Clause 8.1 or the rights under Clause 29.1 in a similar way they would have done so.

141. It was submitted for Cigna that it makes commercial sense for the clause to operate in favour of the group at the time the cause of action arose. It was submitted for Cigna that since the cause of action does not arise until the loss occurs (which in relation to the PPI claims was from December 2015 onwards) the companies that should be able to take the benefit of the indemnity should be those members of the Seller's Group at that time.

142. In my view it would be contrary to commercial common sense to have excluded the operation of the indemnity in the event of a departure of a member from the Seller's Group. The indemnity was to protect the Seller, its subsidiaries and its holding company in economic terms from pre-existing liabilities once it had sold the business. Having sold the business and transferred the risk to the Buyer with the protection of those indemnities, the value of the sale to the Seller would be adversely affected if the indemnity to the Seller's Group was to be lost on a transfer out of the Seller's Group of one of its subsidiaries which then suffered a loss or expense in respect of the Liabilities of the business conducted by it prior to Completion. It was the subsidiary undertakings at the time of sale that would need the indemnity against the past liabilities of the business carried on by the Seller and its subsidiaries prior to Completion, not new subsidiaries coming into the Group. In my view it would be contrary to commercial common sense to conclude that such a limitation had been agreed between the parties.

143. I do not accept that Clause 19.2 limiting assignments provides any assistance in this regard. Clause 19.2 operates in favour of both parties and limits the relationship between the parties so that neither party can assign its rights under the BTA outside the then current group. In my view there is a commercial and logical distinction between on the one hand, prohibiting the transfer of rights under or in connection with the BTA (which will extend to the ongoing relationship between the parties in conducting the various aspects of the Business) to a company outside the Group and thereby creating the right for a new entity with no prior links to enforce rights against the Seller or the Buyer and on the other hand, preserving existing rights to an indemnity from the Buyer held by an entity originally within the Seller's Group which relates to liabilities for the business conducted by the Seller/its subsidiaries prior to the sale even where the relevant subsidiary of the Seller is no longer owned within the Group.

144. Cigna relied on the proposition that the cause of action under the contractual indemnity arises only when the indemnified party suffers a loss and the decision of the Supreme Court in *Enviroco.*

145. In that case a charterparty governed by English law contained clauses whereby the owner of the chartered vessel was obliged to indemnify the charterer and its "affiliates" in respect of all claims and liabilities resulting from loss or damage to the vessel. "Affiliate" was defined as including any "subsidiary" of a company of which the charterer was also a subsidiary, the word "subsidiary" having the

meaning assigned to it in section 736 of the Companies Act 1985. A plc, which was registered in Scotland, was the holding company of the charterer and also owned 50% of the contractor, another Scottish company. Since its name was on the contractor's register of members, A plc was a "member" as defined by section 22 of the 1985 Act. It also controlled voting rights through an agreement with other shareholders. The contractor, therefore, was A plc's subsidiary for the purposes of section 736(1)(c) of the 1985 Act.

146. A plc pledged its shares in the contractor to a Scottish bank as security for a loan which, pursuant to Scots law, required that the bank or its nominee be entered on the register of members instead of A plc. The contractor was subsequently employed to clean the oil tanks of the vessel and, while its employees were doing so, a fire occurred causing substantial damage. The vessel's owner commenced proceedings in Scotland against the contractor for the damage caused. In response the contractor issued proceedings in England seeking a declaration that, because it was one of A plc's subsidiaries, it was an affiliate of the charterer and the owner was, therefore, obliged to indemnify it under the terms of the charterparty for the losses it claimed.

147. The Supreme Court held that there was no basis, either in law or arising from the factual matrix, for giving the words of sections 736 and 736A a different meaning or construction in the charterparty from the meaning which they would have in the statutory context; that, consequently, A plc had not been a member of the contractor company after the bank's nominee had been entered on the register of members in its place; and that, accordingly, the contractor had not been a subsidiary of A plc for the purposes of the charterparty at the time of the damage to the vessel.

148. I accept that as submitted for PAGI, the issue of timing was not considered by the Supreme Court, and I do not accept that any significance can be drawn from the fact that the Supreme Court accepted this as the premise. The dicta in which the Supreme Court acknowledged that the outcome of their construction was surprising or not the planned result was directed to the issue about the shares having been transferred and not the issue of timing.

149. Further if and to the extent that the judgment can provide any support for the proposition that the claimant had to be a member of the Group at the time of the event, it is clear that the Supreme Court were construing the particular indemnity before it and in this case the construction of the language in context leads me to a different conclusion.

150. The fact that the cause of action does not accrue until the loss is suffered does not in my view alter the construction of this clause when the language of the clause is considered and weighed against the context.

Conclusion

151. In my view there is no basis on the language of the definition to conclude that it was intended to be limited to subsidiaries which at the time of the claim were a member of the Seller's Group, the context would suggest that there was a deliberate decision in other parts of the contract to make an express qualification in this regard when that was the intention and business common sense supports the interpretation that the indemnity should benefit the subsidiaries who at the time of the BTA were part of the Seller's Group whether or not they remained a subsidiary at the time of the loss or claim.

152. As to the Contracts (Rights of Third Parties) Act 1999 (the "1999 Act") the relevant provisions are in Clause 1 as follows:

> "*(1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if—*
>
> *(a) the contract expressly provides that he may, or*
>
> *(b) subject to subsection (2), the term purports to confer a benefit on him.*
>
> *(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.*
>
> *(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into…*". [emphasis added]

153. In my view the entitlement of PAGI to enforce its rights under the 1999 Act flows from the findings above (as appeared to be accepted by Mr Tolley KC in oral submissions [Day 3p142]) and PAGI is entitled to enforce its rights under the indemnity pursuant to clause 1(1)(a) of the 1999 Act.

Issue 33-the construction of "Liabilities"

154. Issue 33 is as follows:

> *In relation to PA(GI)'s claim for indemnification in respect of the alleged PPI Liability and related complaint handling, administration and legal costs pursuant to clause 8.1 of the BTA:*
>
> *a. On the true construction of the definition of "Liabilities" in the BTA and of clause 8.1(a), does the reference to "liabilities" in that definition and in clause 8.1(a) mean liabilities as a matter of law (as Cigna contends)? If so, what does that mean?*
>
> *b. Alternatively (as PA(GI) contends), does the indemnity in clause 8.1(a) extend to an actual liability and to a reasonable acceptance of liability*

(including by way of a reasonable and bona fide settlement of claims/complaints) if (absent such acceptance) PA(GI) was not so liable, and does it extend to payment made in such circumstances under the provisions of the DISP sourcebook in the FCA Handbook (including DISP App 3)?

155. There are 2 linked issues here which are best addressed separately:

a. Firstly whether the indemnity in clause 8.1(a) extend to a reasonable and bona fide settlement of claims as well as an actual liability; and
b. Secondly whether it extends to payment under the provisions of the DISP sourcebook in the FCA Handbook where (assuming it was a reasonable and bona fide settlement) there was a complaint or where there was no complaint.

PAGI submissions

156. It was submitted for PAGI (paragraph 46-52 of its skeleton) that:

a. As a matter of construction, the BTA indemnity extends to both an actual liability and a reasonable acceptance of liability including a reasonable and *bona fide* settlement of claims/complaints.
b. Indemnities against "*claims*" and "*liabilities*" are frequently construed to include reasonable settlements.
c. The BTA does not use the words "*at law*" or "*legal liability*".
d. The warranty in the BTA is relevant to the scope of the indemnity where it refers to the absence of complaints.
e. Even if DISP App 3 specifically was not within the parties' reasonable contemplation when they entered into the BTA, the potential for mis-selling liability and having to make redress payments to customers mis-sold PPI was.
f. Findings by the FOS that it would be fair and reasonable for PAGI to make redress and payments made by PAGI to subscribing customers by way of redress do not have to amount to a legal liability to fall within the indemnity. DISP sets out how complaints must be handled by firms; it has to resolve complaints at the earliest opportunity; if it had not offered redress, this would have led to complaints to the FOS and FOS awards are enforceable like court awards.

Cigna submissions

157. It was submitted for Cigna (paragraphs 89-91 of its skeleton) [Day 4 p109] that:

a. "*in respect thereof*" in Clause 8 means in respect of the "*Liabilities*" which in turn uses the undefined term "*liabilities*" and there is nothing to suggest that it means a complaint short of a claim in law or alleged

liabilities; there is no reference to a regulatory investigation or to a compliance review.

b. This interpretation is supported by the context: at time of the BTA insurance mediation was not regulated (that happened in January 2005).
c. payments by PAGI were made on the basis of an exercise that was required as a matter of regulatory responsibility but not legal obligation; the evidence of Mrs McInnes is that PAGI sought out potential complainants.
d. The changes to the regulatory framework (DISP Appendix 3) which imposed an obligation on regulated entities to review old sales even if there had not been a complaint were not known or in contemplation at the time of the BTA; the provisions of DISP strengthening the position of complainants were introduced in 2010.
e. In 2003 there was far less focus on mis-selling of insurance products and thus it was less likely that it was intended to cover a situation where the indemnified party chose to provide redress. [Day 4 p109-111]

Discussion

158. The relevant part of Clause 8.1 provides an indemnity against:

> "*the payment or performance of the Liabilities … and any and all actions, costs, claims, losses, liabilities, proceedings or expenses (including reasonable legal expenses) which the Seller (or other member of the Seller's Group) may suffer or incur in respect thereof*". [emphasis added]

159. The focus of the oral submissions [Day 4 p109] for Cigna was on the defined term "*Liabilities*" which in the definition refers to "*liabilities*" and it was submitted that there was nothing in the BTA to give the word "*liabilities*" a special meaning or to suggest that it means a complaint short of a claim in law. It was submitted that there was no reference to a regulatory investigation, fine or penalty or to a compliance review.

