Neutral Citation No. [2020] EWHC 2024 (Comm)

Claim No CL-2017-000795

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 27 July 2020

Before :

THE HONOURABLE MR JUSTICE BRYAN

- -

Between :

AXA S.A.

Claimant

-and-

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

Defendants

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

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

Named Third Parties

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Andrew Green QC, Fraser Campbell and **Laura Inglis**
(instructed by **Clifford Chance LLP**) for the **Claimant**
Jonathan Nash QC, **Michael Jones and James Potts**
(instructed by **Sidley Austin LLP**) for the **Defendants**

Hearing dates: 11, 15, 16, 17, 18, 22 and 23 June 2020

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Approved Judgment

MR JUSTICE BRYAN:

A. INTRODUCTION

1. The parties appear before the Court on the quantum hearing following the Court's judgment on various points of principle on liability handed down on 6 December 2019, and reported at [2019] EWHC 3376 (Comm) (the "Liability Judgment").

2. In summary, the Claimant's ("AXA's") claim is to recover alleged losses as a result of mis-selling of payment protection insurance ("PPI") cover underwritten by the First and Second Third Named Parties (which I will refer to as "FICL" and "FACL") and marketed and sold by the Third and Fourth Named Parties (referred to together as "Santander"), under Clause 10.8 and/or Clause 15.1 of a Sale and Purchase Agreement dated 27 November 2015 between, inter alios, the First Defendant ("GFIH") (as Seller), the Second Defendant ("GFI") (as Guarantor) (together with GFIH "Genworth") and AXA as Purchaser (the "SPA").

3. At paragraph 87 of the Liability Judgment I held that the obligation on Genworth in Clause 10.8 of the SPA is to pay on demand 90% of all "Relevant Distributor Mis-Selling Losses", which I found to mean any costs

   "incurred by FICL/FACL that relates to:

   (1) a claim or complaint;
   (2) regarding the selling of a PPI product;
   (3) underwritten by FICL/FACL;
   (4) sold by Santander;
   (5) prior to 1 January 2005,"
   (the "Five Criteria").

4. AXA seeks a payment of just short of £500 million (£499,834,187) under Clause 10.8, and in addition it submits that on the true and proper construction of Clause 18.5 of the SPA it is entitled to a gross up payment at the UK corporate tax rate of 19% or, alternatively, at a combined rate of 32.023% in respect of French corporate income tax and social surcharge. The sum claimed does not take into account an interim payment of £100 million already made by Genworth on 3 January 2020 following the Liability Judgment (that payment was expressly in respect of the principal sum demanded under Clause 10.8, not any gross up amount).

5. As identified in the Updated List of Issues, the following issues arise for determination upon the quantum hearing:-

   (1) **Issue 1** – Whether the sums claimed by AXA reflect costs and losses that have actually been "incurred" by AXA/FICL/FACL.

   (2) **Issue 2** – Whether the sums claimed by AXA fall within the scope of the obligations under Clauses 10.8 and 15.1 of the SPA, in terms of satisfying the requirement that they relate to policies underwritten by FICL/FACL (i.e. the third of the Five Criteria).

(3) **Issue 3(a) –** Whether the words "subject to Taxation in the hands of the receiving party" in Clause 18.5:-

(i) Mean "within the scope of a Tax and not exempt" (i.e. an amount is "subject to Taxation" if it feeds into a Tax calculation of the recipient, regardless of whether that calculation results in any tax ever being payable) (as AXA contends) so that sums payable under Clauses 10.8 or 15.1 fall to be grossed up at the date of their payment, or

(ii) Mean "actually taxed in hands of the receiving party" (i.e. the clause operates by reference to tax on the payment in question which the receiving party is under an enforceable obligation to pay, such tax having been assessed by the relevant revenue authority and determined as being due) (as Genworth contends) so that any additional amount is only payable if and when the recipient is under an enforceable obligation to pay such actual tax.

Issue 3(b) – If it is the former (AXA's construction) i.e. the obligation under Clause 18.5 operates by reference to some potential, rather than an actual, tax liability, how is that to be determined?

Issue 3(c) – To what extent, if any, does the gross up calculation need to take into account: (1) tax deductions or reliefs prospectively available to the receiving party to reduce the amount of the Tax payable on the principal payment; or (2) tax deductions or reliefs previously obtained for or in respect of the losses, costs, etc to which the principal payment relates?

Issue 3(d) – To what extent, if any, does the entitlement to a gross up under Clause 18.5 require any party to have used its reasonable endeavours to minimise the tax liability by reference to which the gross up payment is sought?

6. It is common ground that if Genworth's contention on Issue 3(a) is the correct construction of the words "subject to Taxation in the hands of the receiving party" in Clause 18.5 then the Court should so find, and not go on to examine or determine the tax treatment of any part of the Final Award in the hands of either AXA, AXA France IARD ("IARD") or AXA France Vie ("Vie") (being the transferees of, respectively, FICL's and FACL's businesses pursuant to the transfers referred to at paragraph 37 below) as in such circumstances the parties must await any actual tax liability being established. However if AXA's contention on Clause 3(a) is the correct construction, then the following further issues arise for determination at the present hearing:-

Issue 4(a) – Will such part of the Final Award as is directed by AXA to be paid to IARD and/or Vie be subject to UK corporation tax as trading income that arises directly or indirectly through or from a UK permanent establishment and is attributable to it?

Issue 4(b) – Will AXA be subject to French corporate income tax on such part of the Final Award which is paid to it?

7. Embedded within Issues 4(a) and 4(b) are issues as to whether there is an appropriate formula to be applied to any part of the Principal Sum paid for the purposes of determining the gross up amount payable by Genworth, and what that amount would be.

8. The factual background to AXA's claims is set out at length in Section B of the Liability Judgment. However in circumstances where the issues arising at the quantum hearing are also set against that same factual background, it is summarised below for ease of reference, and updated with details of factual developments since the Liability Judgment.

B. FACTUAL BACKGROUND

B.1 The Parties

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

10. Between 1988 and 2011, FICL and FACL were engaged in the business of underwriting PPI for store cards. During that period, the Third Additional Party, Santander Cards UK Limited ("SCUK"), and the Fourth Additional Party, Santander Insurance Services UK Limited ("SISUK") (collectively, as already defined, Santander) marketed and sold PPI on behalf of FICL/FACL, principally through retail stores.

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

12. On 1 December 2000, FICL/FACL and SCUK's predecessor GE Capital Bank, ("GECB") entered into an Agency Agreement ("the Agency Agreement"), by which the parties formalised the historic agency arrangements under which GECB acted as agent in marketing and selling PPI products underwritten by FICL/FACL

B.2 PPI Mis-selling

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

14. Broadly speaking, the regulatory redress system for consumers is as follows: A consumer can make a regulatory complaint relating to PPI mis-selling against a regulated financial services company ("Direct Redress"). If that complaint is rejected by the company, or the customer disputes the amount of redress offered, the customer can then refer the complaint to the FOS, which may order the firm to pay redress to the customer ("FOS Redress"). The

FOS was established in 2000 and given statutory powers in 2001 pursuant to the Financial Services and Markets Act 2000 ("FSMA"). If the FOS has jurisdiction to consider the complaint, it may order the company to pay redress. Regardless of the outcome, the company is required to pay a flat fee to the FOS for each referral, which is currently £550 ("FOS Fees").

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

B.3 The Regulatory Context

16. At all material times FICL and FACL have been subject to various regulatory regimes in their capacity as issuers of insurance policies. From 1989 until 2005, FICL and FACL were members of the Association of British Insurers ("ABI"), the Insurance Ombudsman Scheme ("IOS") and/or the General Insurance Standards Council ("GISC"). FICL and FACL became regulated by the FSA for the purpose of underwriting insurance from 1 December 2001, pursuant to the FSMA (Regulated Activities) Order 2001, and from 14 January 2005, the marketing and sale of insurance policies became regulated by the FSA.

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

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

B.4 Events leading up to the SPA

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

20. It was clear, in advance of the entering into of the SPA, that FICL and FACL faced significant liabilities arising from the historic mis-selling of PPI policies, although the exact scope of those liabilities was uncertain. What was clear was that AXA was not prepared to assume those responsibilities other than to a limited extent which led to the inclusion of Clause 10.8 of the SPA.

21. In this regard in July 2015, Genworth disclosed to AXA a compliance monitoring report dated 11 May 2015 which raised very serious concerns, in particular that FICL/FACL's PPI complaints handling processes were not up to scratch. The report noted that the FOS and the Financial Conduct Authority considered the complaints to be FICL/FACL's responsibility, and that it was required to have arrangements in place for handling them.

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

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

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

B.5 Events after the entering into of the SPA

25. However, and contrary to the parties' expectations, after completion of the SPA, the Relevant Distributor Agreement was **not** entered into with Santander. The result is that not only did Clause 10.8 allocate, but it continues to allocate to this day, responsibility for 90% of the Relevant Distributor Mis-selling Losses to Genworth. In consequence Genworth not only bore at the time of contracting with AXA, but continues to bear, the lion's share of the Relevant Distributor Mis-selling losses. Nevertheless, Genworth has not made payment to AXA in respect of those losses when the same has been demanded under Clause 10.8. Following the liability judgment, Genworth has made an interim payment of £100 million to AXA. It is not disputed, however, that its liability to AXA is very much greater than that whatever the outcome of the quantum issues that arise for determination.

26. On 3 July 2017, Santander informed FICL/FACL that it did not accept that it was liable for any losses flowing from PPI customer complaints in respect of policies sold prior to 14

January 2005, and that it would no longer handle or pay redress in respect of any such complaints.

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

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

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

C. PROCEDURAL HISTORY

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

31. In consequence, on 22 December 2017, AXA issued its Claim Form and Particulars of Claim against Genworth, seeking: (1) specific performance of GFIH's obligation to pay the amount demanded under Clause 10.8 of the SPA; or (2), in the alternative, to enforce the guarantee given to it by GFI under Clause 15.1. In making that claim, AXA gave notice that it intended in due course to amend its claim so as to claim further Relevant Distributor Mis-selling Losses.

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

33. Genworth's position is that FICL/FACL have good claims against Santander to recover losses as a result of alleged mis-selling of PPI by Santander, both before and after 1 December 2000, for breach of various clauses under the Agency Agreement. However, such claims are not for determination in these proceedings. By its Part 20 Claim, Genworth sought to join FICL and FACL and Santander to the proceedings, in order to resolve the

issues of liability between them for losses arising from the mis selling of PPI both pre and post 2005. Genworth sought: (1) a declaration that as between Santander and FICL/FACL, Santander was liable for PPI Mis-selling Losses (both pre and post 2005); (2) a declaration that FICL/FACL were not liable to Santander for breaches of the Agency Agreement; and (3) a declaration that, if Genworth made payment to AXA under Clause 10.8 of the SPA, Genworth was entitled to be subrogated to FICL/FACL's rights under the Agency Agreement, and thereby an indemnity or damages from Santander.

34. On 6 March 2018, AXA served its Reply and Defence to Counterclaim and its application to strike out the Part 20 Claim as an abuse of process.

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

36. In accordance with directions set by Andrew Baker J, by draft Amended Particulars of Claim served on 25 November 2018, and a second updated draft Claim Form sent on 17 January 2019, and a second draft Amended Particulars of Claim sent on 13 February 2019, AXA increased the sum claimed to a total of £264,953,912.18 to reflect further losses up to 31 December 2018. That sum was said by AXA to represent 90% of the Relevant Distributor Mis-selling Losses incurred by FICL/FACL up to 31 December 2018, comprised of (1) sums paid to customers as redress following a FOS determination; (2) fees paid to the FOS following the referral of complaints; (3) the administration costs of handling complaints; (4) sums paid to FICL and FACL to SUKPLC, pursuant to the CHA to fund redress payments made by SUKPLC to customers; (5) sums paid by FICL and FACL to customers following determination by SUKPLC, pursuant to the terms of the CHA, that redress should be paid to them; and (6) service charges paid by FICL and FACL to Santander, pursuant to the terms of the CHA.

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

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

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

D. THE LIABILITY JUDGMENT AND PROOF OF QUANTUM

40. As addressed in the Liability Judgment, Genworth was unsuccessful in its various defences and arguments of construction advanced at the points of principle hearing, and the Court also dismissed Genworth's claim for the Subrogation Declaration.

41. At paragraph 87 of the Liability Judgment I found as follows:-

> "… on the ordinary and natural meaning of the language of Clause 10.8 and the embedded definitions contained therein I am satisfied that Genworth is, by the express terms of Clause 10.8(a) obliged to pay ("will pay") "on demand" an amount equal to 90% of all Relevant Distributor Mis-Selling Losses which (as a result of the embedded definitions) means on a demand by AXA in an amount equal to a cost incurred by FICL/FACL that relates to:
>
> (1) a claim or complaint;
>
> (2) regarding the selling of a PPI product;
>
> (3) underwritten by FICL/FACL;
>
> (4) sold by Santander;
>
> (5) prior to 1 January 2005."

42. Paragraph 9(b) of Genworth's Defence and Counterclaim (as repeated in its Amended and Re-Amended Counterclaim) put AXA to proof as to "*[w]hether each cost, payment or loss comprised within the total sum claimed falls within the scope of the indemnity provided by clause 10.8 of the SPA and in every case that it is a cost, payment or loss which has actually been incurred by AXA."* That is a stance which, as Genworth itself points out, it has never resiled from.

43. Accordingly, following the Liability Judgment, and as AXA put it in its Skeleton Argument for the quantum hearing, *"Genworth was left in the position of simply being able to put AXA to proof as to how far the claimed costs and losses were actually incurred, and how far they satisfied the five criteria identified by AXA and upheld by [the Court]."*

44. As already noted, when AXA issued its claim it gave notice that it intended in due course to amend its claim so as to claim further Relevant Distributor Mis-selling Losses to the extent that these sums were not paid under Clause 10.8(a). AXA has since updated its claim twice, most recently by the Re-Amended Particulars of Claim in which AXA seek judgment in the sum of £499,834,187 (excluding interest and tax gross-up) which is said to represent 90% of Relevant Distributor Mis-selling Losses incurred by FICL/FACL up to 30 April 2020. Relevant Distributor Mis-selling Losses continue to be incurred on a daily basis during the CHA run-off period, and AXA has foreshadowed its intention to claim such sums in due course. It is clearly desirable that some mechanism be found to achieve that with a View to obviating the need for repeated further claims and associated court hearings, if at all possible, following the Liability Judgment and this quantum judgment.