160. The contention that the defined term "*Liabilities*" was intended to be limited to liabilities "as a matter of law" is a possible interpretation of the defined term "*Liabilities*". However the indemnity extends on its language not just to "Liabilities" but more broadly to any "*actions, costs, claims, losses, liabilities, proceedings or expenses*" incurred "*in respect of*" the Liabilities (defined as the liabilities of the Business).

161. I note that the term "*liabilities*" is included within the phrase "*any and all actions…which the Seller… may suffer or incur in respect [of the Liabilities]*". The defined term "*Liabilities*" limits the scope of the indemnity to liabilities of the Business (as defined) so it is not open ended but the additional reference to "*liabilities…which the Seller…may suffer or incur in respect of [the Liabilities]*"

would appear unnecessary unless it was intended to give a broader scope to the indemnity.

162. Further in referring to "*actions*" "*claims*" and "*proceedings*" in addition to "*liabilities*" the language of the indemnity expressly contemplates not just liabilities which are established or found to exist at law but amounts incurred as a result of actions or claims being brought, whether or not they result in a finding of legal liability.

163. In making express reference to both "*claims*" and "*proceedings*" the clause extends not only to actual proceedings being brought but also to "*claims*" which one infers would be made prior to any proceedings. On their face the term "*claims*" and "*proceedings*" are not limited to claims made to, or proceedings before, a court.

164. The limited interpretation for which Cigna contends is not consistent with business common sense but as was pointed out by Toulson LJ in *Rust Consulting v PB* [2012] EWCA Civ 1070 would produce a paradoxical result if one considers the example of a failed defence. He said at [19]:

> "*In considering the rival constructions, it is right to consider their effects. Mr White accepted that on his construction the costs of defending a claim by a third party would be irrecoverable if the defence succeeded, but recoverable if the defence failed, provided that additionally Rust established that there was indeed an underlying liability so that it was right that its defence had failed. A firm of consulting engineers entering into an agreement of this kind might regard that as a somewhat paradoxical result. Mr White also accepted that the reasonable settlement of a claim would give rise to indemnity if it were later judged to have had a 51 per cent probability of success, whereas no right to indemnity would arise if it were judged to have had a 49 per cent chance of success. I recognise that the mathematical exactness of attributing such percentages to the prospects of success of a claim is spurious, but sensible professional people want to settle claims which carry any significant risk of success on the best terms they can, often without admission of liability. These are relevant factors to consider when deciding which construction more probably gives effect to the intentions of the parties. [emphasis added]*

165. On the construction of the clause in that case Toulson LJ concluded that the indemnity in question was:

> "*capable of including bona fide settlements of claims, or sums reasonably incurred in the defence of claims, whether successfully or unsuccessfully defended. I do not suggest that it follows from the construction of the clause that such indemnity will necessarily be available; a dispute might arise whether a settlement was reasonable…*".

166. Cigna submitted that although contractual indemnities may be interpreted so as to include a reasonable acceptance of liability such provisions may be interpreted as providing an indemnity only against actual liability: *AstraZeneca Insurance Company v XL Insurance (Bermuda) Ltd* [2013] EWCA Civ 1660 at [52]. However that case concerned the construction of an insurance policy in a very different context.

167. In *John F Hunt Demolition Ltd v ASME Engineering Ltd* [2007] EWHC 1507 (TCC) Judge Peter Coulson QC said at [61]:

> "*In addition, I consider that the judgment of Colman J in the General Feeds case provides a cogent explanation of the proper approach in cases of this sort, where A's liability to B may be difficult, if not impossible, to establish. The court must consider whether the breach of contract caused the loss incurred in satisfying the settlement. Unless the claim was (or was reasonably considered to be) of sufficient strength reasonably to justify a settlement, and the amount paid in settlement is reasonable having regard to the strength of the claim, it cannot be shown that the loss has been caused by the relevant breach of contract. On the other hand, the settlement of an intrinsically weak claim in order to avoid the uncertainties and expenses of litigation may well be reasonable; on Colman J's analysis (with which I respectfully agree) a claim will usually have to be so weak as to be obviously hopeless before it could be said that the settlement of the claim was unreasonable. In my view, in the passages of his judgment in the Comyn Ching case that I have cited above, Colman J provided an answer to preliminary issue (3) ('it is not necessary to prove that the claim settled . . . would [2008] 1 All ER 180 at 202 probably have succeeded') and provided the clearest guidance as to the appropriate test to be applied ('it is enough to establish that [the claim] had sufficient substance for the settlement of it to be regarded as reasonable').*" [emphasis added]

And at [63]:

> "*...The authorities cited above do not demonstrate any rule or principle of law that A must prove that he was liable to B before recovering against C the sums which he paid to B by way of settlement. Of course, that is not to deny that, in the vast majority of cases, that liability will either be agreed by A and C or will, on investigation, be demonstrated. But there will be some cases, like the Comyn Ching case and the General Feeds case where, even though investigation of the underlying facts demonstrated that there was in truth no liability at all, the settlement of the claim that had been made was found to be reasonable in all the circumstances. Furthermore, it seems to me that this is entirely in accordance with normal rules of foreseeability and remoteness of damage. It must be reasonably foreseeable, at the time that the contracts were made between A and C, that*

> *A might settle a claim brought by B arising out of the same subject matter, even if, on a detailed analysis, A's legal liability to B might actually be hard or even impossible to establish.*" [emphasis added]

168. It is clear on the authorities that an indemnity can be construed to include the reasonable settlement of claims and the question of whether a settlement was reasonable is then a question of fact. In my view the language used in the indemnity suggests that it was intended to be broad and extend to all losses incurred in relation to the Liabilities and it was not intended to limit this to legal liability established in the courts. It was a professionally drafted contract and therefore the breadth of the scope of the language of the indemnity should be given weight. Commercial common sense (as discussed by Toulson LJ in *Rust*) also supports a broad interpretation of the language to encompass reasonable settlements.

169. The question which then arises is whether it extends to payments made under the provisions of the DISP sourcebook in the FCA Handbook where there was no finding of liability and in some cases, no complaint.

170. The term "*complaints*" is not used in Clause 8.1. However the language of the indemnity extends to "*all actions, costs, claims, losses, liabilities, proceedings or expenses*". The word "*claims*" is capable of being interpreted as extending to claims other than claims lodged before a court and thus could encompass complaints. Alternatively where complaints resulted in losses, costs or expenses this would fall within the scope of the indemnity if they were "*in respect of*" the Liabilities (which would encompass the liability for PPI). The word "*proceedings*" is capable of being construed as extending to proceedings other than before a court.

171. When the language is considered against the other provisions of the BTA, namely the warranties in paragraph 15 of Schedule 2, these would suggest that the parties had in contemplation at the time of entering into the BTA that there could be action taken in the form of complaints or investigations by either the regulator (at that time the FSA) and/or the FOS and that complaints could be made by customers including "*complaints or allegations*" of mis-selling.

> "*15. COMPLAINTS*
>
> *15 .1 Save as disclosed, no complaints have been made in the last three years against or addressed to the Seller by the FSA, nor have any material complaints been made against the Seller by any customer, in respect of the Business. So far as the Seller is aware, there are no disputes, investigations or disciplinary proceedings in operation or dispute which has been or is to be referred to the Financial Ombudsman Service.*

> *15.2 No complaints or allegations that advice given by the Seller (or any other member of the Seller's Group) in respect of any of the Products was unsuitable or constituted a misrepresentation have been received by the Seller or any other member of the Seller's Group during the three year period ending on the date of this agreement*." [emphasis added]

172. In turn it must have been in the reasonable contemplation (having regard to the previous fines levied against RSA and the other published material discussed above) that complaints in relation to PPI mis-selling may lead to costs and expenses being incurred. Although Mr Jolley stated that his team did not perceive mis-selling to be a significant concern until 2010 and Cigna relied on his evidence in support of its submission that the potential liability could not be quantified in 2003, that does not displace the broad language used in the indemnity as supported by the context of the warranties and the published material.

173. The regulatory environment in 2003 was different from the regulatory position in 2015 onwards when complaints were investigated and amounts paid out by PAGI in respect of mis-selling. However the factual context supports a broad interpretation of the indemnity and in particular a conclusion that the terms "*claims*" and "*proceedings*" are not limited to claims made to, or proceedings before, a court but extend to complaints to the regulator and FOS and proceedings involving these bodies.