45. Following the Liability Judgment, Genworth (by agreement) filed Further Particulars of Defence, by reference to the tranche of 1,036 sample complaint files disclosed in advance of the points of principle liability hearing (the "Initial Sample"). Those Further Particulars of Defence were recently amended (again, by agreement) to refer also to a further updated sample of 341 complaint files (the "Additional Sample"), giving a total sample of 1,377 complaint files. By para. 9 of the Amended Further Particulars of Defence Genworth does not admit that the PPI policies that were the subject of the 137 complaint files listed in Annex 1A of the Amended Further Particulars were underwritten by FICL/FACL (i.e. the third of the Five Criteria). Those are the only complaints files (out of the 1,377 disclosed in the Initial and Additional Samples) with which Genworth takes issue. Genworth admits that the balance of the complaint files satisfy the Five Criteria. AXA's response to the Amended Further Particulars of Defence setting out its case as to why it says the 137 disputed complaint files relate to policies that were underwritten by FICL/FACL, is contained within its Amended Reply to the Further Particulars of Defence.

46. If I find that AXA has not proven that one or more of the 137 disputed complaint files relates to policies underwritten by FICL/FACL, the parties are in broad agreement as to how such findings should be extrapolated across the full population of underlying complaints, so as to reduce AXA's total claim insofar as it relates to amounts of: (1) redress paid to customers (whether directly or via Santander); and (2) fees paid to the FOS. They are not, however, agreed on how far such reductions should be made to AXA's claim insofar as it relates to: (1) administrative expenses; and (2) service charges payable to Santander under the CHAs.

E. WITNESSES

47. AXA called four witnesses. Each of the witnesses gave oral evidence and was cross-examined by Genworth. In this regard AXA called:-

(1) Ms Catriona Healy. Ms Healy is an Operations Manager with AXA Partners, the division of AXA that FICL and FACL operated as part of after they were acquired by AXA from Genworth. Her evidence was focussed on the handling of PPI complaints following the acquisition of FICL and FACL. Her witness statement was prepared for the purpose of the Liability trial (at which she also gave evidence).

(2) Mr Mark Doherty. Mr Doherty is an Operations Excellence Project Manager at AXA Partners S.A.S. having been an employee thereof since 2006. Since 2017 he has worked in relation to PPI complaints. He presented AXA's evidence in relation to proof of the heads of loss claimed by AXA and the making of redress payments including, the satisfaction of the Five Criteria and, in particular, whether polices were underwritten by FICL/FACL.

(3) Mr Robert Falkner. Mr Falkner is a partner in Reed Smith LLP who are the solicitors for SUKPLC, and SCUK and SISUKL who were previously parties to these proceedings (as addressed in the Liability Judgment). He gave evidence, based on his discussions with Santander employees, as to Santander's belief that all the policies concerned are FICL/FACL policies

(4) Mr Michael Diver. Prior to his retirement Mr Diver was an employee of AXA Partners S.A.S. acting as a tax manager. From July 2011 he had been an employee of the

Genworth group dealing with tax matters for FACL and the main point of contact for the Genworth group's dealings with HMRC. He gave evidence in relation to the transfer of FICL and FACL to IARD and Vie and the accounting and tax treatment of Relevant Distributor Mis-Selling Losses.

48. I considered that all the witnesses were honest witnesses who provided supportive factual evidence in relation to AXA's claims to the extent that factual evidence was of relevance (in particular in relation to Issue 2). A number of the issues (most obviously Issue 3(a) and the proper construction of Clause 18.5) were issues of construction where factual evidence has only a more limited role in the context of factual matrix. I also bear well in mind Mr Nash's submissions in relation to the weight to be attached to factual evidence where a witness did not have first-hand knowledge of a particular matter and relied upon what they had been told by others. I address the evidence of the factual witnesses, so far as relevant, when addressing the particular issues that arise, and to which their evidence relates.

49. The parties also called expert evidence in relation to French law in the context of Issue 4(b), in the case of AXA from Mr Philippe Derouin and in the case of Genworth from Mr Jacques-Henry De Bourmont.

F. THE APPROACH TO CONTRACTUAL CONSTRUCTION

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

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its View as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381 , 1383H–1385D and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989 , 997, Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment *in Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extrajudicial writing, *"A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision"* (2008) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.
>
> 11. Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the *Rainy Sky case* [2011] 1 WLR 2900 , para 21f. In the Arnold case [2015] AC 1619 all of the judgments confirmed the approach in the

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

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

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn* [2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

51. Whilst principles of contractual construction are of relevance, and apply, to all of the issues of contractual construction that arise, they are in particularly sharp focus in relation to Issue 3(a) and what is meant by *"subject to Taxation in the hands of receiving party",* which is considered in due course below, together with further authorities on contractual construction that are of relevance in that regard.

G. ISSUE 1

52. Issue 1 is whether the sums claimed by AXA reflect costs and losses that have actually been "incurred" by AXA/FICL/FACL. This raises the question as to what is meant by the word "incurred". The issue arises in circumstances where, as already noted, paragraph 9(b) of Genworth's Re-Amended Defence and Counterclaim expressly put AXA to proof as to *"[w]hether each cost, payment or loss comprised within the total sum claimed falls within the scope of the indemnity provided by clause 10.8 of the SPA and in every case that it is a cost, payment or loss which has actually been incurred by AXA"* (emphasis added). Although paragraph 9(b) refers to costs being incurred by "AXA" it is common ground that the issue is whether such costs etc have been incurred by AXA and/or FICL/FACL.

53. The submissions before me addressed correspondence between the parties preceding the quantum hearing in relation to proof of quantum. This included a letter dated 4 March 2020 from AXA's solicitors Clifford Chance to Genworth's solicitors Sidley Austin {QH/555} which stated at paragraph 2.2: *"AXA understands that Genworth does not intend to dispute that the sums set out in those invoices/demands have in fact been paid by the AXA France Entities, and therefore does not require AXA to produce proof of payment of such sums"*. Genworth made clear, however, that it considered that AXA were required to prove payment (and not simply a liability to pay whether or not payment was actually made), and proof of payment (where possible) was thereafter addressed in the witness statement of Mr Doherty (which was served on 25 May 2020) on behalf of AXA. A difference between the parties as to what it is said must be demonstrated by AXA in order to make a recovery under Clause 10.8 was accordingly highlighted by the time of trial (albeit that Issue 1 had always been an agreed issue for determination at this quantum hearing).

54. AXA's stance (as reflected in paragraph 40 of its Skeleton Argument at trial) is that in order to prove that the losses claimed have been "incurred" it is not necessary to demonstrate an actual payment out by FICL/FACL received by the beneficiary in respect of every amount claimed (as Genworth submits is required) but rather is only required to prove that FICL/FACL is under an obligation to make payment. The financial significance of the point is relatively modest when compared to the overall sums claimed (and to be ordered based on sums no longer in dispute), but is relevant, in particular, to the question of whether Genworth is liable under Clause 10.8 for customer redress in the sum of £485,069 in respect of which cheques have been issued to customers by FICL/FACL but not, at least to date, cashed by customers.

55. It will be recalled, as I have already set out, that I found at paragraph 87 of my Liability Judgment that, Genworth is, by the express terms of Clause 10.8(a) obliged to pay on demand an amount equal to 90% of all Relevant Distributor Mis-Selling Losses which (as a result of the embedded definitions) means "on a demand by AXA in an amount equal to **a cost incurred** by FICL/FACL that relates to: (1) a claim or complaint; (2) regarding the selling of a PPI product; (3) underwritten by FICL/FACL; (4) sold by Santander; (5) prior to 1 January 2005" (emphasis added). At one point in the present hearing Genworth understood AXA to be submitting that as "payment" is not one of the five criteria

previously found it was too late now for Genworth to submit that "incurred" contemplated "payment" so that Genworth's argument failed *in limine*. It was not clear to me that AXA did, in fact, so submit, but to the extent it was so submitted it would have been a bad point. Neither party addressed me at the liability hearing as to what the word "incurred" meant in the definition of PPI Mis-Selling Losses in Clause 1.1 of the SPA, and that point remains for determination at this hearing.

56. The issue raises a short point of contractual construction. In this regard Clause 10.8 of the SPA requires Genworth to pay on demand an amount equal to 90% of all "Relevant Distributor Mis-selling Losses". As defined in Clause 1.1, "Relevant Distributor Mis-selling Losses" means "any PPI Mis-selling Losses which arise out of or directly relate to PPI Selling Activity undertaken by the Relevant Distributor or its agents or its appointed representatives (as the case may be) prior to 1 January 2005.

57. "PPI Mis-selling Losses", as defined in Clause 1.1, means

"all damages, losses, liabilities, penalties, fines, costs, interest and expenses, including for the avoidance of doubt costs and liabilities relating to FOS fees, claim administration, complaints handling, customer notifications and redress amounts, incurred by any Target Group Company whether before or after Completion in respect of:

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

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

(c) any PPI Complaint;

but excluding for the avoidance of doubt, any sums which are covered as Complaint-Handling losses." (my emphasis)

58. "PPI Complaint", as defined in Clause 1.1, means

"Any claim or complaint brought by any person against a Target Group Company in respect of PPI Selling Activity or in respect of the handling by or on behalf of a PPI Distributor or the Relevant Distributor of any claim or complaint in respect of PPI Selling Activity".

59. AXA submits that as a matter of ordinary language, costs etc are "incurred" when the relevant party has either: (1) paid the amount in question; or (2) come under a legal obligation to do so. Where meaning (1) is intended, the natural language is not "incurred", but instead "paid" or "disbursed" - see, for example, *Ensign Tankers (Leasing) Ltd v. Stokes (Inspector of Taxes)* [1989] 1 WLR 1222 per Millett J at 1240H-1241A:-

> "…Incurs
> The Crown next contended that the only expenditure which the partnerships "incurred" on the provision of plant was the 25 per cent, or 25.5 per cent, of the whole which was funded from their own resources. This attack was better targeted since it sought to disallow only that part of the expenditure which was made from non-recourse borrowing.

> Unfortunately the contention is hopeless. "To incur" means "to render oneself liable to." Expenditure is incurred, whether or not there has been any actual disbursement, if the taxpayer has legally committed himself to that expenditure." (AXA's emphasis)

It is also to be noted that although the point did not need to be determined in the subsequent appeal ([1991] 1 WLR 341), Sir Nicholas Browne-Wilkinson VC stated at p. 358 that he considered there was, *"much force in the judge's reasoning".*

60. AXA recognise that the words of a contract are always to be construed in the context of the particular clause and contract in question, but submit that the meaning ascribed to the word "incurred" by Millett J in *Ensign Tankers* is the ordinary and natural meaning of the word i.e. to "incur" means to render oneself liable to, with the result that expenditure is incurred, whether or not there has been any actual disbursement, if the entity has legally committed itself to that expenditure, which is what AXA says the word "incurred" means in the definition of PPI Mis-selling Losses. Indeed AXA submits that not only is there no reason to depart from that ordinary and natural meaning but that the position under the definition of PPI Mis-selling Losses is *a fortiori*, because that definition does not merely refer to expenditure that is "incurred", but also to "liabilities" that are "incurred". AXA submits that on any View, an amount of redress reflected in, for example, an uncashed cheque relates to a "liability" that FICL/FACL have "incurred" (or, to adopt the gloss in Genworth's pleading, "actually incurred") in terms of the obligation to pay the relevant redress.

61. For its part Genworth also acknowledges that the meaning of the word "incurred" depends on the particular context, but submits that in Clause 10.8 it requires proof of actual payment which should be taken to be the intention of the parties having regard to the definition of PPI Mis-selling Losses (as quoted above). In this regard Genworth submits that taken in the context of this clause, and what it says is the obvious purpose of the covenant at Clause 10.8 which is to make good 90% of the actual losses to FICL/FACL of the PPI mis-selling remediation scheme, "damages" etc. are "incurred" by payment, not simply by the existence of a liability. Genworth further submits that there is a strong pointer to this construction in the terms of the clause itself, which refers (at sub-paragraph (b)) to "complying with any order etc." in respect of any "Action that relates to PPI Selling Activity": it is submitted that the cost of actually complying with the order or a settlement agreement, not the existence of the liability, which comprises a PPI Mis-selling Loss.

62. Alternatively, says Genworth, if the term "incurred" is broad enough in principle to comprehend merely being exposed to a liability, it is submitted that where it is clear that the liability will never fall to be discharged, there is no longer extant a PPI Mis-selling Loss falling within the scope of the definition. Otherwise, FICL/FACL would be in the position of being able to obtain a release from a liability and yet AXA would be entitled to claim payment under Clause 10.8 in respect of the non-existent liability.

63. Genworth points out, in the context of the part of the claim represented by uncashed cheques, that £485,069 of AXA's claim relates to cheques that have not been cashed by customers, of which £159,410 relates to uncashed cheques issued prior to 2020, and that many of these cheques are for pennies and date from 2019. It submits that AXA cannot prove that it is likely to be required to honour these cheques and therefore that it has incurred these sums, whether "incurred" is taken to mean actual payment, or an extant

liability which will be discharged. Genworth does not suggest that if such sums are not recoverable now that is the end of the matter. It acknowledges that at least some cheques may be re-issued and cashed hereafter – after which it accepts it would be liable to AXA in respect of the same. To that extent the issue really impacts only upon cashflow/timing (subject to any solvency risk). Genworth also refers to Mr Doherty's acceptance, in cross-examination, that *"if somebody has not cashed his cheque for tuppence issued in September last year, he's unlikely to do so now"*. For its part AXA pointed out that many claims are advanced by claims management companies who, it is said, are likely to ensure that cheques are encashed. It also emerged during the trial that (per AXA – based on spreadsheet information before the Court) only about £6,000 is in respect of cheques under £20, and only £643 is in respect of cheques under £5.

64. It goes without saying that the parties' objective common intention is to be judged at the time the SPA was entered into (and not by reference to subsequent knowledge and events). However Genworth submits that when looking at the commerciality of the parties' respective constructions, a construction that sums must be actually paid, makes more commercial sense than that sums be due simply because of a legal liability having arisen. It is also suggested that it is not likely to have been the objective common intention of the parties that AXA obtain a benefit from Genworth in the form of a windfall in the amount of uncashed cheques.

65. In oral closing Mr Nash, on behalf of Genworth, submitted that one has to look at the definition of "PPI Mis-selling Losses" as a whole and "*when you look at the clause as a whole you've got a portmanteau of different expenditure in the first line of the clause: damages, losses, liabilities, penalties, fines, costs, interest and expenses, together with a group of three different types, or three circumstances in which one or more of that portmanteau will fall to be engaged…So if you try and attach one part of that first line to one paragraph in order to make good your argument, you are doing violence to the clause as a whole, because it is bringing all of those different items into play in relation potentially to all of those subparagraphs. So a close linguistic argument doesn't work: it gives rise to anomalies."*

66. He submitted that what one should ask oneself as a matter of construction is, what does this clause read as a whole tell you as to the scope of the liability under 10.8? And he submitted that what this clause taken as a whole tells one, especially by reference to item (b), is that it is concerned with circumstances in which the target group company is out of pocket, it has actually complied with an order, decision or settlement in respect of a PPI action, and therefore it's entitled to look over to Genworth to get that money back.

67. He also submitted that a further indication that it is concerned with actual losses is the last two lines of the clause, which provide, "excluding for the avoidance of doubt any sums which are recovered as Complaints Handling Losses." So that where the target company group gets the money back from another source or under another head, then again there is no obligation to pay under Clause 10.8.

68. There is no doubt that one has to construe the clause as a whole, but there is nothing wrong in attaching one part of the first line to one paragraph in order to support a particular construction provided that the construction arrived at is consistent with the clause taken as a whole. What Mr Nash's submission fails to recognise is that the definition of PPI Mis-selling Losses is dealing with, and encompassing, a number of different scenarios, and the

draftsman is no doubt keen to capture the various different matters which are to amount to a PPI Mis-selling Loss. One of those matters is, "liabilities**...**incurred by [FICL/FACL in respect of…(c) any PPI Complaint". Far from doing violence to the clause as a whole, these words identify what amounts to a particular PPI Mis-selling Loss, and it is apt to reflect the sums that are being claimed – FICL and FACL have incurred legal liabilities to customers and Genworth has agreed to pay AXA in respect of those liabilities incurred.

69. Ultimately, and despite Mr Nash's valiant efforts, based on his submissions that I have identified above, to persuade me that "incurred" meant "actually paid" I am satisfied that the word "incurred" in the definition of PPI Mis-selling Losses bears its ordinary and natural meaning of "to render oneself liable for" or to "incur a liability in respect of" whether or not there has been any actual payment following the incurring of such liability. This is expressly spelled out by the reference to *"liabilities…incurred by [FICL/FACL] in respect of…(c) any PPI Complaint".* As AXA points out, and as I am satisfied is the case, it is incontrovertible that liabilities in relation to sub-paragraph (c) do not require payment. A liability in respect of a PPI Complaint arises when liability is established, not when payment is (subsequently) made.

70. Even had there not been an express reference to "liabilities" in the definition of PPI Mis-selling Losses, the word "incurred", properly construed, bears the meaning I have identified in the definition as a whole, and indeed is equally apt (and bears the same meaning) in respect of, for example, "damages…incurred" and "losses…incurred" or indeed any of the matters being incurred that are identified. This accords with the sense as identified in the *Ensign Tankers* case, and the observations of Millett J in that case which, although in a tax context, reflect the ordinary and natural meaning of the word "incurred", and such observations are of general application, and reflect the meaning of the word "incurred" as it is ordinarily understood.

71. In short Clause 10.8 does not bear the meaning that Genworth submits it bears, nor is its purpose to make good 90% of the <u>actual</u> losses to FICL/FACL of the PPI mis-selling remediation scheme on the basis that "damages" etc. are "incurred" by <u>payment</u>, not simply by the existence of a liability. This is simply submission on Genworth's part which is not reflected in the language of the definition of PPI Mis-selling Losses, and "damages" are not incurred by payment – indeed they are awarded where there is liability established. Notably the words "actual" and "payment" simply do not appear in the definition of PPI Mis-selling Losses. Nor do I consider that the language of sub-paragraph (b) "complying with any order" assists Genworth – sub-paragraph (b) is simply one of many permutations that may arise and that the draftsman has covered – its presence does not detract from AXA's construction. Equally the closing words simply clarify that there is excluded any sums which are recovered as Complaints-Handling Losses.

72. There is also the obvious point (foreshadowed above) that the language used is "incurred" and not "paid". If the trigger for an obligation to pay was payment by AXA the parties would surely have stated that. As AXA notes, if the trigger is that the money be actually paid, then one would expect the contract to state that the trigger is payment – yet the language used is not that of "payment" or "paid" but rather (in contra-distinction) "incurred". This is not a case where the language is ambiguous and the parties could have been more felicitous in their use of language – the word "incurred" has an ordinary and natural meaning, and is apt to cover the matters defined as PPI Mis-selling Losses.

73. Genworth's construction would also have surprising consequences that it is unlikely represented the objective common intention of the parties. It would mean that AXA could not go to court and obtain an order that Genworth was obliged to pay it a sum until after it had actually made payment to the customer. Equally, and in consequence, the result (for example) would be that if AXA was impecunious and could not afford to pay customers (an admittedly unlikely scenario on the facts) Genworth would have no obligation to pay AXA. In contrast there is good commercial sense in AXA being able to demand payment from Genworth, and thereby being put in funds, before having to pay sums to third parties.

74. AXA's construction is an entirely commercial and business-like construction providing for a recoverable loss once liability is established which is an entirely orthodox approach to adopt in a clause such as Clause 10.8. The possibility that some cheques may not be cashed (in reality likely ultimately only to be small cheques representing a very small percentage in monetary terms) does not render AXA's construction unbusiness-like, or suggest that AXA's construction is not likely to represent the objective common intention of the parties. The value of such small cheques is *de minimis* in the context of likely claims given the volume of claims for alleged PPI mis-selling, and indeed the ongoing claims under Clause 10.8 that arise day by day.

75. Turning to Genworth's alternative submission, namely to submit that *"where it is clear that the liability will never fall to be discharged, there is no longer extant a PPI Mis-selling Loss falling within the scope of the definition"* there is simply no support for such a submission (or construction) in the definition of PPI Mis-selling Loss or any other aspect of the definition that feeds into Clause 10.8, and the submission does not bear examination. For such an outcome there would either need to be express language to such effect or it would be necessary to imply a term to such effect. As to the former there is no such express language (nor could the same be derived on the "true and proper construction" of the definition of PPI Mis-selling Losses), and as to the latter, not only would the criteria for an implied term (including as to necessity) not be met, but any attempt at implying such a term would fall foul of Clause 20.1 of the SPA, which provides that except as required by statute (which is not applicable), "no terms shall be implied (whether by custom, usage or otherwise) into this Agreement".

76. In the above circumstances I am satisfied, and find in relation to Issue 1, that the meaning of the word "incurred" in the definition of PPI Mis-selling Losses for the purposes of Relevant Distributor Mis-selling Losses and Clause 10.8, bears its ordinary and natural meaning of "to render oneself liable for" or to "incur a liability in respect of" whether or not there has been any actual payment following the incurring of such liability. Accordingly in order to prove that the losses claimed have been "incurred" AXA is not required to demonstrate a payment out in respect of every amount claimed, but only that FICL/FACL have come under an obligation to make payment.

77. Three sub-issues arose under Issue 1, namely in relation to (1) uncashed cheques, (2) unmatched redress payments and (3) administrative costs, to each of which I will now turn. I should add that Genworth putting AXA to proof of quantum had resulted in other adjustments to the total quantum claimed being made by AXA, but these were the three issues that remained in the context of Issue 1.

G.1 Uncashed cheques

78. It is not suggested that FICL/FACL have not come under an obligation to make payment in respect of the sums that are the subject matter of the uncashed customer redress cheques (indeed that is the reason why cheques have been issued in the first place). Under the definition of PPI Mis-selling Losses in Clause 1.1 of the SPA such cheques are in respect of "liabilities" that have been "incurred" by FICL/FACL, for the reasons I have identified above, and with "incurred" having the meaning I have found above. Accordingly AXA has proved that the sums totalling £485,069 in respect of uncashed customer redress cheques has been incurred, and is recoverable from Genworth such that Genworth was, and is, obliged to pay the same to AXA.

G.2 Unreconciled payments

79. At the quantum hearing Genworth sought a reduction of 2% of redress payments made by cheque directly by FICL/FACL to customers prior to the 2018 CHA (in the sum of £579,290) to reflect the fact that AXA has not reconciled such payments with bank statement entries as at the time of the parties' skeleton arguments for this quantum hearing.

80. This was never a particularly attractive submission for two reasons. First, and as Mr Nash fairly recognised in opening, it would be open to the Court to find that an ability to reconcile 98% of the individual cheque payments in the relevant underlying population gave sufficient reassurance as to the robustness of the total figure to justify an order in respect of the whole figure. Secondly it was always open to AXA to continue the reconciliation exercise during the course of the Quantum Trial (not least in the context of the mammoth exercise being undertaken and the difficulties with data access during the COVID-19 "lockdown").

81. AXA did continue its analysis with a View to further reconciling payments with the results being set out in Clifford Chance's letter to Genworth of 18 June 2020 and an accompanying spreadsheet. It revealed all but 25 individual payments had now been reconciled with bank records. Those 25 outstanding payments comprised (1) 10 payments totalling £11,102 in the form of voided (i.e. cancelled) cheques; (2) 1 uncashed cheque in the sum of £160; and (3) 14 other payments, totalling £5,727, which have not yet been reconciled. AXA stated that it was willing to reduce its claim by reference to the cancelled cheques in the sum of £9,991 (i.e. 90% of £11,102), but submitted that the other unreconciled amounts should not lead to any reduction, in circumstances where (1) uncashed cheques represent "liabilities" that have been "incurred", and (2) it was said that the Court can be sufficiently confident that the *de minimis* residue of unreconciled payments would with further analysis be reconciled. In his oral closing Mr Nash adopted a realistic approach and stated that Genworth no longer sought a deduction in the respect of 2% unmatched cheques, but only uncashed cheques (however these have already been addressed above and in respect of which I have ruled against Genworth). Accordingly, in the light of my ruling on issue 1, I understand that the parties agree that the only reduction from AXA's claim in respect of this issue is in the sum of £9,991, but the actual position can be confirmed by the parties upon hand-down.

G.3 Administration Costs

82. Genworth seeks a reduction of 1.3% of FICL/FACL's internal administrative costs of complaints-handling (i.e. £61,430) to reflect the fact that 1.3% of the complaints handled by FICL/FACL's complaints team over the relevant period related to policies other than those sold by Santander. As Mr Doherty explained in his witness statement, FICL/FACL's

own administrative costs of complaints handling consist largely of fixed costs, based on maintaining a team with only around 7 full-time members of staff. He addresses the activities performed by staff at paragraph 12 of his witness statement. His evidence (as set out at paragraph 16 of his witness statement) was that:-

"The work done in respect of complaints relating to non-Santander policies does not materially impact upon administrative costs, since those costs (which are principally staff costs) would need to be incurred in any event even if those other complaints were not made. This is because the negligible volume of such other complaints means that FICL/DACL could not reduce the number of staff working on PPI complaints, nor materially reduce other expenses, if such other complaints were not received."

83. The evidence of Mr Doherty was, therefore, that a marginal reduction of 1.3% in the volume of complaints would not have materially reduced those costs. In other words, the costs would have been incurred even if any complaints that were not compliant with the Clause 10.8 criteria had never been made.

84. Mr Doherty was cross-examined about such evidence. He maintained his evidence in that regard:-

"Q. And if, for example, the volume of complaints was the volume of complaints you identify there as being outside of scope, ie 1,111 rather than 85,295, there would inevitably be a reduction both in staff costs and non-payroll costs associated with handling those complaints, wouldn't there?

A. Theoretically. However, in practice, may I say that in isolation of Santander if we were just handling that volume of complaints over an extended period, that type of workload I would expect to be absorbed within the existing capacity in the UK team that, as we manage our SLAs and our expectations on our performance, that this volume of work which, on recollection, is equivalent to maybe 20 complaints a week or a month, that could be handled within the current capacity of the size of the current team if we exclude any Santander activity.

…

Q. Reducing the total costs by the percentage -- the proportion of complaints out of scope, ie your 1.3%, is actually quite a generous adjustment to AXA because of the economies of scale, otherwise you would have to reduce it by a larger amount to reflect the fact that some part of -- that in order to handle, let us say, 1.3% of complaints, you would need to hire more people at the start than you are currently doing with your economies of scale.

A. Yes, okay. I don't believe that the 1.3% would be directly translated into headcount. I think that that 1.3% is absorbed within the team that has been established to process the 85,295 complaints.

> So I think the assumption that by removing the out of scope complaints that we can somehow reduce headcount is -- would not be practical from our perspective. That capacity is -- that volume of complaints is dealt with in the existing capacity of the team.
>
> Q. Well, I think we've dealt with that, haven't we, Mr Doherty. We've agreed that even with existing capacity they would have to deal with these out of scope complaints. Perhaps it's a matter for submission, ultimately.
>
> But do you accept my principle that if we were to reduce the costs, then what we propose, the 1.3%, is, in fact, a favourable reduction for AXA?
>
> A. No, I do not. We're still carrying those costs. The team size doesn't change."

85. I accept Mr Doherty's evidence, which he maintained despite repeated questions in cross-examination, as quoted above, and which I found credible. In short the staff that were needed (and associated staff costs that were incurred) were needed in any event to deal with Clause 10.8 compliant claims – the fact that 1.3% of the complaints handled by FICL/FACL's complaints team over the relevant period relating to policies other than those sold by Santander changed neither the staff needed not the staff costs.