174. I derive no assistance from any similarities in the underlying fact pattern in *Wood v Capita* referred to by Cigna. Although the underlying issue for the Supreme Court was whether the contractual indemnity was confined to loss arising out of a claim made to the party or complaint to the FSA or FOS, it is clear that the issue in that case turned on the construction of the clause in question and does not provide any direct parallel or assistance (beyond the general principles of construction).

175. It was submitted for Cigna that the indemnity was not intended to cover a situation where PAGI chose to provide redress.

176. Mrs McInnes, the Customer Director at the relevant time for the Phoenix Group provided a witness statement in which she described her role as ensuring that customers of the group were treated fairly and appropriately. She was cross examined on her statement in her evidence that:

> "*There was quite a bit of pressure from the FOS for us to accept the High Court's decision and get on with the remediation*."

177. She clarified that she meant:

> "*that FOS had a number of outstanding cases that they would have expected us to progress in line with the normal course of business and we were outside our normal timelines for doing that*."

178. It is an incomplete description of what occurred for Cigna to submit that PAGI "*chose to provide redress*". In oral submissions [Day 4 p111] Mr Tolley distinguished between a legal liability to provide redress and an offer of redress to "*protect its standing*" and I infer that he acknowledged that PAGI provided redress even where customers had not made a complaint in order to protect its standing.

179. Whilst it is not clear whether Mr Tolley was accepting that PAGI offered redress to protect its standing with the regulator, PAGI submitted that had it not offered redress there would have been complaints to the FOS. [Day 3 p54]

180. Insofar as these payments were made in recognition of, or pursuant to, its obligations as a regulated entity (even absent any specific pressure from the FCA or FOS) it seems to me that payments made even prior to complaints being made to the FOS, are capable of falling within the scope of the indemnity as losses, costs and expenses incurred in relation to the Liabilities. The question of whether any settlement was reasonable remains for subsequent determination and is not for this Court. The issue of whether PAGI was the correct respondent and whether it was obliged to offer redress in the circumstances is dealt with below under Issues 43 and 44.

Conclusion

181. For these reasons I find that (subject to my findings in relation to Issue 43 and 44 below) the indemnity in clause 8.1 extends to:

    a. an actual liability and a reasonable and bona fide settlement of claims/complaints in respect of the Liabilities; and
    b. a reasonable acceptance of liability in respect of the Liabilities (including by way of a reasonable and bona fide settlement of claims/complaints) if (absent such acceptance) PAGI was not so liable and extends to payment made in such circumstances under the provisions of the DISP sourcebook in the FCA Handbook.

Issues 34 and 35-the effect of the 2005 Scheme

182. There are two issues to consider in relation to the 2005 Scheme: one is the effect of the 2005 Scheme on the rights of PAGI under the BTA indemnity and the other is the effect of the 2005 Scheme on the liabilities of PAGI for mis-selling. The issues are formulated by the parties as follows:

> "*34. Was any entitlement on the part of PAGI to bring a claim under the BTA indemnity transferred to Phoenix Life under the 2005 Scheme (as Cigna contends and PA(GI) denies)?*
>
> *35. To what extent did the 2005 Scheme transfer mis-selling liabilities from PA(GI) to Phoenix Life?*"

To what extent did the 2005 Scheme transfer mis-selling liabilities from PAGI to Phoenix Life?

183. Dealing first with the question of whether (and to what extent) the mis-selling liabilities were transferred by the 2005 Scheme from PAGI to Phoenix.

184. The definition of "*Transferred Liabilities*" was:

> "*all liabilities whatsoever of a Transferor comprised in or attributable to the Transferred Business including (without prejudice to the generality of the foregoing):*
> *(A) all liabilities under the Transferred Policies;*
> *(B) all liability to taxation attributable to the Transferred Business or to the transfer thereof, whensoever incurred;*
> *(C) all liabilities under any reinsurance agreements or arrangements in respect of the Transferred Business; and*
> *(D) all liability for compensation and other costs in respect of the mis-selling of Policies;*
> *together with all liabilities allocated as at the Effective Date to the Bradford Shareholders' Fund, the Phoenix Shareholders' Fund and the SLUK Shareholders' Fund, but excluding: (1) the Residual Liabilities; (2) any liabilities under or relating to the Excluded Policies; and (for the avoidance of doubt) (3) the Excluded Liabilities.*" [emphasis added]

"*Excluded Liabilities*" were defined as:

> "*All liabilities whatsoever of Phoenix and/or Bradford comprised in or attributable to its GI Business including (without prejudice to the generality of the foregoing) the General Component Liabilities*".

Cigna Submissions

185. It was submitted for Cigna (paragraph 93 of its skeleton) that:

> a. under the statutory scheme PAGI was able to transfer the liabilities for mis-selling to Phoenix Life and the liabilities for mis-selling were transferred, or in the alternative that the liabilities concerned with mis-selling the life component were transferred.

b. Subparagraph (D) of "*Transferred Liabilities*" referred to all liability in respect of the mis-selling of "*Policies*" and accordingly the liability which was transferred to Phoenix Life related to the whole of the Policies and not merely the life element of a composite policy (paragraphs 98-100 of its skeleton).
c. There is a legal and logical difficulty in purporting to split liability for the mis-selling of the life component from liability for mis-selling the non-life component and one would have expected to find a prescribed method of allocating shares as between the two "liabilities".

PAGI submissions

186. It was submitted for PAGI that:

a. The "*Transferred Liabilities*" excluded the "*Excluded Liabilities*" which in turn were defined as "*all liabilities whatsoever of Phoenix and/or Bradford comprised in or attributable to its GI Business including (without prejudice to the generality of the foregoing) the General Component Liabilities*." Accordingly subparagraph (D) which includes "*all liability for compensation and other costs in respect of the mis-selling of Policies*" cannot be read in isolation without reference to the introductory words "*all liabilities whatsoever of a Transferor comprised in or attributable to the Transferred Business*" [emphasis added] or the reference to "*Excluded Liabilities*".
b. It is legally possible to split liability in respect of the mis-selling of only part of a policy. Under the Scheme it was envisaged that only some of the rights and liabilities under a policy were transferred. Clause 5.8 of the Scheme provided that:
"*Each Transferred Policy which is a Composite Policy shall be construed as if it were two separate Policies, as follows: (A) a Policy underwritten by Phoenix in respect of the General Component; and (B) a Policy underwritten by RSALI in respect of the Life Component, in each case with effect from the Effective Date*."

Discussion

187. As a preliminary point I note that the effect of the 2005 Scheme on the liability for mis-selling was not an issue which required determination before Andrews J in 2015 although there is reference in her judgment to the submissions which were made before her.

188. The conclusion that mis-selling liabilities were intended to fall within the definition of *Transferred Liabilities* is supported by the express inclusion of mis-selling in paragraph (D) of *Transferred Liabilities*:

> "*all liability for compensation and other costs in respect of the mis-selling of Policies*".

189. I accept that subparagraph (D) refers to "*Policies*" and is not expressly limited to life policies or the life component of Composite Policies. The term "*Policy*" is defined in general terms by reference to the statutory instrument (SI 2001/2361) as a contract of insurance or an instrument evidencing such a contract. In my view subparagraph (D) referring to Policies has to be read subject to the introductory and general language in the definition of Transferred Liabilities which precedes the words "*including (without prejudice to the generality of the foregoing)*" namely:

> "*all liabilities whatsoever of a Transferor comprised in or attributable to the Transferred Business*"

190. Accordingly subparagraph (D) cannot be given an interpretation which is broader than the scope of "*Transferred Business*" and subparagraph (D) is limited by the overarching description of "*Transferred Business*" which is:

> "*the whole of the Long Term Business of Phoenix carried on at the Effective Date, including all activities carried on in connection with or for the purposes of such business, save to the extent that such business relates to Excluded Policies or to the General Component of Composite Policies*"

191. Subparagraph (D) therefore does not extend to liabilities which are neither liabilities attributable to the business of effecting long term insurance contracts (the life business) nor activities carried on in connection with the life business.

192. This interpretation is supported by the express exclusion in the definition of "*Transferred Business*" of "*Excluded Liabilities*" which were defined as:

> "*All liabilities whatsoever of Phoenix and/or Bradford comprised in or attributable to its GI Business including (without prejudice to the generality of the foregoing) the General Component Liabilities*".

In turn "*General Component Liabilities*" were defined as:

> "*those liabilities arising under or by virtue of the Composite Policies which arise under or by virtue of the General Component*"

193. It is clear from the definition of "*Excluded Liabilities*" that:

    a. liabilities comprised in or attributable to the general i.e. non-life business were expressly excluded from the scope of the Transferred Business.

b. where the liability related to Composite Policies, there was intended to be a distinction drawn between liabilities which arose by virtue of the "*General Component*" (defined as "*that part of a Composite Policy which comprises GI Business*") and liabilities which arose by virtue of the life component.