86. Mr Doherty did accept in cross-examination, however, that some of the internal administrative costs relate to non-payroll costs (in particular, printing and postage) which would vary depending on the total complaint volume (as could be seen from the "Non payroll costs' tab of the associated spreadsheet). However, it appears that such variable costs are themselves a tiny percentage of the total administrative costs. In this regard, and as appears from the "Summary" tab in the spreadsheet, 93% of the administrative costs take the form of payroll costs, and only 7% are "Other" costs. AXA pointed out in closing that some of the non-payroll costs (e.g. recruitment and IT costs) would likely not vary as a result of marginally reduced complaint volumes, however AXA was prepared to reduce its administration costs claim by 7% of 1.3% of the total (i.e. a flatline reduction of non-payroll costs by reference to the proportion of non-Santander complaints), being a reduction to the costs of £4,300, which reduces AXA's claim by 90% of that amount, i.e. £3,870. I consider that to be a realistic and appropriate approach.

87. Genworth nevertheless maintained in closing that a 1.3% deduction (in particular in respect of staff costs) was appropriate notwithstanding Mr Doherty's evidence. In this regard Genworth submitted that whilst Mr Doherty's evidence was that *"complaints would not have materially reduced the number of staff employed or other expenses, conversely it is clear that FICL/FACL would have had to incur at least some staff and other administrative expenses to deal with the 1.3% of complaints relating to other underwriters. The full amount of FICL/FACL's administrative costs as claimed have therefore not been "incurred…in respect of" Relevant Distributor Mis-selling Losses*". Genworth further submitted that *"Even if the 1.3% were to be dealt with by existing FICL/FACL employees, that would have drawn those employees away from other tasks and so represents a cost to FICL/FACL."* Genworth maintained that, *"On the present evidence, it is submitted that the*

best the Court can do in assessing the incurred loss is to make a reduction proportionate to the number of complaints in the total population (i.e. 1.3% of current claimed administration expenses…)" stating that even this measure of loss was generous to AXA because dealing with a small number of complaints would have required proportionately more resources than the full population of complaints, in respect of which Mr Doherty accepted that economies of scale are possible.

88. Mr Nash expanded on such submissions in his oral closing submitting that:

"But [AXA] don't accept the same in relation to the payroll costs on the basis of Mr Doherty's evidence that either the same number of people would have had to be employed even if the complaints out of scope did not exist, or if it were FICL and FACL dealing only with complaints out of scope, they would have dealt with them within their existing staff capacity.

My Lord, we say that this argument misunderstands the obligation under the contract. The question is not whether FICL and FACL would have hired the same number of people irrespective of the existence of the out of scope complaints; the question is whether the whole of the costs of the staff can be said to have been incurred in respect of Relevant Distributor Mis-Selling Losses. In other words, it's not a simple but-for test: but for the existence of the in-scope complaints we would not have hired these people; the question is: have all the costs which are being claimed been shown to have been incurred in respect of in-scope complaints, and once it's agreed that some part of the work, even if it's a small part, was concerned with out of scope complaints, in that part of their work and the cost of payment to do part of the work, whether it's by way of additional recruiting or by way of in-house staff, was not incurred in respect of relevant distributor losses, but was incurred in respect of something else." (my emphasis)

89. In the first place, I consider that Genworth's submissions fail to give sufficient weight to and/or fails properly to take into account Mr Doherty's evidence, which I have accepted, which is to the effect that these staff (and so their associated cost) were needed to deal with the complaints in respect of policies sold by Santander (as he put it, *"those costs (which are principally staff costs) would need to be incurred in any event even if those other complaints were not made"*). In circumstances where such staff were needed to deal with the complaints the associated payroll cost is, I am satisfied, "incurred…in respect of" Relevant Distributor Mis-selling Losses.

90. Secondly, it is not apt to characterise AXA's approach as applying "but for" causation – rather what AXA addresses is the relevant question, namely whether the payroll costs were "incurred… in respect of" Relevant Distributor Mis-selling Losses. I am satisfied that they were.

91. Thirdly, even if one asks the questions asked by Genworth, then on the basis of Mr Doherty's evidence, the whole of the costs of the staff can be said to have been incurred in respect of Relevant Distributor Mis-selling Losses and the costs of the staff have been shown to have been incurred in respect of in-scope complaints.

92. Further it does not follow, and is not right to say (as Genworth submits), that "if some part of the work, even if it's a small part, was concerned with out of scope complaints, in that part of their work and the cost of payment to do part of the work, whether it's by way of additional recruiting or by way of in-house staff, was not incurred in respect of relevant distributor losses, but was incurred in respect of something else". First, there is no evidence of additional recruiting (and that suggestion is contrary to Mr Doherty's evidence) and secondly (and again as Mr Doherty made clear) the staff, and the associated payroll costs were needed (and so incurred) to deal with the complaints in respect of policies sold by Santander – they were not incurred "in respect of something else".

93. In the above circumstances, and for all the above reasons, I am satisfied and find that the administrative costs claimed were "incurred…in respect of" Relevant Distributor Mis-selling Losses, and accordingly the only reduction in respect of the administration costs claimed is that of £3,870, which I consider to be an appropriate reduction for non-payroll costs in the context of the proportion of non-Santander complaints.

H. ISSUE 2 UNDERWRITTEN BY FICL/FACL

94. Issue 2 is whether the sums claimed by AXA fall within the scope of the obligations under Clauses 10.8 and 15.1 of the SPA, in terms of satisfying the requirement that they relate to policies underwritten by FICL/FACL (i.e. the third of the Five Criteria).

95. It will be recalled that by paragraph 9(b) of Genworth's Defence and Counterclaim (as repeated in its Amended and Re-Amended Counterclaim) Genworth put AXA to proof as to *"[w]hether each cost, payment or loss comprised within the total sum claimed falls within the scope of the indemnity provided by clause 10.8 of the SPA and in every case that it is a cost, payment or loss which has actually been incurred by AXA."* Consequent upon the Liability Judgment, therefore, AXA were put to proof not only that costs etc were incurred but that each of the Five Criteria was satisfied in respect of each cost etc.

96. Since AXA's claim concerns a huge volume of PPI complaints, it was directed by agreement of the parties that the quantum issues would be determined *"by reference to a sample of underlying complaint files"*. AXA provided Genworth with the Initial Sample of PPI complaints (the "Initial Sample") composed of:

(1) 661 "Direct Redress Uphold Complaints": complaints upheld by Santander on behalf of FICL and FACL without the involvement of the FOS.

(2) 375 "FOS Uphold Complaints": complaints that were initially rejected by Santander on behalf of FICL and FACL, subsequently referred to the FOS, where the FOS determined that redress ought to be paid, and redress was paid by or on behalf of FICL/FACL.

97. AXA also disclosed to Genworth 20 "CHS FOS Uphold Complaints", complaints that were initially rejected by Santander on behalf of FICL and FACL pursuant to the Complaint

Handling Services in place since 7 December 2017, subsequently referred to the FOS, where the FOS determined that redress ought to be paid, and redress was paid by or on behalf of FICL/FACL. These complaints were provided in order to establish that there were no material differences between the FOS Uphold complaints handled by Santander before the CHA was entered into and those handled after.

98. On 24 May 2019, AXA provided Genworth with a set of template PPI policy terms and conditions and an accompanying spreadsheet (the "Policy Spreadsheet").

99. By a Consent Order dated 23 July 2019, AXA was additionally directed to provide a "Mapping Document" which allowed Genworth to map the complaint files disclosed by Santander to PPI policies underwritten by FICL/FACL or "other means of identifying which policy or policies of insurance relate to each PPI complaint within the Initial Sample disclosed by AXA". Santander, at the request of AXA, provided Genworth with three documents in relation to the Initial Sample: a mapping document for the Direct Redress Uphold Complaints (provided on 26 July 2019), a mapping document for the FOS Uphold Complaints and a mapping document for the CHS FOS Uphold Complaints (both provided on 1 November 2019) (these three documents, together, the "Initial Sample Axa Mapping Documents").

100. Within 6 weeks of receipt of the Initial Sample, Genworth was entitled to request the production of further Complaint Files. By letter dated 21 November 2019 Genworth served on AXA a request to extend the Initial Sample in respect of Direct Redress and FOS Uphold Complaints. Genworth did not seek disclosure of further CHS FOS Uphold Complaints.

101. AXA agreed to provide Genworth with the Additional Sample of 171 Direct Redress Uphold Complaints and 170 FOS Uphold Complaints (the "Additional Sample"). A third Party Disclosure Order against Santander dated 19 February 2020 was agreed for that purpose. By a further Consent Order dated 22 April 2020, it was directed that AXA provide disclosure in relation to the Additional Sample on a rolling basis. A fourth Third Party Disclosure Order against Santander was made on 1 May 2020.

102. The Additional Sample was provided by AXA in stages as follows:

(1) On 14 April 2020, AXA provided complaint files for 86 Direct Redress Uphold Complaints.
(2) On 17 April 2020, AXA provided complaint files for a further 85 Direct Redress Uphold Complaints.
(3) On 30 April 2020, AXA provided complaint files for 169 FOS Uphold Complaints.
(4) On 11 May 2020, AXA provided: (a) the Mapping Document in respect of the Additional Sample (the "Additional Sample Mapping Document"; together with the Initial Sample Axa Mapping Documents, the "AXA Axa Mapping Documents"); (b) the one outstanding FOS Uphold Complaint; and (c) in relation to the 170 FOS Uphold Complaints in the Additional Sample, 58 letters to the relevant customers offering redress following determination by the FOS.

103. On 19 May 2020 and 2 June 2020, AXA provided 67 letters to customers offering customer redress which were missing from the above complaint files.

104. Genworth accepts that in respect of circa 90% of the total sample of complaint files, the Five Criteria for recovering associated costs and losses under Clause 10.8 have been satisfied. The only remaining dispute relates to the balance of 136 sample complaint files (the "Disputed Complaint Files"). As set out in its Amended Further Particulars of Defence, Genworth's case on the Disputed Complaint Files is limited to a non-admission that they satisfy one of the five criteria, viz. the requirement that the underlying PPI policy must have been underwritten by FICL/FACL. That non-admission is based on an alleged insufficiency of documentary evidence as to the underwriting of the Disputed Complaint Files.

105. It is common ground that it is for AXA to prove that the PPI underlying policy the subject matter of the PPI Complaint was written by FICL/FACL. The amount of money that turns on this point depends on the extent to which AXA can discharge the burden of proof upon it in respect of particular Disputed Complaint Files. By way of example, if all the Disputed Complaint Files (i.e. 136 complaints) were to be outside the scope of Clause 10.8, that is approximately 10% of the total sample and so as a simple percentage reduction on AXA's total claim of almost £500 million, would be around £50 million (excluding any gross up amount) although in fact the complaints are, I understand, predominantly older complaints, and in consequence higher value because of the effect of compound interest on the redress payments. By way of further illustration, 5 of the Disputed Complaint Files (referred to as the "Powerhouse Complaint Files" as addressed below) amount to 0.36% of the total sample and so as a simple percentage reduction on AXA's total claim of almost £500 million, would be around £1.8 million (excluding any gross up amount), although again, using the parties' agreed methodology, the reduction would be higher due, I understand, to a predominance of older, and therefore more valuable, complaints.

106. AXA made two preliminary observations about Genworth's non-admission in respect of the 136 Disputed Complaint Files:-

(1) While Genworth accepts that the Disputed Complaints Files satisfy four of the Five Criteria (i.e. they are complaints, relating to PPI policies, sold by Santander, and sold prior to 1 January 2005), it has not identified any evidence suggesting that the policies were underwritten by any entity other than FICL/FACL.

(2) Its non-admission in relation to the Disputed Complaint Files is based on what it says is an alleged lack of (sufficient) available records, in circumstances where (a) FICL/FACL were under Genworth's ownership at the time when the relevant policies were underwritten, and (b) AXA inherited from Genworth both FICL/FACL's own records from that period and FICL/FACL's reliance on Santander's processes and systems for complaints-handling.

107. In order to understand what issues rise it is necessary to appreciate how Genworth's stance has arisen. Genworth has adopted the stance it has by reference to whether or not it had been possible to map a Disputed Complaint File to the relevant terms and conditions of a PPI policy underwritten by FICL/FACL. In order to do this it is necessary to: (a) select the relevant AXA Mapping Document; (b) identify the "Scheme Number" listed in that AXA Mapping Document against the relevant Complaint File reference number; and then (c) look up the Scheme Number on the Policy Spreadsheet to identify the relevant template PPI policy terms and conditions and confirm that the policy was underwritten by FICL/FACL. Genworth says that a Scheme Number by itself is not evidence that a policy was underwritten by FICL/FACL, on the basis that Scheme Numbers were allocated to

every type of insurance policy administered by Santander, not just store card PPI policies underwritten by FICL/FACL.

108. For the Disputed Complaint Files (the 136 relevant complaint files) in Annex 1A to Genworth's Amended Further Particulars of Defence either:

(1) A Scheme Number is included in the relevant AXA Mapping Document but the Scheme Number is not listed in the Policy Spreadsheet; or

(3) The relevant Scheme Number is not present in the relevant AXA Mapping Document (this applies only to the 5 Complaint Files in Annex 1B, referred to as the "Powerhouse Complaint Files").

109. AXA submits that Genworth's non-admission, based upon reliance on such an approach is misconceived – i.e. an approach based on the absence of records enabling the Disputed Complaint Files to be matched with standard policy terms and conditions, via the Axa Mapping Documents produced by Santander in respect of the sample files, and the Policy Spreadsheet produced by AXA. In opening Mr Nash described this matching process as the "gold standard of verification" and submitted that in cases where it was not possible there was "doubt" about the identity of the underwriter. However the question for the Court is whether the Court is satisfied as to the identity of the underwriter by reference to all the evidence in the round, and on the balance of probabilities. In this regard Mr Nash stated as follows:

> "MR NASH
> We say that unless you can link the file with policy terms, well, the file with the scheme with policy terms, you can't fulfil that gold standard of verification and there is a doubt about who was actually underwriting the policies.
> MR JUSTICE BRYAN: …
> you said at one point there is doubt. Again, it must be common ground between you that the question is whether or not the claimant has established on the balance of probabilities that a particular amount is due. So, in other words, the doubt has got to be such that I would consider that they had not discharged the burden of proof on the civil standard.
> MR NASH: Correct, my Lord. I completely agree with that. It's a question of the burden of proof and the standard of evidence, yes."

110. AXA's position is that on the entirety of the evidence (as addressed below) it has discharged the burden of proof and proved on balance of probabilities that the policies in respect of the 136 Disputed Complaint Files were written by FICL/FACL. Genworth maintains that it has not done so.

111. AXA further submits that there is no reason to doubt the underwriter of the policies in question, simply because they cannot be matched with underlying terms and conditions. In this regard AXA submits that the starting point is that Genworth's "gold standard" actually

misunderstands the nature and purpose of the "Axa Mapping Documents" and the Policy Spreadsheet. AXA points out that the purpose of the "Axa Mapping Documents' (as expressed in the Order of 23 July 2019 at para. 5b) was to be a "means of identifying which policy or policies of insurance relate to each PPI complaint".

112. The "Axa Mapping Documents" identify (for each complaint within the Initial and Additional Samples) a "scheme number" which links the complaint to a particular type of PPI policy underwritten by FICL/FACL. The "scheme number' can then be cross-referenced against the Policy Spreadsheet, the purpose of which was to identify the applicable standard set of policy terms and conditions disclosed by AXA.

113. At the time when it was agreed that the "Axa Mapping Documents" and the Policy Spreadsheet would be provided, Genworth's contention that AXA/FICL/FACL had to advance "all reasonable defences" to customer complaints was still live (as it pre-dated the Liability Judgment in which such contention was rejected), and so it was potentially relevant for Genworth to know the precise policy terms applicable to a particular complaint. The particular policy terms and conditions are no longer relevant in the light of the Liability Judgment (the only remaining relevance of such terms and conditions, if available, would be that they would identify the underwriter).

114. AXA accept that Genworth is correct that, in respect of the Disputed Complaint Files, the "Axa Mapping Documents" and the Policy Spreadsheet cannot be used to identify applicable terms and conditions. However AXA say that that is irrelevant on the basis that AXA has adduced other evidence proving, to the requisite standard, that the applicable policies in respect of the 136 Disputed Complaint Files were written by FICL/FACL. By way of explanation (in relation to the absence of policy terms and conditions in respect of such Disputed Complaint Files) AXA observe that it is hardly surprising that in circumstances where AXA's claim relates to complaints about sales of PPI policies stretching back for several decades, that policy terms and conditions cannot be found in every case (and in such cases). They also note that reference is made in Clifford Chance's letter of 22 May 2019 {QH/205} to the reason that some policy terms and conditions are unavailable is that hard copies were destroyed during the period when FICL/FACL were owned by Genworth.

115. The above chronology of events explains the background to Genworth's non-admission, and why AXA submits that Genworth's reliance on the absence of policy terms and conditions is misplaced. However, whatever the reason for Genworth's non-admission it is common ground that Genworth is entitled to put AXA to proof, and it is for AXA to prove its claim if it is to recover the sums claimed.

116. Ultimately the factual position on this aspect is clear and undisputed. In respect of the 136 Disputed Complaint Files the "Axa Mapping Documents" and Policy Spreadsheet cannot be used to identify applicable terms of conditions. However the inability to identify the particular applicable policy terms and conditions in relation to these Disputed Complaint Files does not, in the circumstances I have identified, establish that the policies were not underwritten by FICL/FACL, rather all it establishes is that the applicable terms and conditions can no longer be located – so AXA is not in a position to place reliance on such terms and conditions (if, indeed, such terms and conditions would have assisted AXA).

117. The question is accordingly whether, on the evidence that does exist, and has been adduced, AXA has proved that the relevant PPI policies were written by FICL/FACL in relation to particular Disputed Compliant Files. It is to that evidence that I will now turn.

118. The first aspect of the evidence is that of Mr Robert Falkner a partner in Reed Smith who are the solicitors for Santander UK Plc (SUKPLC), Santander Cards UK Limited (SCUK) who were previously parties to these proceedings (as addressed in the Liability Judgment) as well as for Santander Insurance Services UK Limited (SISUKL).

119. His evidence is that Santander is clear in its belief that all the policies concerned are FICL/FACL policies and it does not have or believe that there is any real basis to doubt that they are FICL/FACL policies and Santander is unaware of any other insurers that could have been the underwriter of the policies in question.

120. Mr Falkner explains that the reason he is giving this evidence on behalf of Santander is that there is no one individual at Santander with direct knowledge and experience of all of the systems and processes which are relevant to the point in issue. He has therefore made enquiries of those individuals with relevant knowledge and experience so as to collate that information into a single witness statement. It is not suggested that such an approach is inappropriate or that his evidence is inadmissible, and in the particular circumstances of this case, and having regard to the extended time period involved and associated databases, and the variety of individuals with knowledge of events, I consider that such an approach is an appropriate one for AXA to have adopted. To attempt to call multiple witnesses in respect of discrete aspects of this evidence would undoubtably have increased costs and there is much to be said for the use of a witness such as Mr Falkner to present such evidence. I also bear in mind that Genworth did not advance any positive case challenging Santander's account of its own systems and processes. Of course ultimately the risk is upon AXA to the extent that Mr Falkner's evidence individually, or collectively with other evidence, does not suffice to prove AXA's case.

121. Mr Nash rightly points out that a consequence of AXA's approach is that Mr Falkner does not have first-hand knowledge of what he recounts, and also that I have not had the benefit of the direct evidence from the individuals concerned and Genworth has not had the ability to cross examine such individuals directly, but only Mr Falkner himself. I bear such points, and the associated limitations on the evidence of Mr Falkner, well in mind when considering the weight to be attached to the evidence given by Mr Falkner. Nevertheless I found Mr Falkner to be a credible witness who was careful to identify his sources of evidence and the basis on which those he had spoken to give the evidence that he recounted. As will appear in due course, his evidence is consistent with particular documentary evidence, and is not contradicted by the documentary evidence that does exist. I see no basis to disregard such evidence which goes to support, and augment, AXA's case that each of the Disputed Compliant Files relate to complaints handled on behalf of FICL/FACL by Santander in respect of policies underwritten through FICL/FACL.

122. Mr Falkner identified that the Santander employees he had spoken to were Pippa Owen, Ian Venus and Kate Greenaway.

123. Pippa Owen is Head of Legal and Regulatory Finance, Legal and Regulatory at SUKPLC Since 2003, Ms Owen has held various roles in the finance team relating to the GECB/SCUK consumer credit accounts and related products. From 2008, Ms Owen

managed the team responsible for the financial planning and analysis of GECB/SCUK's store card business, which included the reporting and forecasting of PPI premiums relating to these accounts.

124. Ian Venus is Head of Remediation, at SUKPLC Since 2014, Mr Venus has been the head of Santander's PPI complaints and remediation department (among other types of complaints and customer remediation projects). In 2017, after the execution of the CHA, Mr Venus took on overall responsibility for the handling of PPI complaints on behalf of FICL/FACL under the CHA.

125. Kate Greenaway is Senior Product Manager, at SUKPLC. Mrs Greenaway worked as a client account manager at Genworth from 1993 until 2007. From 1999, Mrs Greenaway was responsible for the insurance products relating to GECB credit accounts (including FICL/FACL PPI). Mrs Greenaway joined GECB as an insurance product manager in 2007 and then moved to SISUKL as an insurance product manager when the Santander group acquired GECB in 2009. In 2019, Mrs Greenaway joined SCUK as a consumer credit product manager. Mrs Greenaway was directly involved in the project to migrate GECB accounts from GECB's Vision PLUS platform onto Santander's PCAS2 platform and the subsequent migration to New Day (referred to below).

126. Although there was some cross-examination of Mr Falkner which it appears was designed to cast doubt on the level of knowledge of the individual Santander employees to whom Mr Falkner had spoken, no real progress was made in this regard by Genworth in cross-examination. Whilst Mr Nash established that Ms Owen was not involved in the PPI area of the business before 2005, Mr Falkner explained that she had told him what she believed to be the case and she had worked for the organisation for some time – as such she clearly had a basis for her belief (even if it derived from a time subsequent to particular policies being written). So far as Mr Venus was concerned, Mr Nash himself stated that Mr Venus *"is clearly very much involved in the remediation side of the business at what appears to be a very senior level"* (to which Mr Falkner agreed), and it is clear that Ms Greenaway was involved in a wide range of insurance products from 1993 (including FICL/FACL underwritten PPI) as a result of which she would have had personal knowledge of FICL/FACL underwritten PPI sold by Santander since 1993.

127. Mr Falkner's evidence at paragraphs 20 and 21 of his statement was that Mrs Greenaway and Ms Owen were

> "clear, in their recollection and belief, that the GEC group had a policy of meeting its member companies' insurance requirements from one of the group's own insurance companies wherever possible. FICL/FACL were the relevant group underwriting entities for PPI. Accordingly, the PPI policies offered by GECB to its customers were underwritten by FICL/FACL. Even where GECB acquired credit accounts for new retailers, it would move the related PPI to FICL/FACL. There were other insurers which provided insurance, other than PPI, for GECB credit/finance arrangements (for example, card protection insurance), but GECB's requirements for PPI were met by FICL/FACL. These legacy employees have informed me that (save in respect of the HBOS Accounts…(i) they are not aware of any other insurer underwriting PPI in respect of GECB consumer credit accounts and (ii) as far as they are aware, no net PPI premiums were ever paid to any insurer other than FICL/FACL from the PPI premium revenues relating to these accounts.

> … I was informed that the general policy that all PPI policies offered to customers of GECB were underwritten by FICL/FACL was subject to only one exception, being in respect of certain consumer loan accounts that were acquired by GECB following a joint venture with HBOS (the "HBOS Accounts"). The PPI policies in respect of these HBOS Accounts was underwritten by another insurer in the St Andrews Group. PPI complaints relating to HBOS Accounts are not handled by SUKPLC on behalf of FICL/FACL under the CHA or relevant to these proceedings."

128. When cross-examined Mr Falkner stated *"in relation to PPI for storecards, in that type of business the information I was provided to by Kate Greenaway was that they only used FICL and FACL"* (whilst confirming by reference to his statement, as quoted above, that that was the "general policy").

129. At paragraphs 22 and 23 of his statement Mr Falkner dealt with transaction and account data relating to GECB accounts. He explained that GECB used two computer platforms to record all relevant transaction data concerning its consumer credit accounts, namely CARDPAC and VisionPLUS. CARDPAC was the platform primarily used for retailer-specific store credit cards, i.e. cards that could not be used in other stores. VisionPLUS was a more sophisticated platform that could be used for retailers whose cards used the MasterCard or VISA payment systems. The data recorded on these platforms for each GECB account included purchases, repayments, interest, and PPI premium charges. He explained that GECB/SCUK continued to use the CARDPAC and VisionPLUS platforms after it became part of the Santander group in 2009. However, in October/November 2010 the data relating to certain accounts (including all active accounts) held on the VisionPLUS platform was migrated onto a Santander platform named PCAS2. PCAS2 was only used for these accounts. SCUK continued to use CARDPAC and PCAS2 until the legal completion of the sale of its business to NewDay group in 2014, when these accounts migrated from these platforms to a platform used by NewDay.

130. When cross-examined, Mr Falkner confirmed that he did not discuss in detail the extent to which the databases actually identified who underwrote the insurance. I note that there is no express reference to any of the databases containing such information as no doubt there would have been had that been the case. Accordingly, Mr Falkner's belief as to policies being underwritten by FICL/FACL, in the context of this evidence, was based on what he had been told by Mrs Greenaway in particular.

131. At paragraph 24 of his witness statement Mr Falkner stated:

> "Based on the information set out above, the individuals to whom I have spoken at Santander believe that all PPI information that was recorded on CARDPAC, VisionPLUS or PCAS2 with respect to GECB consumer credit accounts concerned PPI policies underwritten by FICL or FACL (save in respect of the HBOS Accounts referred to in paragraph 21 above). In other words, if a consumer credit account recorded on CARDPAC, VisionPLUS or PCAS2 had an associated PPI policy, the underwriter of the policy must (save in respect of HBOS accounts) have been FICL/FACL because it would not have been anyone else."

132. When cross-examined he confirmed that that evidence again came from the evidence that he had from Mrs Greenaway that all PPI with store cards was underwritten by FICL and FACL, and he acknowledged that such evidence depended on the reliability of Mrs Greenaway's evidence. He was also asked if he knew whether Mrs Greenaway did any research to refresh her memory and he replied "I believe she did". He added that he had several sessions with Mrs Greenaway and she would check the outcome of those sessions (i.e. that the notes of those sessions were accurate).

133. Genworth sought to attack the understanding that FICL/FACL underwrote all store card PPI policies issued by the GECB group by reference to a single document which was a set of policy terms and conditions for a GECB-marketed PPI policy that was underwritten not by FICL/FACL, but by entities known as Combined Life Assurance Company Limited and London General Insurance Company Limited (members of the AON insurance group). However that policy does not relate to any policy that is the subject of this claim, and as explained by AXA it was disclosed in error as it does not appear in any of the Axa Mapping Documents prepared for the sample complaint files. AXA has also confirmed in correspondence that, having investigated the matter, it does not believe that any policies underwritten by the AON entities are included in the full underlying population of complaints. As Mr Doherty explained in cross-examination the policy was a PPI policy attached not to a store card issued by GECB, but instead to a term loan advanced by GECB, and when one was talking about GECB and store cards the underwriters were FICL and FACL. His evidence was that, *"In the context of Santander and in the context of store cards, these covers are only underwritten by FICL and FACL".* This is also consistent with Mrs Greenaway's evidence as Mr Falkner confirmed when cross-examined.

134. I bear well in mind the fact that Mr Nash did not have the opportunity to cross-examine Mrs Greenaway and the impact of that on the weight to be attached to the evidence originating from her, but ultimately there was no evidential basis established to contradict such evidence (set against the backdrop of Mrs Greenway's involvement in the insurance products dating back to 1993 including, though not limited to, FICL/FACL PPI) that all PPI cover for store card consumer credit was underwritten by FICL and FACL (subject only to the HBOS exception). The evidence originating from Ms Owen was to like effect (as Mr Falkner also confirmed when cross-examination), as did Mr Doherty.

135. I also consider that had any entity other than FICL/FACL written any policies which were the subject of the Disputed Complaint Files there would have been (1) some evidence of that, (2) some knowledge on the part of the witnesses called by AXA of that and (3) some positive basis for challenging the evidence originating from Mrs Greenaway and Ms Owen given the sheer number of policies written over very many years and the sheer number of complaints. Yet of that there was nothing. Ultimately there was no factual basis to challenge the evidence of Mrs Greenaway and Ms Owen, as presented through Mr Falkner, and I accept that evidence.