194. The construction of sub-paragraph (D) of "Transferred Business" as being limited to the transfer of the life element of the Policies is supported by the express provisions of the Scheme dealing with Composite Policies. Composite Policies were defined in the Scheme as:

> "*any Transferred Policy comprised in the Phoenix Transferred Business in respect of which at least one risk falls within Part I of Schedule 1 to the RAO and one other risk falls within Part II of Schedule 1 to the RAO*"

Clause 5.8 of the Scheme provided for the Composite Policies to be treated as two separate policies underwritten by Phoenix for the general component and RSALI for the life component:

> "*Each Transferred Policy which is a Composite Policy shall be construed as if it were two separate Policies, as follows:*
> *(A) a Policy underwritten by Phoenix in respect of the General Component; and*
> *(B) a Policy underwritten by RSALI in respect of the Life Component, in each case with effect from the Effective Date.*"

195. Given the definition of "*Excluded Liabilities*" which excludes a portion of liability under a Policy and the provisions of Clause 5.8, I do not see a difficulty in apportioning the liability for mis-selling between the life component and the non-life component. I do not find the absence of provisions dealing with the allocation of the liabilities as persuasive given the clear language of "*Transferred Liabilities*" and Clause 5.8.

196. Cigna sought support for its interpretation from the underlying materials for seeking sanction for the Scheme in particular sections of the report of the independent expert and the witness statement of Michael Kipling. None of the passages identified by Cigna deal expressly with the issue: the passages reinforce my conclusion on the language that it was intended to transfer the liabilities in respect of the life business but do not provide any clear indication that it was intended to transfer all liabilities for mis-selling even where they related to the general business.

Conclusion

197. In my view:

a. it is clear from the definition of "*Transferred Business*" considered in the overall context of the structure of the 2005 Scheme and that it was only intended to transfer liabilities which related to or were attributable to the life business.
b. the mechanism of treating Composite Policies as though they were separate life and non-life policies was expressly provided for in the Scheme and supports the interpretation that only the liabilities for mis-selling which related to the life element were to be transferred.
c. even if the cause of action for mis-selling a Composite Policy was single and indivisible, as is evident from the definition of "*Excluded Liabilities*" there is no commercial or legal reason why the liability for mis-selling cannot be apportioned between two different entities.

198. For these reasons I find that the 2005 Scheme transferred the mis-selling liabilities from PAGI to Phoenix Life which related to or were attributable to the life business, including the life element of Composite Policies.

Was any entitlement on the part of PAGI to bring a claim under the BTA indemnity transferred to Phoenix Life under the 2005 Scheme (as Cigna contends and PAGI denies)?

199. Turning then to whether, as Cigna contend, the right on the part of PAGI to bring a claim under the BTA indemnity was transferred to Phoenix Life under the 2005 Scheme (Issue 34).

200. The Order sanctioning the 2005 Scheme ordered that:

> "*pursuant to section 112 of the Act (using the definitions as set out in the Scheme in the Schedule hereto):*
> *(i) on and with effect from the Effective Date, each part of the Transferred Business shall be transferred to and be vested in RSALI in accordance with the Scheme so that:*
>
> (a) *subject to paragraph 8 of the Scheme, on and with effect from the Effective Date, <u>each Transferred Asset</u> and all the interest of the relevant Transferor in it <u>shall,</u> by the Order and without any further act or instrument, <u>be transferred to and be vested in RSALI,</u> subject to all Encumbrances (if any) affecting such asset…*"
>
> "*Transferred Business*" was defined as "*All or any of the Bradford Transferred Business, <u>the Phoenix Transferred Business</u> and the SLUK Transferred Business, as the context requires*;"

In turn "*Phoenix Transferred Business*" was defined as:

> "*the whole of the Long Term Business of Phoenix carried on at the Effective Date, including all activities carried on in connection with or for the*

> *purposes of such business, save to the extent that such business relates to Excluded Policies or to the General Component of Composite Policies*".
>
> "*Long Term Business*" was defined as "*the business of effecting or carrying out long term insurance contracts as principal, being contracts falling within Part II of Schedule 1 to the RAO*".

201. The definition of "*Transferred Assets*" was:

> "*all property of a Transferor whatsoever and wheresoever situated comprised in or attributable to the Transferred Business as at the Effective Date including (without prejudice to the generality of the foregoing):*
> *(A) the rights, benefits and powers of the Transferor under or by virtue of the Transferred Policies;*
> *(B) all rights and claims (present or future, actual or contingent) against any third party in relation to the Transferred Business or arising as a result of the Transferor having carried on the Transferred Business; and*
> *(C) the rights, benefits and powers of the Transferor under any reinsurance agreements or arrangements in respect of the Transferred Business,*
> *together with all property comprised as at the Effective Date in the Bradford Shareholders' Fund, the Phoenix Shareholders' Fund and the SLUK Shareholders' Fund, but excluding: (1) the Residual Assets; (2) any rights, benefits and powers under the Excluded Policies; and (for the avoidance of doubt) (3) the Excluded Assets.*"

Cigna submissions

202. It was submitted for Cigna that if PAGI had a right under the indemnity after it ceased to be a member of the Seller's Group, it was transferred to Phoenix Life by the 2005 Scheme.

203. Cigna relied (paragraph 50 of its skeleton) on the provisions, particularly paragraph (ix), in the Order that:

> "*(ix) On and with effect from the Effective Date or Subsequent Transfer Date as the case may be, all references to Bradford or Phoenix or SLUK in any contract between any of them and any other party, or in any other document or instrument, relating to the Transferred Business shall, in so far as they relate to the Transferred Business, be read and construed as if the same were references to RSALI so that such contract, document or instrument shall operate as if such references had always been to RSALI rather than to Bradford or Phoenix or SLUK*." [emphasis added]

PAGI submissions

204. It was submitted for PAGI that the definition of "Transferred Assets" makes it clear that it is only property "*comprised in or attributable to the Transferred Business*".

Discussion

205. The provisions of subparagraph (xi) by its terms captures "references" to Phoenix in:

> *(i) any contract between [Phoenix] and any other party, or*
> *(ii) any other document or instrument, relating to the Transferred Business*
>
> The BTA is capable of falling within (xi) as a contract or document "*relating to the Transferred Business*" if the BTA is a document "*relating to the Transferred Business*".

206. "*Transferred Business*" is itself broadly defined being, in relation to Phoenix, not only "*the whole of the Long Term Business of Phoenix carried on at the Effective Date* (i.e. the business of effecting or carrying out long term insurance contracts) but also "*including all activities carried on in connection with or for the purposes of such business, (save to the extent that such business relates to Excluded Policies or to the General Component of Composite Policies)*".

207. The language of sub paragraph (ix) is broad enough to cover the BTA as a contract or document relating to "*activities carried on in connection with*" the life business (which would include marketing and servicing the life business).

208. The language of subparagraph (xi) dealing with how references in agreements should be construed must be read in context and subject to the key operative provisions which are the transfer of the *Transferred Business* and the transfer of the *Transferred Assets*.

209. The *Transferred Assets* were defined as:

> "*all property of a Transferor whatsoever and wheresoever situated comprised in or attributable to the Transferred Business as at the Effective Date including (without prejudice to the generality of the foregoing): … (B) all rights and claims (present or future, actual or contingent) against any third party in relation to the Transferred Business or arising as a result of the Transferor having carried on the Transferred Business; and (C) … but excluding: (1) the Residual Assets; (2… (3) the Excluded Assets*". [emphasis added]

210. In my view the rights under the indemnity were within the definition of a "*Transferred Asset*" as:

> "*all rights and claims (present or future, actual or contingent) against any third party in relation to the Transferred Business or arising as a result of the Transferor having carried on the Transferred Business…*" [emphasis added]

211. The indemnity under the BTA (insofar as it related to the mis-selling of life policies or the life component of Composite Policies) fell within sub paragraph (B) in that it was a "*right*" (or future claim) against a "*third party*" (Cigna) which arose as a result of the Transferor (Phoenix) "*having carried on the Transferred Business*" namely the business of underwriting life contracts and "*activities carried on in connection with … such business*" which would extend to marketing of such contracts.

212. Although the *Transferred Business* was defined as:

> "*the whole of the Long Term Business of Phoenix carried on at the Effective Date*"

this temporal limitation in my view is that the right must be attributable to the life business carried on at the Effective Date. However the use of the past tense in the phrase "*having carried on the Transferred Business*" in sub paragraph (B) of *Transferred Assets* makes it clear that it is rights and claims (present and future) which flow from the activities prior to the effective date of the Scheme and it is the nature of the business i.e. the life business which is tied to the effective date of the scheme not the particular activities which give rise to the right or claim.

213. These rights, in so far as they related to the rights in relation to an indemnity for the mis-selling of life policies and the life component of composite policies, were not "*Excluded Assets*" from the definition of "*Transferred Assets*" which were defined as assets which related to the general business including the general component of the composite Policies. "*Excluded Assets*" were defined as follows:

> "*such assets of … Phoenix as the … the Phoenix Board (as appropriate), having regard to the advice of … the Phoenix Actuary (as applicable), shall determine prior to the Effective Date as sufficient to ensure that … Phoenix (as the case may be) is able to meet its Capital Resources Requirements in relation to its GI Business (including, for the avoidance of doubt, the General Component of all Composite Policies)*".