136. Yet further, importantly, there are other aspects of AXA's evidence that not only augment and support the truth of such evidence, but independently corroborate that particular policies were written by FICL/FACL. I have in mind, in particular, the scheme numbers in Addenda to the Agency Agreement and the TIA reference numbers, as addressed below.

137. The next aspect of evidence adduced by AXA is, I consider, particularly compelling evidence. 131 of the 136 Disputed Complaint Files appear in the "Axa Mapping Documents" linked to a "scheme number" and, although the relevant "scheme numbers" there listed do not appear in the Policy Spreadsheet, they do appear in the Addenda to the Agency Agreement, under which Santander historically sold PPI policies on behalf of FICL/FACL.

138. At one point, in correspondence, Genworth sought to argue that certain of these Addenda could not be relied on because signed copies were not available, but that point was not pursued. Genworth was left to assert that *"as it is not a party to the Agency Agreement, it cannot go behind that contract to verify the process by which FICL/FACL and [Santander] satisfied themselves that the Scheme Numbers listed in the agreement identify policies underwritten by FICL/FACL … It therefore remains for AXA to prove its case in these respects".*

139. However I am satisfied that, as AXA submits, the obvious conclusion to be drawn is that where a "scheme number" is identified in an Addendum to the Agency Agreement, policies issued under that scheme number were underwritten by FICL/FACL. In this regard the whole purpose of the Addenda was to list policies of a particular type (i.e. those identified by a particular scheme number) that were to be sold under the terms of the Agency Agreement – namely by Santander as marketing agent, on behalf of FICL/FACL as underwriters.

140. There is no basis to suggest that the scheme numbers in the Addenda relate to policies underwritten by any insurer other than FICL/FACL, who were the counterparties to the Agency Agreement. Furthermore it is to be borne in mind that the Addenda were all entered into while FICL/FACL were under Genworth's ownership. If there had been any suggestion that they covered policies underwritten otherwise than by FICL/FACL, this would surely have been uncovered by Genworth at the time of the due diligence leading up to the SPA.

141. There is a yet further point. As AXA point out in their Closing Submissions it would also be a remarkable coincidence if Santander's relevant databases (which only contain information relating to policies underwritten by FICL/FACL, save for the separately identifiable HBOS-related policies) inexplicably also contained scheme numbers for policies (1) written by insurers other than FICL/FACL, and (2) which have the same scheme numbers as those listed in the Addenda to the Agency Agreement.

142. An attempt was made by Genworth during the cross-examination of Mr Doherty to suggest that as the term loan PPI policy, underwritten by the AON group, that was put to him, had a scheme number, that AXA cannot rely on scheme numbers to prove that other policies were underwritten by FICL/FACL. However such a suggestion made no sense – it is not suggested by AXA that every policy with a scheme number is a FICL/FACL policy – rather all polices with scheme numbers that appear in the Agency Agreement Addenda are FICL/FACL policies. The AON policy scheme number does not appear in the mapping document or the Agency Agreement Addenda, and I am satisfied that it is of no relevance, and does not show anything of any significance about the scheme numbers in issue.

143. Mr Nash was left to suggest a number of matters of pure speculation, devoid of any evidence that anything of the sort had occurred – suggesting that a number had been put

into the Addenda in error, or that it had been added to the Addenda on the assumption or in the expectation that FICL and FACL would write the business when in fact that was not what happened or alternatively that the original idea was that FICL and FACL would write the business and then for some reason perhaps FICL and FACL had reached its capacity on that class of business at a particular moment, or there was a desire to place it elsewhere, that in the event the business was not written by FICL and FACL. There was no evidential support for such unwarranted speculation.

144. Ultimately, in his oral closing submissions Mr Nash had no choice but to acknowledge and *"accept that the agency agreement addenda generally are a strong point in AXA's favour"* also noting that, *"I've already accepted that the agency agreement is a good point for AXA"* whilst concluding, *"I'm just suggesting to your Lordship that it's not a cast iron point for AXA"*. As he put it, *"That's the limit of the submission".* Of course a point need not be a "cast iron" point for it to enable a party to prove its claim on balance of probabilities.

145. The acknowledgment that the Agency Agreement Agenda point is a "strong point" and "a good point" is realistic but is, I am satisfied, something of an under-statement. The reality is that there was nothing in the speculative points that were put by Genworth and the obvious conclusion to be drawn, which I draw, is that where a "scheme number" is identified in an Addendum to the Agency Agreement, policies issued under that scheme number were underwritten by FICL/FACL. This point, in and of itself, suffices, I find, to prove that 131 of the 136 Disputed Complaint Files are in respect of policies written by FICL/FACL, albeit that the other evidence adduced by AXA (including the evidence of Mr Falkner that has already been addressed) also leads to this conclusion, and this conclusion in respect of all Disputed Complaint Files.

146. Yet further, AXA has been able to link all but two of the scheme numbers attaching to the Disputed Complaint Files to an internal FICL/FACL code known as a "TIA reference number". There was some apparent confusion on Genworth's part (that manifested itself in Genworth's cross-examination of Ms Healy and Mr Doherty) as to what TIA reference numbers were being relied upon by AXA. Ms Healy and Mr Doherty each confirmed that the TIA reference numbers relied on by AXA (and referred to in para. 19 of AXA's Amended Reply to Further Particulars of Defence) were not the reference numbers on the TIA system that relate to a complaint about a product, but instead the reference numbers that are applied to the product itself on its issuance. I am satisfied this was, or should have been, apparent from AXA's Amended Reply.

147. Whilst Genworth submitted that it was impossible to explore whether TIA references in this sense were unique to FICL/FACL underwritten PPI policies, as to the integrity of the TIA system and as to how TIA numbers had been mapped by AXA to specific complaints, ultimately neither Ms Healy's nor Mr Doherty's evidence that TIA reference numbers were inputted by FICL and FACL on their database at the time of launch of scheme products was successfully challenged. I am satisfied that this is additional compelling evidence (not that further evidence is needed given what is already obvious from the presence of the scheme numbers in the Addenda to the Agency Agreement) that the policies in question were indeed underwritten by FICL/FACL.

148. Next, and in relation to the 5 Disputed Complaint Files that are not associated with a scheme number that appears in the Addenda to the Agency Agreement, these all concern

policies sold with store cards for a retailer known as "Powerhouse". AXA has produced copies of the store card agreements in each case, which identify First Personal Bank PLC (a member of the Santander Group) as the issuer of the cards. Santander, both in correspondence, and through the evidence of Mr Falkner, have confirmed that FICL/FACL were the only underwriters of PPI policies linked with store cards issued by that Santander company. In this regard Mr Falkner explained that "Fixed Repayment Credit" accounts with the retailer Powerhouse did not have insurance information recorded on Solix as the PPI premium was charged as a single payment at the opening of the account and included in the initial credit amount and that *"In these circumstances the case set-up/complaint creation team will reView a copy of the original consumer credit agreement (assuming it is available) to confirm that the complaint relates to a GECB account (or, as it was called then, a First Personal Bank PLC account) with PPI."*

149. Mr Falkner's evidence in relation to the Powerhouse policies was not challenged successfully in cross-examination and I accept it. It is also entirely consistent with the generality of his evidence (based on the evidence of Mrs Greenaway and Ms Owen) that I have also already accepted.

150. Finally, two of the Disputed Complaint Files (4773805 and 1115498432) contain store card credit agreements referencing (respectively) FICL/FACL or Consolidated Financial Insurance which was a trading name used by FICL/FACL and two other businesses which were transferred to FICL/FACL in 1997. Genworth denies that the store card credit agreements for complaints 4773805 and 1115498432 referred to by AXA establish that FICL/FACL was the underwriter of the related PPI policy, in circumstances where, in both cases, the PPI policy was sold to the customer by telephone some months after the customer entered into the credit agreement in store. The credit agreement for complaint 4773805 was signed on 3.12.1996 and refers to Consolidated Finance Insurance Ltd, but the PPI policy was sold by telephone on 21.3.1997, whilst the credit agreement for complaint 1115498432 was signed on 15.2.2004 and refers to FICL/FACL, but the PPI policy was sold by telephone on 5.8.2004.

151. Genworth's stance in relation to these complaints is, I am satisfied, without merit. First, the evidence is that there are scheme numbers for these, as per the Addenda to the Agency Agreement. Secondly there are TIA reference numbers and, thirdly, there are store card agreements referring to FICL and FACL. These demonstrate that the relevant policies were written by FICL/FACL, and in such circumstances the fact that they were written later is of no significance.

152. Accordingly, in the circumstances identified above, and having regard to the evidence adduced by AXA, both individually and cumulatively, I am satisfied, and find, that AXA has proved that each of the 136 Disputed Complaints Files relate to policies underwritten by FICL/FACL. In such circumstances, and as is common ground, AXA is entitled to payment in full, and no question of extrapolation arises, or stands to be addressed.

I. ISSUE 3(a) SUBJECT TO TAXATION IN THE HANDS OF THE RECEIVING PARTY

153. Issue 3(a) is whether the words *"subject to Taxation in the hands of the receiving party"* in Clause 18.5:-

(1) Mean "within the scope of a Tax and not exempt" (i.e. an amount is "subject to Taxation" if it feeds into a Tax calculation of the recipient, regardless of whether that calculation results in any tax ever being payable) (as AXA contends) so that sums payable under Clauses 10.8 or 15.1 fall to be grossed up at the date of their payment, or

(2) Mean "actually taxed in hands of the receiving party" (i.e. the clause operates by reference to tax on the payment in question which the receiving party is under an enforceable obligation to pay, such tax having been assessed by the relevant revenue authority and determined as being due) (as Genworth contends) so that any additional amount is only payable if and when the recipient is under an enforceable obligation to pay such actual tax.

I.1 The consequences of the parties' respective constructions

154. The consequence of AXA's construction is that a grossed up sum will be payable by Genworth immediately at this time, when the actual tax burden of IARD and Vie and/or AXA is not known, when any tax burden will not be established for some considerable time and in circumstances where this sum will not represent (or is unlikely to correspond to) the actual tax burden, if indeed there will transpire to be any tax burden upon IARD and Vie and/or AXA - in this regard, and on the basis of Genworth's submissions as to UK tax law and the Views of its expert on French law as to French taxation (each of which is disputed by AXA), no tax will ever be due.

155. AXA acknowledges these consequences of its construction, and does not shy away from them. In this regard Mr Green expressly acknowledged that the consequence of AXA's construction was the possibility of a windfall to AXA*, "Absolutely, I mean, of course, … there was also the possibility… it would act against AXA, but I certainly accept…that the likelihood is that if it operated in the way we say, the likelihood is that any benefit was going to be to AXA. I have to accept that."* AXA nevertheless maintains that its construction is the correct construction.

156. For its part Genworth submits that the iterative construction process identified by Lord Hodge in *Wood v Capita, supra* at [12]-[13] is particularly pertinent and tells in favour of Genworth's construction and against that of AXA. Genworth submits that the obvious purpose of Clause 18.5, Viewed in the context of its factual matrix, is as a tax "grossing up" clause which is a familiar provision in commercial contracts where one party is bound to make a payment to another party and is intended to ensure that AXA is "made whole" against the incidence of taxation on any sums it receives. AXA is not to be left out of pocket; nor is it entitled to a windfall (nor, says Genworth, is it entitled to the interest benefit of many millions of pounds before any subsequent tax payment). Genworth submits that the clarity of this point makes it the most powerful tool for the iterative construction process, and submits that it would take very clear language indeed to displace the obvious conclusion that Genworth must "gross up" by reference to the actual tax burden when it is known; rather than by reference to a hypothetical calculation which self-evidently will not be the true tax burden.

157. Whilst rightly recognising that Clause 18.5 is to be construed at the time the SPA was entered into (so that the precise monetary consequences of AXA's construction would not have been known at the time of contracting, although the possibility of a "windfall" in favour of AXA, on AXA's construction, probably would have been) Genworth calculates

that on the basis of the headline tax rates identified by AXA, at the current UK corporation rate, the grossing up sum amounts to about £114 million; at the French corporation tax rate it amounts to about £230 million.

158. It is common ground that (1) if as Genworth submits (but AXA denies) no tax is ultimately paid by IARD, Vie or AXA or if the amount of tax payable is less than the sum payable by Genworth on AXA's formulae, there is no provision in the SPA for repayment to Genworth; (2) IARD, Vie and AXA would have the benefit of the interest on the grossed up payment in the meantime and (3) if there was a shortfall in the gross up payment versus tax (which AXA accepts is less likely but is possible) that shortfall would fall on AXA on AXA's construction.

I.2 Clauses 18.4 to 18.6

159. Clause 18.5 is part of Clause 18 which is headed "PAYMENTS AND CURRENCY CONVERSION" and contains clauses dealing with payments under the SPA. In particular Clauses 18.4 to 18.6 of the SPA provide as follows:-

> "18.4 If a party is required by law to make a deduction or withholding in respect of any sum (other than the Consideration, except where such deduction or withholding is an obligation arising under or in connection with French Tax law) payable under this Agreement, that party shall, at the same time as the sum which is the subject of the deduction or withholding is payable, make a payment to the relevant party of such an additional amount as shall be required to ensure that the net amount received or retained by that relevant party will equal the full amount which would have been received or retained by it had no such deduction or withholding been required to be made.
>
> 18.5 If any sum payable by a party under this Agreement (other than the Consideration or interest under clause 18.3) shall be subject to Taxation in the hands of the receiving party, the paying party shall be under the same obligation, as under clause 18.4 above, to pay an additional amount in relation to that Taxation as if the liability were a deduction of withholding required by law.
>
> 18.6 To the extent that any deduction, withholding or Tax in respect of which an additional amount has been paid under clauses 18.4 or 18.5 above results in the payee obtaining a Relief (as defined in the Tax Covenant) (all reasonable endeavours having been used to obtain such Relief), the payee shall pay to the payer, within ten (10) Business Days of obtaining the benefit of the Relief, an amount equal to the lesser of the amount of the actual cash Tax saving from the utilisation of such Relief obtained and the additional sum paid under clause 18.4 or 18.5 (the "Withholding Relief"). The payee shall only be obliged to account to payer for the Withholding Relief to the extent that the payer is satisfied that such accounting will not: (a) prejudice any of the entitlement of the payee to the relief; nor (b) result in the loss, reduction or non-availability of the actual cash Tax saving obtained by the payee from the utilisation of such Relief."

I.3 The proper construction of Clause 18.4

160. Clause 18.5 immediately follows, and also contains an express reference back to, Clause 18.4. Clause 18.4 is concerned with the situation where *"a party is required by law to make a deduction or withholding in respect of any sum… payable under [the SPA]".* As is clear (and common ground) Clause 18.4 is directed at a tax in the nature of a withholding tax, whereby a paying party (the payor) is to make a deduction (the withholding tax) when making payment to the receiving party (the payee) i.e. an actual tax. By its very nature this actual tax is a fixed and certain amount at the time of the payment to the payee. An example of such an obligation in UK law is found in section 874 of the Income Tax Act 2007, which obliges certain payers of "yearly interest" to deduct tax at the basic rate on making the payment. Other jurisdictions have similar rules requiring payers to deduct tax on making of certain types of payments.

161. Where the payer is so obliged, clause 18.4 requires it to make a payment *"of such additional amount as shall be required to ensure that the net amount received or retained by that relevant party* ***will equal*** *the full amount which would have been received or retained by it had no such deduction or withholding been required to be made"* (emphasis added). The payer is thus obliged to gross-up the payment so as to ensure that, after deduction of tax, the recipient receives 100% of the payment due under the SPA.

162. The words "will equal" are important as they show that the *"net amount received or retained"* is to be equal – i.e. to be no more, and no less, than the full amount due. In other words the "additional amount" is to make the payee "whole" so that the payee receives the same amount as if there had been no withholding tax deducted.

163. There is also a timing aspect under Clause 18.4. Under Clause 18.4 the *"additional amount"* is to be paid, *"at the same time as the sum which is the subject of the deduction or withholding is payable*". Thus, in the context of the fact that the actual tax is payable at the same time as the payment, the additional payment is to be made at the same time as the payment itself. This makes perfect commercial sense. It is by payment of the additional amount at the same time, that AXA receives at that time *"the full amount which would have been received or retained by it had no such deduction or withholding been required to be made".* Under Clause 18.4 this additional payment is made when the actual tax is known and payable. It makes perfect commercial sense for the additional payment to be made at that time (which in the case of Clause 18.4 is at the same time as the payment). This context is, however, of potential importance when considering whether the same applies to any payment under Clause 18.5.

164. Thus Clause 18.4 has the following characteristic features:-

(1) It is concerned with an actual amount of tax, fixed and certain at the time of payment.
(2) Required by law to be deducted at that time.
(3) The clause requires an additional amount to be paid to the payee to make the payee whole - no more no less.
(4) As the tax is to be deducted at the moment of payment, so the additional amount is to be paid at that time, so as to ensure that the net amount received at that time will be equal to the full amount which would have been received at that time if no such deduction had been required to be made.

165. Such a construction of Clause 18.4 makes perfect commercial sense – its purpose is to ensure that AXA is made whole against the incidence of taxation on payments it receives. The timing of that payment also makes perfect sense in the context of an actual tax in a fixed and certain amount payable at the time of payment.

I.4 The Proper Construction of Clause 18.5

I.4.1 The condition precedent

166. Clause 18.5 is concerned with, and only concerned with, the situation if *"any sum payable by a party under this Agreement… shall be subject to Taxation in the hands of the receiving party".* It may be an obvious point but it is only if this provision is triggered that the remainder of the clause has any application i.e. *"the paying party shall be under the same obligation, as under clause 18.4 above, to pay an additional amount in relation to that Taxation as if the liability were a deduction of withholding required by law"*- if the provision is not triggered then what follows has no application. Put another way, it is a condition precedent to any obligation to pay an additional amount that *"any sum payable by a party under this Agreement .. shall be subject to Taxation in the hands of the receiving party".*

167. If *"subject to Taxation in the hands of the receiving party*" means (as Genworth says it means) subject to an actual tax liability to pay a sum by way of tax and there is no actual tax liability upon IARD, Vie or AXA (as Genworth contends but AXA denies) then no additional amount is ever payable (regardless of any question of timing). In contrast if "subject to Taxation in the hands of the receiving party" means (as AXA says it means) "within the scope of a Tax and not exempt" (i.e. an amount is "subject to Taxation" if it feeds into a Tax calculation of the recipient, regardless of whether that calculation results in any tax ever being payable) the provision will be triggered by that fact and is likely to be triggered in many more cases, and at a different time than if it means subject to an actual tax liability.

168. It is therefore necessary to determine what is meant by the words *"if any sum payable by a party under this Agreement… shall be subject to Taxation in the hands of the receiving party"* to establish how Clause 18.5 operates (and when the payment obligation is triggered).

I.4.2 "Taxation"

169. Under Clause 1.1 of the SPA, "Taxation" and "Tax" have the same meaning in the SPA, and mean:

> "(a) any charge, tax, duty, levy, impost and withholding having the character of taxation, wherever chargeable, imposed for support of national, state, federal, cantonal, municipal or local government or any other governmental or regulatory authority, body or instrumentality QF/6/1920, including but not limited to tax on gross or net income, profits or gains, taxes on receipts, sales, employment, payroll, goods and services, use, occupation, franchise, transfer, minimum, excise value added and personal property and social security taxes; and
>
> (b) any penalty, fine, surcharge, interest, charges or additions to taxation payable in relation to any taxation within (a) above;" (emphasis added)

170. Accordingly, "Taxation" and "Tax" are broadly defined in the SPA. Genworth submits that the words underlined above are more consistent with, and envisage, actual tax payable. Certainly, the words underlined are consistent with Genworth's construction and the word "payable" in (b) appears to envisage that the tax is payable i.e. it is actual tax to be paid. However this point is of limited relevance. First the definition is generalised and broad and in the context of the SPA as a whole. Secondly some of the language is equally consistent with the imposition of taxation as opposed to tax payable (for example it is also possible to talk about "tax…imposed for support of national…government".)

I.4.3 The calculation of tax

171. It is common ground that one of the contemplated taxes is the possibility of UK corporation tax in relation to IARD and Vie (albeit that Genworth submits that there would be no actual tax liability). Part of the factual matrix to Clause 18.5 are the features of the UK tax system as it stood at the time the SPA was entered into, and how it operates.

172. These features were identified by Genworth in its Closing Submissions. I do not understand them to be controversial. They can be summarised as follows:-

(1) A company resident in the UK is chargeable to corporation tax on all its profits wherever the profits arise and whether or not these profits are received in, or transmitted to, the UK. The charge to corporation tax is made on the profits arising in a company's accounting period. Income and chargeable gains are aggregated to arrive at the total profits of the accounting period.

(2) A company not resident in the UK is chargeable to corporation tax only if it carries on a trade in the UK through a "permanent establishment", which is a "fixed place of business … through which the business of the company is wholly or partly carried on" and for these purposes can be considered synonymous with the concept of a "branch". Broadly, such a company is chargeable only on:

(a) any trading income arising directly or indirectly through or from the permanent establishment;
(b) any income from property or rights used by, or held by or for, the permanent establishment; and
(c) chargeable gains arising on the disposal of assets situated in the UK and (a) used in or for the purposes of a trade carried on through the establishment, (b) used or held for the purposes of the establishment, or (c) acquired for use by or for the purposes of the establishment.

(3) Whether the company in question is resident or not, the profits that are to be taxed must first be computed, i.e. the receipts are set against the expenditure necessary to earn them. This is done in accordance with generally accepted accounting practice, but subject to any adjustment required or authorised by law in calculating profits for corporation tax purposes.

(4) The approach to computing trade profits is, therefore, a two-stage process:

(a) First, ascertain the profits of the trade for the period computed in accordance with generally accepted accounting practice;

(b) Secondly, adjust the accountancy profits in accordance with any tax rules or principles which differ from generally accepted accountancy practice.

(5) It follows that not all receipts shown in the accounts are taxable and not all expenditure shown in the accounts is allowable. An example of the latter is that in calculating profits of a trade, no deduction is allowed for items of a capital nature. Another example of expenditure that is not allowable for tax purposes is that which is not "incurred wholly and exclusively for the purposes of the trade".

(6) There are also statutory rules dealing with the inclusion of some specific receipts in the calculation and the deduction of some specific expenses. These include, for example, the provisions of the Capital Allowances Act 2001 that treat allowances as deductible expenses of a trade.

(7) Some deductions are automatically made in arriving at the figure of taxable profit (or loss); others must be claimed in order to be deducted.

(8) The company must submit a return to HMRC detailing its chargeable profits, as computed. The tax return must include a self-assessment by the company of its corporation tax liability on the basis of the information contained in the return, and taking into account any relief or allowance for which a claim is included in the return or which is required to be given in relation to the accounting period to which the return relates.

(9) That return must be filed by the specified due date, which is usually 12 months from the end of the relevant accounting perio

(10) HMRC then have a window of 12 months during which they can open an enquiry into the company's tax return. If HMRC open an enquiry then they can make any amendments to that return that they consider are required, for example by increasing the amount of tax shown as due in the company's self-assessment.

(11) The company can then appeal against those amendments. The dispute will thereafter be determined by the specialist tax tribunal. Further appeals in principle lie to the higher courts.

(12) Unpaid tax is recoverable as a debt due to the Crown.

173. These features how the tax system generally operates form part of the background which, for the purpose of interpreting the SPA, the parties should be taken to have known. The key point that emerges from the inherent features of the UK tax system is that corporation tax is not in the nature of a withholding tax (payable immediately on the amount of a payment), and whether or not corporation tax will be payable at all, and if so in what amount, depends on the matters that have been identified above. Corporation tax may never be payable if (for example) the payments do not represent any trading income arising directly or indirectly through or from the permanent establishment (as Genworth submits but AXA denies) and if matters are chargeable then profits have to be calculated through the methodology identified above (including any available tax deductions or reliefs available), with the result that corporation tax may or may not be payable, and in an amount to be determined.

174. The consequence of this aspect of the factual matrix is that on Genworth's construction of Clause 18.5 there will be a gross up payment which correlates with any tax actually payable (as determined by HMRC assuming tax is payable), whereas on AXA's construction a gross up payment is to be made in circumstances where (set against the backdrop of the above UK tax system) (1) tax may or may not be payable, (2) to calculate any tax payable the calculation will take into account any deductions or reliefs available and (3) it is inherently improbable that the actual tax payable will be the same as the grossed up payment to be made on AXA's construction (and there may be, and Genworth says will be, a "windfall" to AXA, if no tax is payable or if tax is reduced by available deductions or reliefs).

I.4.4 HMRC guidance and authorities on "subject to tax"

175. AXA refers to the fact that there is HMRC guidance that an amount can be "subject to tax", in the sense of not being exempt from tax even if little or no tax is actually payable. AXA refers to the following:-

(1) HMRC's International Manual at INTM162090:

> *"…Examples of where the income is regarded as 'subject to tax' but on which no or little tax is actually paid may include the following:*
>
> *i) The customer does not pay any UK tax because their income is covered by personal allowances and reliefs.*
>
> *ii) The foreign income arises in a penultimate year and no penultimate year adjustment is made, so the income falls out of assessment in the UK.*
>
> *iii) The income is wholly covered by capital allowances so that no UK tax is payable.*
>
> *iv) The customer is entitled to a deduction under ITEPA03/S341 or S376.*
>
> *v) The remittance basis applies: the person is subject to tax only on the sums remitted.*
>
> *A person is not regarded as subject to tax in the UK if the income in question is exempted from UK tax by an extra-statutory concession or is statutorily exempt from tax, for example the income is that of a charity (CTA10/S478 onwards) …"*

(2) HMRC's International Manual at INTM332210:

> *"The expression "subject to tax" usually means that the person must actually pay tax on the income in their country of residence.*
>
> *However, a person is still regarded as "subject to tax" if, for example, he or she does not pay tax because their income is sufficiently small that it is covered by personal allowances that are available to set against liability to tax in the other country.*

> *A person is not regarded as "subject to tax" if the income in question is exempted from tax because the law of the other country provides for statutory exemption from tax. For example*
>
> - *the income is that of a charity*
> - *the income is that of an exempt approved superannuation scheme (pension fund).*
>
> *In such cases the 'subject to tax' condition is not met and relief is not allowable."*

(3) HMRC's International Manual at INTM504020:

> *"…'Subject to tax' does not signify that the person receiving the income must actually pay tax on the income in their country of residence. A person is regarded as 'subject to tax' if, for example, he or she does not pay tax because their income is covered by personal allowances, or there are deductions allowed against the income that are sufficient to cover the liability …"*

176. AXA also refer to the guidance in HMRC's International Manual at INTM332210, described as HMRC's "long-standing and published View of the phrase 'subject to tax'" as being endorsed and applied by Judge Berner in *Weiser v HMRC* [2012] UKFTT 501 (TC) at [37]-[38].

177. I have no doubt that in the context of various aspects of the UK tax regime (in particular in the context of certain double tax treaties), HMRC use the words "subject to tax" in the senses identified above of being subject to the taxation regime whether or not tax is in fact payable, although it will be noted that in INTM332210 it is also stated, "The expression 'subject to tax' usually means that the person must actually pay tax in their country of residence" (in the context under consideration). I do not consider it profitable to debate the respective interpretations of AXA and Genworth as to what can be derived from the statements made by HMRC in its International Manual.

178. All such meanings are in the context of the specific tax regime under consideration and it does not follow at all that these words, still less these words when construed in the context of the phrase "if any sum payable…shall be subject to taxation in the hands of the receiving party" (emphasis added) bears the same or a similar meaning in a commercial contract containing a payment obligation. Words and phrases used in a specific context, may or may not be of assistance, or a useful guide, to what those words mean in a different context. I consider that the context in which the words are used in Clause 18.5 is a very different context to the particular tax regimes that are being addressed in the HMRC guidance relied upon by AXA, and is of limited, if any, assistance when construing the phrase under consideration in Clause 18.5 which relates to a payment obligation in a commercial contract. To the extent that there is any correlation, it can only be in the context of a reference to tax, and the associated factual matrix as to UK tax assessment – and as identified above, in that context tax is only payable after taking account of available allowances and deductions etc, so that no tax may ever be payable. In the context of Clause 18.5 it does not follow that "subject to tax" has the same meaning as in parts of HMRC's International Manual.