214. "Transferred Assets" also excluded: "*any rights, benefits and powers under the Excluded Policies*". "*Excluded Policies*" were defined as:

> "*written by a Transferor in the course of carrying on Long Term Business but which are not otherwise capable of being transferred pursuant to FSMA on the Effective Date*"

215. As referred to above, the Composite Policies were deemed to be split into the life and non-life component. For the reasons discussed above, in my view the rights which relate to the life component were capable of being transferred and thus do not fall within the exclusion from Transferred Assets of "*Residual Assets*" as "*any property of a Transferor attributable to the Transferred Business which cannot be transferred or vested in RSALI for any other reason*".

Conclusion

216. For the reasons set out above I find that the entitlement of PAGI to claim under the BTA indemnity was transferred to Phoenix Life insofar as it related to the mis-selling of life policies or the life component of Composite Policies either by virtue of sub-paragraph (ix) of the Order for the 2005 Scheme or in the alternative, under sub-paragraph (i).

Issues 43 and 44-Was PAGI the appropriate respondent to complaints and what is the relevance to the indemnity under the BTA.

217. Issues 43 and 44 are as follows:

> *43. Was the FOS correct to decide on 27 August 2015, citing the decision of Andrews J, that PAGI (and no other person) was the appropriate respondent to complaints by subscribing customers about the mis-selling of PPI?*
>
> *44. If so, has PAGI been obliged since then (by the provisions of the DISP sourcebook in the FCA Handbook and specifically DISP App 3) to handle complaints from subscribing customers and to offer redress where appropriate? If so, what is the relevance of any such obligation of PA(GI) for the purpose of its claims under the BTA or the DWI?*

218. These issues are linked to Issue 33(b) namely whether "*Liabilities*" extend to redress under the provisions of the DISP sourcebook. The claim by PAGI under Clause 8.1 of the BTA goes further than settlement of claims/complaints made in litigation. PAGI seeks to recover for amounts paid out both where complaints had been made to FOS and the FOS has made findings that PAGI should make redress and where no such findings have been made and where customers may not have made a claim for redress.

PAGI submissions

219. It was submitted for PAGI that:

> a. the indemnity in clause 8.1 concerned liabilities of the business which PAGI had paid or performed or suffered or incurred so it was entitled to claim and that PAGI having been held to be the proper respondent to the

complaints by the court in 2015 meant that it has suffered the losses. [Day 3 p71]

b. it was required by the regulator to be proactive in its approach and if it had not offered redress, it would have led to complaints to the FOS and FOS awards are enforceable like court awards.
c. there was evidence that PAGI was concerned to ensure that it complied with its regulatory obligations to customers, that an increasing number of complaints was being received in relation to the mis-selling of the Next PPI and there was pressure from the FOS to accept the High Court's decision (paragraph 34 of its skeleton).
d. if it had not offered redress subscribing customers would have been entitled to make complaints to the FOS which would have been upheld and PAGI would have had to comply with FOS awards (paragraph 35 of its skeleton).
e. Cigna had accepted that Next could not be the right respondent because it was not a regulated entity. It was therefore submitted that PAGI was the correct respondent and has borne the mis-selling liability "*given that the FOS has determined that it was the correct respondent and that was upheld by the court*". It was submitted that it was not clear who else could have borne the liability and why PAGI cannot claim under the indemnity. [Day 3 p65]

Cigna's submissions

220. Cigna's primary proposition was that after the 2005 Scheme PAGI no longer had a liability for mis-selling the PPI [Day 4 p118].

221. In the alternative it was submitted for Cigna that Phoenix Life was the appropriate respondent in respect of the life component [Day 4 p120].

Discussion

222. As to whether PAGI was the correct respondent, Andrews J was concerned with whether liability for mis-selling had passed under the 2006 Scheme to Groupama. Andrews J concluded at [58] as follows:

> "*For the reasons set out above, the "Transferred Liabilities" under the 2006 Scheme which were transferred to Groupama by Clause 10 of the Order do not include any liability for the alleged mis-selling of PPI. It follows that the insurer "responsible" for any claims before the FOS is PAGI, not Groupama*."

223. However as referred to above Andrews J had not decided the argument raised by Mr Tolley and referred to in her judgment at [44]:

> "*There is a further argument, which Mr Tolley outlined, to the effect that all liability for mis-selling the policies concerned had already been transferred to Phoenix Life under the 2005 Scheme*."

224. On this issue Andrews J said at [47]:

> "*It is unnecessary for me to resolve this argument in order to decide the issue of construction before me. I doubt if it would be possible to do so without more information about the 2005 Scheme, and in any event it would be unfair to do so in the absence of submissions by Phoenix Life…*".

225. Andrews J was not ruling on whether liability for mis-selling had passed in whole or in part to Phoenix Life under the 2005 Scheme. She was not ruling on whether a claim could be made by PAGI on Cigna under the BTA indemnity for losses incurred by PAGI in relation to the mis-selling of life policies or the life component of Composite Policies. Her judgment was that as between PAGI and Groupama, PAGI was liable for any claims before the FOS.

226. The evidence of the correspondence shows that the FOS made a provisional decision in September 2014 based on its analysis of the 2006 Scheme documentation that PAGI was the correct respondent. After the judgement of Andrews J PAGI wrote to the FOS in July 2015 stating that the court had determined that PAGI was the correct respondent to mis-selling complaints and PAGI would not appeal the decision. In response the FOS relied on these statements to formally state that PAGI was the correct respondent.

227. Accordingly the Court in 2015 had only considered the effect of the 2006 Scheme and the language of the 2005 Scheme was different from the language of the 2006 Scheme and in particular referred expressly to the transfer of mis-selling liabilities. The FOS had also not addressed the 2005 Scheme in reaching a conclusion and the implications of that Scheme.

228. The evidence of Mrs McInnes was that

> "*18. …the Phoenix Group takes its customer care responsibilities seriously and the FOS had emphasised to us how many complaints there were, how much they were worth and the fact they were being brought by genuine people who had had this product mis-sold to them and who were out of pocket. There was quite a bit of pressure from the FOS for us to accept the High Court's decision and get on with the remediation.*
>
> *19. Ultimately the business decided that it must to accept the decision of the High Court that it was the correct respondent in relation to these claims and proceed with assessing those claims*."

229. As referred to above, in her oral evidence to the Court, Mrs McInnes confirmed that there was no pressure from the FOS as a body which could be said to be putting pressure on PAGI to get on with the remediation but there were a number of outstanding cases that the FOS would have expected it to progress.

230. PAGI also relied on section 234B of FSMA and submitted that even if there is an assumption of liability of a person who would otherwise have been the respondent (Phoenix Life) it is not the case that the complaint has to be dealt with as if the successor were the respondent. It was submitted for PAGI that as a consequence even if the liability transferred to Phoenix Life it was entirely proper for PAGI to remain the respondent. [Day 3 p72]

231. Section 234B of FSMA provides:

> "*234B Transfers of liability*
> *(1) This section applies where a person (the "successor") has assumed a liability (including a contingent one) of a person (the "predecessor") who was, or (apart from this section) would have been, the respondent in respect of a complaint falling to be dealt with under the ombudsman scheme.*
> *(2) The complaint may (but need not) be dealt with under this Part as if the successor were the respondent.*"

232. The rules (DISP 1.1A.20) provide that a regulated firm must:

> "*(1) investigate the complaint competently, diligently and impartially, obtaining additional information as necessary;*
> *(2) 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; and*
> *(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; and*
> *(3) comply promptly with any offer of remedial action or redress accepted by the complainant*" [emphasis added]

233. In my view, the FOS was correct to decide that PA(GI) was the appropriate respondent to complaints by subscribing customers about the mis-selling of PPI which related to the general business of PAGI. However it cannot be said that PAGI was the appropriate respondent to complaints to the FOS for claims which related to the life policies or the life component of the Composite Policies. The evidence including the correspondence between PAGI and the FOS shows that its conclusions were based on its analysis of the effect of the 2006 Scheme and the Court's judgment. The 2005 Scheme and its potential effect was not raised with the FOS and the evidence does not suggest that PAGI was precluded from raising with the FOS the effect on liability of the 2005 Scheme or that, had this been raised the FOS would necessarily have concluded that PAGI was the correct

respondent for claims which related to the life policies or the life component of the Composite Policies.

234. Given that Andrews J had not determined the effect of the 2005 Scheme and the 2005 Scheme expressly referred to the transfer of the mis-selling liabilities, PAGI should have raised the 2005 Scheme with the FCA (as its regulator) and the FOS (as the entity to which customer complaints were made) since in my view it had "*reasonable grounds to be satisfied that another respondent may be solely or jointly responsible for the matter alleged in the complaint*". It should not have paid out without raising this with the FCA and the FOS and it cannot be said that a settlement in those circumstances with customers whose complaint related to the mis-selling of life policies or the life component of Composite Policies was reasonable (to the extent that the settlement related to those elements).

235. Even if I were wrong on that and PAGI acted reasonably in the circumstances having regard to s234B, it does not follow that PAGI was then entitled to recover from Cigna under the BTA indemnity in respect of amounts it had paid out in respect of the mis-selling of life policies or the life component of the Composite Policies.

236. As found above, in my view, under the 2005 Scheme the liabilities for mis-selling in respect of the life element of the Policies had passed to Phoenix Life and the right of indemnification in respect of such liabilities under the BTA indemnity had passed to Phoenix Life. PAGI no longer had the right to claim against Cigna under the BTA indemnity for the amounts it paid out to customers in respect of the mis-selling of life policies or the life component of the Composite Policies.

Conclusion on Issues 43 and 44

237. For the reasons discussed above I find that:

    a. The FOS was not correct to decided that PAGI (and no other person) was the appropriate respondent to complaints by subscribing customers about the mis-selling of PPI.
    b. PAGI was not obliged to handle complaints from subscribing customers and to offer redress where appropriate without having raised the effect of the 2005 Scheme with the FCA and the FOS.
    c. In the alternative, even if applying section 234B it was open to the FOS to decide that PAGI was the appropriate respondent to complaints by subscribing customers about the mis-selling of PPI such that PAGI was obliged to handle complaints from subscribing customers and to offer redress where appropriate, PAGI is not entitled to recover in respect of such amounts under the BTA to the extent that the amounts paid out related to the mis-selling of life policies or the life component of Composite Policies.

Issues 41 and 42-2011 Scheme

238. In 2011, PAGI transferred the remainder of its General Insurance Business to R&SA pursuant to the 2011 Scheme. The 2011 Scheme took effect on 1 January 2012.

239. Issues 41 and 42 are as follows:

> "*41. Did the 2011 Scheme transfer from PA(GI) to R&SA any entitlement to bring a claim under clause 8.1 of the BTA?*
> *42. Did the 2011 Scheme transfer any mis-selling liabilities from PA(GI) to R&SA?*"

240. The 2011 Scheme defined the "*Transferred Business*" as "*the PA(GI) General Insurance Business of the Transferor, including, without limitation, all insurance liabilities under any Policy issued by or on behalf of the Transferor in respect of that business, all assets and liabilities of the Transferor in respect of that business…and all activities of the Transferor carried on in connection with, or for the purposes of, that business as at the Effective Date….*"

241. The "*PA(GI) General Insurance Business*" was defined as:

> "*the business of [PA(GI)] carried on in relation to: (a) each of the general insurance contracts entered into by [PA(GI)]; and (b) each contract entered into by [PA(GI)] under which [PA(GI)] agreed to reinsure any general insurance contract,*
>
> *in each case that is in force as at the Effective Date and which was in force at 30 September 2004 and which was reinsured to RSA/ pursuant to the general reinsurance agreement between RSA/ and [PA(GI)] dated 30 September 2004, including all assets and liabilities of [PA(GI)] and all activities carried on in connection with or for the purpose of that business, including rights and obligations under any reinsurance contracts relating to that business and rights and obligations under the Cyprus Trust Fund, but excluding:*
>
> > *(a) all rights and obligations of [PA(GI)] in respect of the US Trust Fund;*
> > *(b) any liabilities and obligations (if any) to the extent created as a result of an act of [PA(G/)] or Pearl which was not carried out with the knowledge or consent of RSA/; and*
> > *(c) for the avoidance of doubt, any other business carried on by [PA(GI)] after 30 September 2004*"

242. The 2011 Scheme also transferred the "*Transferred Business Liabilities*", which were defined as:

> "*all liabilities whatsoever, whether present or future, actual or contingent, of [PA(GI)] at the Effective Date under or arising by virtue of the Transferred Policies or under the Transferred Business Assets but Excluding the Excluded Liabilities*."

"*Transferred Policies*" were defined as the "*Relevant Policies*", excluding any Policies written by or on behalf of PA(GI) in connection with the marine business, and all and any "Excluded Policies" (policies that have a non-UK EEA elements).

"*Relevant Policies*" were defined as:

> "*all Policies written by or on behalf of [PA(GJ)J prior to the Effective date and which were in force at 30 September 2004 and remain in force at the Effective Date in relation to the PA(GI) General Insurance Business*".

Submissions

243. It was submitted for Cigna (paragraphs 55-59 of its skeleton) that:

a. the effect of the 2011 Scheme was to transfer back from PAGI to R&SA the residual non-life business of PAGI in belated compliance with the 2004 Agreement for the sale of PAGI by R&SA to Resolution Life.
b. any right under the BTA indemnity would be captured by the phrase "*all assets and liabilities of the Transferor in respect of that business*" in the definition of "*Transferred Business*" where "*business*" refers to the "*PAGI General Insurance Business*" in turn defined as the "*the business of [PA(GI)] carried on in relation to: (a) each of the general insurance contracts entered into by [PA(G/)]…*".
c. it was not contending that the 2011 Scheme covered lapsed policies: Cigna accepted that the policy had to be in force at the effective date of the 2011 Scheme.

244. It was submitted for PAGI that [Day 3 p72]:

a. the policies in respect of which the mis-selling claims are brought were transferred to Groupama under the 2006 Scheme so it is unclear how they can transfer back to RSA under the 2011 Scheme.
b. The definition of *Transferred Business* [p444] relates to the PAGI general insurance business but the policies transferred to Groupama were no longer policies caught within the general insurance business carried on in 2011.
c. it cannot be said that policies which have been transferred to Groupama are caught by the words "*in relation to*".

d. the words "*carried on*" in the definition of *PAGI General Insurance Business* which is the business transferred is the business actually being operated [p439]
e. lapsed policies would not fit with the definition of PAGI General Insurance Business which includes the words "*carried on*".

Discussion

245. In a witness statement filed in the 2015 proceedings Ms Tulloch of Hogan Lovells for PAGI said that:

> *"PA(GI) considers that this language [Transferred Business Liabilities] is sufficiently broad to cover any PPI mis-selling liabilities under or arising by virtue of the Transferred Policies If (contrary to PA(Gl)'s contentions) certain policies remained with PA(GI) after the 2006 Scheme, then it is likely that a large proportion of such policies transferred to RSA as part of the 2011 Scheme.*"

246. PAGI now submit that the evidence cannot alter the position as a matter of law and that it was common ground between PAGI and Groupama by the time of the hearing of the 2015 application that the policies transferred to Groupama under the 2006 Scheme.

247. Cigna described the 2011 Scheme as the "*final implementation of the extraction from PAGI of any residual liabilities in respect of the non-life business shifting it back, whatever's left after the transfer to Groupama, to R&SA*" [Day 4 p44].

248. Cigna referred to the 2004 Agreement and the intention behind the sale of PAGI to Resolution, with the idea being that the non-life business would be transferred back to R&SA and that pending that transfer the economic risk was transferred back to R&SA through the Reinsurance Agreement. However Cigna acknowledged that the 2004 Agreement could not be treated as part of the factual matrix for the Schemes.

249. Further Cigna accepted that the 2011 Scheme only caught policies that were in force at the effective date of the 2011 Scheme.

250. The 2011 Scheme does appear to have been a transfer of any residual policies back to RSA and it was that business which was transferred.

251. The rights under the BTA indemnity so far as they related to claims for mis-selling of general insurance policies were not rights (assets) which were "*in respect of*" the *PAGI General Insurance Business* since this was limited by that definition to the business carried on in relation to general insurance contracts in force at the Effective Date (1 January 2012):

> "*the business of [PA(GI)] carried on in relation to: (a) each of the general insurance contracts entered into by [PA(GI)]; and (b) each contract entered into by [PA(GI)] under which [PA(GI)] agreed to reinsure any general insurance contract, in each case that is in force as at the Effective Date* …".

252. The 2011 Scheme did not transfer any PPI Liabilities from PAGI to R&SA since the definition of "*Transferred Business Liabilities*" was limited to:

> "*all liabilities whatsoever, whether present or future, actual or contingent, of [PA(GI)] at the Effective Date under or arising by virtue of the Transferred Policies or under the Transferred Business Assets but Excluding the Excluded Liabilities*." [emphasis added]

253. The PPI Liabilities did not arise "*under or by virtue of*" the Transferred Policies but were separate from the policies themselves. The Transferred Business Assets were limited to rights which were "*comprised in or relating to the Transferred Business*" and as referred to above the "*Transferred Business"* was limited to the business carried on in relation to general insurance contracts in force at the Effective Date (1 January 2012).

254. The mis-selling liabilities did not fall within the definition of "*Transferred Business*" as they were not liabilities "*in respect of*" the *PAGI General Insurance Business* which was limited to the business carried on in relation to general insurance contracts in force at the Effective Date.

Conclusion

255. For the reasons discussed above, in my view the 2011 Scheme did not transfer from PAGI to R&SA any entitlement to bring a claim under clause 8.1 of the BTA and did not transfer any PPI Liabilities from PAGI to R&SA.

Deed of Warranty and Indemnity

256. This is the alternative case advanced by PAGI. PAGI claims under the indemnity in Clause 3 of the DWI in respect of the PPI Liabilities except that part referable to the life business or to a contract of long-term insurance.

257. Given the findings above and the overlap in some of the issues, this issue can be taken shortly. It is common ground that if PAGI has a right to an indemnity pursuant to clause 3 of the DWI, PAGI can assert such right pursuant to the 1999 Act.

Issue 38. What is the scope of the indemnity under the DWI?

258. As discussed above by reference to the authorities, the Court's task is to ascertain the objective meaning of the language, considering both the language and the wider context and striking a balance between the indications given by the language and the implications of the competing constructions. Issue 36 (the relevant factual matrix) is part of the exercise of construction and is therefore considered as part of this section.

259. The indemnity in the DWI provided as follows:

> "*FirstAssist hereby agrees to indemnify R&SA, SALIP and PA(GI) and their subsidiaries and keep R&SA, SALIP and PA(GI) and their subsidiaries indemnified against any and all costs, claims, damages, liabilities and expenses of whatsoever nature arising out of or in connection with the Transfers, the Creditor Business or as a result of any breach of the provisions of and warranties contained in clause 2 above (and so that in determining whether there has been any such breach for the purposes of this clause 3 and notwithstanding the provisions of clause 2, such warranties shall be deemed to have been given on the basis that they are not qualified by any reference to FirstAssist's knowledge and belief), including without limitation, any liabilities resulting from:*
>
> > *(a) any failure to notify any person of the Transfers;*
> > *(b) any inaccuracy or omission in any of the Transfer Documents;*
> > *(c) any liability remaining with R&SA, SALIP or PA(GI) or any of their subsidiaries in connection with the Creditor Business, or the Policies issued in connection with the Creditor Business following the Transfers including without limitation the Transferred Policies as defined in Schedule 1 and Schedule 2;*
> > *(d) any claim made against R&SA, SALIP or PA(GI) or any of their subsidiaries where such claim arises as a result of any act, omission or breach of R&SA or any member of the R&SA Group or PA(GI) or FirstAssist or any member of the FirstAssist Group of or in connection with any agreement entered into in connection with the Creditor Business (including without limitation the arrangements referred to in Schedules 2, 3 and 4 to the document at Schedule 1 and Schedules 2 and 3 to the document at Schedule 2) or the HSBC Agreement or any of the Transaction Documents;*
> > *(e) any liability of R&SA, PA(GI) or SALIP arising in connection with or in relation to the Creditor Business, or any policy written by R&SA, PA(GI) or SALIP in connection with or in relation to the Creditor Business or any agreement entered into by R&SA, PA(GI) or SALIP in connection with or in relation to the Creditor Business and whether or not such liabilities arise in respect of Creditor Insurance.*

"*Creditor Business*" was defined for this purpose as:

> "*means the business of marketing, underwriting and servicing Creditor Insurance which was carried on by the Transferor and PA(GI) Limited until 22 April 2003 and then transferred to FirstAssist pursuant to the Business Transfer Agreement (and for the avoidance of doubt only to the extent that such business was transferred pursuant to the Business Transfer Agreement) and subsequently carried on by FirstAssist*" [emphasis added]

"*Creditor Insurance*" was defined as follows:

> "*means insurance of a type falling within all and any of paragraphs 1, 2 and 16(c) of schedule 1 of the Regulated Activities Order which principally provides cover in respect of a borrower's inability to repay all or part of the amount of any credit made available to him by a lender as a result of the occurrence of a specified event, and for the avoidance of doubt excluding any insurance which comprises Life Business or which otherwise amounts to a contract of long-term insurance for the purposes of the Regulated Activities Order*." [emphasis added]

260. By the warranty in 2(e) Cigna warranted that:

> "*following the Transfer neither PA(GI) nor R&SA will have any further obligation or liability in connection with the Creditor Business or the Transferred Assets, Transferred Liabilities, The Transferred Reinsurances, the Coinsurance Arrangements or the Transferred Policies including without limitation (i) any obligation to pay any amounts (whether by way of profit commission or otherwise) to any third party or (ii) in respect of the arrangements referred to in Schedules 2, 3 and 4 to the document at Schedule 1 and Schedules 2 and 3 to the document at Schedule 2 or the Agreement dated 2 May 1997 between Midland Bank PLC and RSA (as amended from time to time) (the "HSBC Agreement") and whether or not such obligation or liability arises in connection with Creditor Insurance*"

Discussion

261. In support of its claim under the DWI Indemnity, PAGI relied on an alleged breach of warranty under Clause 2 or a breach of sub-paragraphs (c), (d) or (e) of the DWI indemnity.

262. Cigna submitted (paragraph 111 of its skeleton) that there is no express provision for Cigna to be required to indemnify PAGI in respect of its negligence (or other wrongdoing) or that of its agents. Nor is there any suggestion that Cigna should indemnify in respect of fraud or other dishonest or reckless wrongdoing.

263. The first question is the natural meaning of the language of the indemnity and in particular since PAGI's case depends on it, the meaning of "*Creditor Business*" such that the PPI Liabilities can be said to be "*costs, claims, damages, liabilities and expenses of whatsoever nature arising out of or in connection with … the Creditor Business*".

264. Cigna submitted (paragraph 116 of its skeleton) that:

    a. It is clear *Creditor Business* excludes the life component of PPI.
    b. The business must have transferred to Cigna pursuant to the BTA.
    c. The business must have been subsequently carried on by Cigna.

265. Cigna submitted (paragraph 118 of its skeleton) that all that Cigna acquired under the BTA was the right for the future to market, underwrite and service creditor insurance products not the pre-existing business.

266. It was further submitted for Cigna (paragraph 119 of its skeleton) that the concluding words of the definition of *Creditor Business* ("*and subsequently carried on by FirstAssist*") are obviously intended to have meaning which is in addition to the phrase "*only to the extent that such business was transferred pursuant to the Business Transfer Agreement*".

267. PAGI accepted that "*Creditor Business"* excluded the life component of PPI. PAGI submitted that Cigna acquired the business as going concern.

268. It was further submitted for PAGI (paragraph 84 of its skeleton) that the phrase "*and subsequently carried on by FirstAssist*" did not qualify the scope of the "*Creditor Business*" by necessitating an enquiry into what exactly Cigna had done since completion with the Creditor Business. It was submitted that the central point "*clarified by the words in parentheses*" in the definition of Creditor Business was to ensure that only the business that actually transferred under the BTA should be caught and not the Excluded Business.

269. For the reasons discussed above in relation to the BTA indemnity, I do not accept that all that Cigna acquired under the BTA was the right for the future to market, underwrite and service creditor insurance products not the pre-existing business. As discussed above, under the BTA Cigna acquired the business as a going concern.

270. However in relation to the words "*and subsequently carried on by FirstAssist*", PAGI's submission in my view gives no real meaning to the words "*and subsequently carried on by FirstAssist*" and would appear to render them otiose. As PAGI's skeleton effectively acknowledges, the phrase "(*only to the extent that such business was transferred pursuant to the Business Transfer Agreement)*" already deals with the point that only the business actually transferred was caught.

The Court is disinclined to conclude that the phrase "*and subsequently carried on by FirstAssist*" has no meaning in a professionally drafted contract.

271. Cigna submitted that it never carried on the business of underwriting and there is no evidence to suggest that it carried on the business of marketing.

272. However PAGI submitted that Cigna in effect warranted in the Scheme Agreement (at clause 4.1.3) that Cigna was carrying on the creditor business:

> "*FirstAssist is at the date of this Agreement authorised under the Act with all permissions required under Part IV or the Act to carry on the business as comprised in the Creditor Business as an Intermediary and agent of R&SA and Phoenix and is not aware or any circumstances which may cause any such permissions to be revoked*"

273. It was submitted that in any event Cigna administered the relevant policies as reflected in Recital B to the DWI:

> "*FirstAssist has administered the relevant policies on behalf of R&SA since April 2003*."

274. This brief recital should be read in conjunction with the list of services contained in Schedule 1 to the RCUA. Under the RCUA Cigna dealt with the customers in relation to the Administered Products, was responsible for regulatory compliance and complaints handling in respect of the Administered Products.

275. "*Administered Products*" was defined in the RCUA as "*together, the Existing Products, the Interim Products and the Ancillary Creditor Life Insurance Products*."

"*Existing Products*" was defined (in the BTA) as:

> "*those Products issued by the Seller or any other member of the Seller's Group in the course of the Business which incept from a date falling on or prior to the Effective Completion Date and/or in respect of which any actual or contingent claim existed as at the Effective Completion Date other than the travel insurance policy which is the subject of the Cargofile Claim (and for these purposes "Cargofile Claim" shall have the meaning ascribed to it in the in the Share Sale Agreement)*"

"*Products*" means "*insurance products of the type issued by the Seller or any other member of the Seller's Group prior to Completion in the course of the Business*"

276. There are 3 separate limbs to Creditor Business:

> *(i) the business of marketing, underwriting and servicing Creditor Insurance which was carried on by the Transferor and PA(GI) Limited until 22 April 2003 and then transferred to FirstAssist pursuant to the Business Transfer Agreement*
> *(ii) (and for the avoidance of doubt only to the extent that such business was transferred pursuant to the Business Transfer Agreement)*
> *(iii) and subsequently carried on by FirstAssist*

In my view the natural meaning of the language, having regard to the factual context, was to exclude the underwriting of life policies which was not transferred to Cigna by the BTA (limb (ii)) and by limb (iii) to exclude the underwriting of non-life policies which was done by R&SA through the Reinsurance Agreement so limb (iii) would cover the fact that underwriting of non-life policies was not carried out by Cigna. This means that the marketing of non-life policies and the PPI Liabilities are capable of falling within the natural meaning of the phrase "*all costs, claims, damages, liabilities and expenses of whatsoever nature arising out of or in connection with the Creditor Business.*" The natural meaning of the language then has to be weighed against the factual context.

277. PAGI's case is that when the DWI was entered into, the following matters were within the parties' reasonable contemplation: (i) The risk of financial penalties, fines and compensatory payments to the FSA or to purchasers or beneficiaries of insurance products in respect of mis-selling or maladministration. (ii) Problems with mis-selling of PPI, and thus the risk of liability and/or redress in relation thereto.

278. In my view, having regard to the findings above in relation to the position in 2003, those matters were within the parties' reasonable contemplation in 2003 and remained in their reasonable contemplation in 2006 even if the extent of the risk was still not known.

279. As to whether, as PAGI submitted, Cigna (then FirstAssist) was under considerable time-pressure to reach agreement over the terms of the 2006 Scheme and the DWI, the evidence does not support that. I accept the submission for Cigna (paragraph 125 of its skeleton) the fact that the Interim Period was extended several times does not suggest any time pressure.

280. The language of the DWI also has to be weighed against the context of the other provisions of the 2006 Scheme.

281. Cigna submitted (paragraph 121 of its skeleton) that it is clear that the DWI was intended to be directed at liabilities arising after the Effective Date as referred to in the Conditions of the 2006 Scheme and the definition of the DWI:

"*an agreement to be entered into between FirstAssist and R&SA dealing, inter alia, with liabilities arising in respect of the Creditor Business after the Effective Date*".

282. Such a definition is necessarily a brief description of the agreement and cannot be a substitute for its precise terms. In any event the defined term included the words "*inter alia*".

283. Cigna also relied on the Novation Agreements which were part of the transfer documents entered into in connection with the 2006 Scheme. It was submitted (paragraph 122 of its skeleton) that the Novation Agreements made an explicit distinction between liabilities arising out of matters prior to the Effective Date and liabilities arising in connection with an act or omission occurring after the Effective Date.

284. The first Novation Agreement related to the profit-sharing agreement with Next. That agreement was not the transfer of a business and in my view no parallel or support can be drawn from that Novation Agreement in interpreting the indemnity in the DWI. If anything is to be taken from that Novation Agreement it suggests that where appropriate, the agreements in relation to the 2006 Scheme expressly addressed the temporal limitations of any indemnity or allocation of risk.

285. Cigna also pointed out that the indemnity given by Cigna to Groupama is wider than the indemnity in the DWI and submitted (paragraph 124 of its skeleton) that neither R&SA nor PAGI sought an indemnity from Cigna in the same or similar terms for the purposes of the DWI. However, the Court in construing the clause cannot have regard to pre-contractual negotiations and does not know what R&SA or PAGI believed was covered by the DWI indemnity: "*The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement.*" (*Wood* at [10] above)

286. As to commercial common sense and whether it is unlikely/ "inherently improbable" that the parties would have agreed to transfer liability for negligence or breach of statutory duty, it was submitted for Cigna that:

    a. PAGI and R&SA, not Cigna, received the premium for, and economic benefit of, sales of the Existing Products.
    b. There were no reserves in respect of mis-selling liabilities concerning the Existing Products, alternatively none had been transferred by R&SA to Cigna pursuant to the BTA.
    c. Nothing was paid (or would be paid) to Cigna in return for assuming mis-selling liabilities.
    d. The BTA had not transferred liabilities for the Existing Products to Cigna and it was inherently unlikely that any such liabilities would be assumed by Cigna pursuant to the DWI.

e. The 2005 Scheme had already expressly transferred any legal liability for mis-selling the Existing Products to Phoenix Life.
f. The scope of any liability for mis-selling the Existing Products would not have been capable (or readily capable) of quantification or verification. It would be contrary to business common sense for Cigna and its funders to accept an open-ended liability for mis-selling historic PPI policies by PAGI or its agent.

287. Some of these submissions have already been addressed in the context of the BTA. It was the sale of a business and there was no reason for there to be separate consideration paid for the indemnity risks which covered a range of products and risks. The liability for mis-selling had been transferred in respect of the life policies and the life component of the life policies but that had no effect on the 2006 Scheme which was drafted in different terms. It was in the reasonable contemplation of the parties that there could be claims for mis-selling and even if they could not have been quantified or verified, liability could have been expressly excluded.

Conclusion on DWI indemnity

288. The DWI indemnity was part of a suite of documents which were both sophisticated and complex. Accordingly the Court is entitled to give significant weight to the language that the parties have used particularly where the language is clear and unambiguous.

289. The language of the indemnity is confined to matters relating to Creditor Business. This did not extend to the life business or to the underwriting of the general insurance contracts.

290. It did relate to the business which was transferred under the BTA and this was the business as a going concern not merely future rights.

291. There is no language which apportions the risks to those arising pre and post the effective date of the 2006 Scheme and nothing in the factual context which leads to a contrary interpretation. It was submitted for Cigna that it was commercial common sense that Cigna should be liable for what it has done in the meantime post the BTA in carrying on the business and not in relation to the business which was not transferred to it and which it did not carry on. However in a professionally drafted contract it was open to the parties to make express provision to that effect as was done in the Novation Agreements.

292. As to whether the indemnity extended to mis-selling, the factual context suggests that the parties were aware of mis-selling risks: it was specifically addressed in the contract with Groupama.

293. The indemnity in the DWI was extremely broad and as discussed above in relation to the BTA, it is not necessary for there to be an express reference to negligence or breach of statutory duty for mis-selling to be caught. Having regard to the authorities discussed above, I have considered whether in the circumstances of this case the fact that it is "inherently unlikely" that the parties intended to transfer liability for mis-selling should alter the natural meaning of the broad language in this professionally drafted and sophisticated contract viewed in the factual context that the risk of mis-selling and claims were in the reasonable contemplation of the parties and have concluded that it does not insofar as the liabilities arise other than as a result of fraud or dishonesty (including deceit) on the part of the agent.

294. For all these reasons I find that liabilities in respect of the PPI mis-selling were capable of falling within the meaning of "*any and all costs, claims, damages, liabilities and expenses of whatsoever nature arising out of or in connection with …the Creditor Business*" other than (for the reasons discussed above) where such liabilities arose as a result of fraud or dishonesty (including deceit) on the part of the agent.

Issues 37, 39 and 40 in relation to the DWI indemnity

295. For the reasons discussed above in relation to the 2011 Scheme and the BTA, I find that any right on the part of PAGI to bring a claim under clause 3 of the DWI was not transferred to R&SA under the 2011 Scheme (Issue 37).

296. For the reasons discussed above in relation to the 2005 Scheme, it is legally possible for Cigna to be liable under the DWI in respect of the mis-selling of the non-life component of the Relevant Policies, but not liable in respect of the life component.

297. Cigna also relied on the fact that the life component was not included within the scope of the 2006 Scheme and submitted that the absence of allocation between the life and non-life components would generate uncertainty as to the identity of the responsible party and the division of any quantum. Cigna therefore submitted (paragraph 127 of its skeleton) that the absence of any contractual mechanism and the uncertainties that would be generated are "most unlikely to have been intended by rational commercial parties".

298. I have no evidence to support the submission that it would generate uncertainty let alone that it would be impossible to allocate responsibility and calculate the quantum to be attributed to the life and non-life components. I do not therefore agree that it can be said that as a result the interpretation of the DWI indemnity to capture the non-life components of PPI is contrary to business common sense. In my view given the language of Creditor Business it was intended for Cigna to be liable under the DWI in respect of the mis-selling of the non-life component of the Relevant Policies, but not liable in respect of the life component. (Issue 39).

299. In my view the phrase "*all costs, claims, damages, liabilities and expenses of whatsoever nature arising out of or in connection with…the Creditor Business* is not limited to liabilities owed as a matter of law or to claims by way of legal proceedings as it expressly covers "*costs and claims… of whatsoever nature*". Having regard to the authorities discussed above, the indemnities extend to an actual liability and to a reasonable acceptance of liability (including by way of a reasonable and bona fide settlement of claims/complaints), if PA(GI) was not (absent the acceptance) liable, and for the reasons discussed above in relation to the BTA, the indemnities extend to redress under the provisions of the DISP sourcebook in the FCA Handbook (Issue 40).

Addendum

300. After this judgment was sent out to counsel in draft form in the usual way, a correction was proposed to paragraph 237 (b) which referred to the FCA. I have considered the proposed amendment and concluded that the paragraph should refer to both the FCA (as the regulator responsible for supervising the conduct of regulated firms) and the FOS (being the entity to which customer complaints were made). A corresponding change has been made to paragraph 234. This change does not affect the substantive conclusions.