179. Equally I do not consider that authorities which make reference to the words "subject to tax" in a particular context are helpful in construing Clause 18.5 which is a bespoke commercial clause concerning a payment obligation between two contracting parties. AXA rely on what was stated by Lord Hoffman in *R (on the application of Carson) v Secretary of State for Work and Pensions* [2006] 1 A.C. 173 (HL) at [22]:

> "The interlocking nature of the system makes it impossible to extract one element for special treatment. The main reason for the provision of state pensions is the recognition that the majority of people of pensionable age will need the money. They are not means-tested, but that is only because means-testing is expensive and discourages take-up of the benefit even by people who need it. So state pensions are paid to everyone whether they have adequate income from other sources or not. On the other hand, they are subject to tax. So the state will recover part of the pension from people who have enough income to pay tax and thereby reduce the net cost of the pension. On the other hand, those people who are entirely destitute would be entitled to income support, a non-contributory benefit. So the net cost of paying a retirement pension to such people takes into account the fact that the pension will be set off against their claim to income support". (emphasis added)

180. I do not find this passage of assistance in the context of construing the meaning of "subject to tax" in Clause 18.5. Lord Hoffmann was not even analysing what the words "subject to tax" mean. These words were simply being used by him when describing the potential effect of tax on pensions in potential factual scenarios.

181. Nor do I find the *Weiser* case and what was said by Judge Berner in that case at [22], and [37]-[38] to be of assistance. Once again what is stated is stated in the particular tax context under consideration :-

> "[22] … 'Subject to tax', on the other hand, requires income actually to be within the charge to tax in the sense that a contracting state must include the income in question in the computation of the individual's taxable income with the result that tax will ordinarily be payable subject to deductions for allowances or reliefs, etc
> …
>
> [37] Ms McCarthy referred me to certain references from HMRC's International Tax Manual to illustrate the long-standing published View of the phrase 'subject to tax'. Paragraph 332210 of that manual was first published on HMRC's website on 29 December 2006. It reads:
> **'INTM332210—Double Taxation applications and claims—Subject to tax**
> *Background*
> The expression "subject to tax" usually means that the person must actually pay tax on the income in their country of residence.
> However, a person is still regarded as "subject to tax" if, for example, he or she does not pay tax because their income is sufficiently small that it is covered by personal allowances that are available to set against liability to tax in the other country.
> A person is not regarded as "subject to tax" if the income in question is exempted from tax because the law of the other country provides for a

> statutory exemption from tax. For example
> ● the income is that of a charity
> ● the income is that of an exempt approved superannuation scheme (pension fund).
> In such cases the "subject to tax" condition is not met and relief is not allowable.'
>
> [38] I agree with this summary. It refers to particular exemptions by way of example, but it is not limited in any way, and is apt to apply also to the exemption from Israel tax enjoyed by Mr Weiser in respect of his UK pension income."

182. For the same reason I do not find much assistance from the Indian tax case that is referred to in *Weiser* (at [26]), and relied upon by Genworth, namely *General Electric Pension Trust v Director of Income-tax (International Taxation) Mumbai* (2005) 8 ITLR 1053, "*It is worth pointing out that the phrase "liable to tax" in para (1) and the phrase "subject to tax" in proviso (b) are not synonymous. If both were read to be synonymous, proviso (b) would become otiose. Whereas para (1) speaks of being in the tax net, proviso (b) speaks of actual taxation".* At most it shows that what "subject to tax" means, even in the context of the tax system, depends on context.

183. In support of "subject to tax" being given the meaning advocated for by AXA, Mr Green noted that elsewhere in the SPA there are quite complex tax provisions (see, for example, paragraphs 1.1, 2.1 and paragraph 11.3 of the Tax Covenant) which he suggested might have been drafted by specialist tax counsel, on the basis of which it was suggested that Clause 18.5 might have been drafted by someone with experience of the meaning of "subject to tax" as reflected in HMRC's International Manual and the tax cases upon which AXA relies, as identified above. I deal separately in due course with the wording of the Tax Covenant and the extent to which it may be of any assistance when construing Clause 18.5, but I consider there are a number of difficulties with AXA's submission. First, there is no evidence that specialist tax counsel were used. Secondly there is no evidence that if they were used to draft the Tax Covenant they read, still less had any involvement in the drafting of, Clause 18.5. Thirdly, even in the context of the tax system, it is always necessary to have regard to the particular context to see whether a reference relates to the applicability of a tax regime, or whether it is referring to actual tax that is payable – there is no "special meaning" of such words applicable in every case. Fourthly, Clause 18.5 is a clause concerned with payments by Genworth to AXA, and as such it is not a tax provision, as such. For all these reasons I do not consider that AXA's suggestion assists in construing Clause 18.5.

184. Nor could it be suggested (and in fairness to AXA, AXA confirmed that it did not go so far as to suggest) that the words "subject to tax" have a customary meaning, or that the requirements for such a meaning have been established.

185. For its part, Genworth rely on the case of *Minera Las Bambas v Glencore Queensland* [2019] STC 1642 (CA). That case does at least relate to a dispute about the interpretation of a tax indemnity clause under a share purchase agreement. The relevant clause did not refer to "subject to tax" but was in these terms, *"The Sellers shall indemnify the Purchasers*

in relation to, and covenant to pay the Purchasers an amount equal to the amount of any Tax payable by a Group Company "(emphasis added).

186. Leggatt LJ (as he then was) in a judgment with which Longmore LJ and Sir Geoffrey Vos VC agreed, stated at [31]:

> "[31] A second and related reason for preferring the Sellers' interpretation is that it does not make commercial sense to require the Sellers to pay an amount of money to the Purchasers which is not at present needed, and may never be needed, to satisfy a liability to pay tax. Thus, in the case of the New Town VAT, if the appeal to the tax court succeeds and SUNAT's assessment is set aside, then (assuming no further appeal) the Company will never come under an enforceable obligation to pay the sum claimed by SUNAT. It is commercially unreasonable to interpret cl 10 as obliging the Sellers to put the Purchasers in funds for an amount of money which they may, or may not, come under an enforceable obligation to pay in the future. If the intention were to oblige the Sellers to provide what would in substance be security for a potential future payment obligation, rather than simply to prevent the Purchasers from being left out of pocket through being compelled to make a payment, I would expect to find language used which established such an arrangement in clear and direct terms." (emphasis added)

187. AXA are right that this case is not directly in point (as the clause used the word *"payable"* rather than the phrase, *"any sum subject to Taxation in the hands of the receiving party"*). However the sentiments expressed are (says Genworth) apt in relation to Clause 18.5. If nothing else they are, on any View, a good illustration of the principles of contractual construction identified in *Wood v Capita* and the fact that it may be appropriate to reject a meaning if it does not make commercial sense in favour of a meaning that does make commercial sense.

188. As Leggatt LJ stated at [20]:

> "In short, the court's task is to ascertain the objective meaning of the relevant contractual language. This requires the court to consider the ordinary meaning of the words used, in the context of the contract as a whole and any relevant factual background. Where there are rival interpretations, the court should also consider their commercial consequences and which interpretation is more consistent with business common sense. The relative weight to be given to these various factors depends on the circumstances. As a general rule, it may be appropriate to place more emphasis on textual analysis when interpreting a detailed and professionally drafted contract such as we are concerned with in this case, and to pay more regard to context where the contract is brief, informal and drafted without skilled professional assistance. But even in the case of a detailed and professionally drafted contract, the parties may not for a variety of reasons achieve a clear and coherent text and considerations of context and commercial common sense may assume more importance."
>
> (emphasis added)

I.4.5 The Proper Construction of Clause 18.5

189. The starting point in construing any provision in a contract is that the words are to be given their ordinary and natural meaning. This is not necessarily the dictionary meaning of the words but that in which words are generally understood. The court assumes that people have used language in the way reasonable people ordinarily do.

190. The phrase that is being construed is, "if any sum payable by a party under this Agreement, shall be subject to Taxation in the hands of the receiving party". I am quite satisfied that the ordinary and natural meaning of "subject to Taxation in the hands of the receiving party" is actually taxed in the hands of the receiving party. This requires no extrapolation, no re-writing of the words or additional words to be read in, and no violence to the words used. Fundamentally it is only if the sum is actually taxed that the sum is "subject to taxation in the hands of the receiving party". If the sum is not actually taxed it is not "subject to taxation in the hands of the receiving party" – there is no sum "in the hands of the receiving party" that is taxed.

191. Nor does this construction create any difficulty in ascertaining the sum due, or when it is due (contrary to AXA's submission). The tax (if any) is calculated in the normal way by way of assessment under the applicable tax regime by the relevant revenue authority taking into account any applicable deductions and reliefs resulting in a tax sum due (which in English law is regarded as a debt to the Crown) – the sum becoming actually due being the relevant trigger under Clause 18.5 (with the result that if no actual tax is ever due Clause 18.5 is simply not triggered and no additional amount is ever due).

192. Clause 18.4, and the words that follow in Clause 18.5 referring back to Clause 18.4, strongly support and reinforce this construction, the words being, "the paying party shall be under the same obligation, as under clause 18.4 above, to pay an additional amount in relation to that Taxation as if the liability were a deduction of withholding tax required by law" (emphasis added). Multiple points in favour of such construction flow from these further words. First, "the same obligation" as "under Clause 18.4" – as already addressed (and as is indisputable) the obligation under Clause 18.4 is to pay an additional amount in respect of an actual tax that is due, so to be the "same obligation" the obligation must (apart from anything else) also be to pay an additional amount in respect of an actual tax due. Secondly, the words "in relation to that Taxation" are only apt to refer to actual tax; if there is no tax payable it is not "Taxation". Thirdly, "as if the liability were a deduction of withholding required by law" – the word "liability" means, and can only mean, an actual liability to pay tax – in contrast, on AXA's construction there may never be any liability to pay any actual tax – put another way there is only a "liability" when there is an enforceable legal obligation to pay tax.

193. Fourthly, "as if the liability were a deduction of withholding required by law". The words "deduction of withholding" are actually either a typo for "deduction or withholding" (as per the opening line of Clause 18.4) or should read "deduction of withholding [tax]". It matters not which for present purposes (although the former is the more likely in my View). Either way, and contrary to AXA's submission (on which it places so much reliance), this part of Clause 18.4 also strongly supports Genworth's construction. As if the liability were a deduction or withholding required by law, this can only be an actual withholding or deduction i.e. there is a legal obligation to withhold – it is "required by law". To be ***"as if"*** (i.e. the same as) "the liability were a deduction of withholding required by law" the liability must be an actual liability required by law – this is apt if "subject to Taxation in

the hands of the receiving party" means actually taxed in the hands of the receiving party, as in that situation the additional amount in relation to that Taxation will be "as if the liability were a deduction of withholding required by law". This is not apt if "subject to Taxation in the hands of the receiving party" means "within the scope of a Tax and nor exempt" as in that situation the additional amount in relation to Taxation **will not** be "as if the liability were a deduction of withholding required by law".

194. The flaw in AXA's construction of "shall be under the same obligation, as under clause 18.4 above, to pay an additional amount in relation to that Taxation as if the liability were a deduction of withholding required by law" (quite apart from ignoring the purpose of Clause 18.4, as addressed further below) is that AXA fails to have regard to all the characteristics of Clause 18.4 and why the various parts of Clause 18.4 provide as they do. As already addressed in Section L3 (and as is indisputable) Clause 18.4 is concerned with an actual amount of tax, fixed and certain at the time of payment, required by law to be deducted at that time and the Clause requires an additional amount to be paid to the payee to make the payee whole at the time the actual tax is deducted. For the paying party to be "under the same obligation as under Clause 18.4" then the obligation under Clause 18.5 must have these same characteristics (as is the case if in each case it is an actual tax and payment when that tax is due but as is not the case if in Clause 18.5 it is merely within the scope of a tax and not exempt and at a time before any tax is due and may never be due).

195. The timing aspect of Clause 18.4 i.e. the making of an additional payment "at the same time as the sum which is the subject of the deduction or withholding is payable" is because the actual tax (the withholding tax) is payable at that time – the purpose is to ensure that the receiving party is not out of pocket at the time the tax is due. If that same purpose is applied to Clause 18.5 (as it must be by the words "the paying party shall be under the same obligation as under clause 18.4 above, to pay an additional amount in relation to that Taxation as if the liability were a deduction of withholding required by law") the additional payment is to be made when the actual tax is due so that the receiving party is not out of pocket. It makes no sense to apply the timing provision in Clause 18.4, which is based on an actual tax deduction, to any additional payment under Clause 18.5, at any time prior to there being an actual tax liability. The objective common intention of the parties is clearly that, in terms of timing, the additional payment be made at the same time as any tax is due. Nothing else makes AXA whole, no more no less (itself clear from the last three lines of Clause 18.4). So understood, the wording of Clause 18.4 supports Genworth's construction and not AXA's.

196. Yet further, AXA's construction is contrary to the reference back to Clause 18.4 in Clause 18.5 as the additional amount to be paid (according to AXA) will not ensure that "the net amount received or retained by that relevant party will equal the full amount which would have been received or retained by it had no such deduction or withholding been required to be made" - on the contrary, on AXA's construction, Genworth would be required to pay an additional amount "regardless" of whether there will be any actual tax (subsequently) payable and so the "net amount received" will **not** "equal the full amount which would have been received…had no such deduction or withholding been required to be made".

197. Still yet further, Clause 18.4 contemplates a party being required by law to make a deduction or withholding - yet on AXA's construction of Clause 18.5 AXA may never be required to make any deduction from the net amount it receives, as it may never incur any

actual tax that it has to pay. So the very triggering rationale of Clause 18.4 would, or might, never occur under AXA's construction of Clause 18.5. That simply cannot represent the objective common intention of the parties at the time the SPA was entered into.

198. The correctness of Genworth's construction of Clause 18.5 is strongly reinforced by having regard to the purpose of Clause 18.4, which sheds light on the proper construction of Clause 18.5 which is clearly intended to share the same purpose. The undoubted (and obvious) purpose of Clause 18.4 (and Clause 18.5) is as a tax "grossing up" clause which is a familiar provision in commercial contracts where one party is bound to make a payment to another party and is intended to ensure that the other party (here AXA) is "made whole" against the incidence of taxation on any sums it receives.

199. Genworth's construction is a business-like construction of a clause in a commercial contract that makes perfect commercial sense. AXA is not to be left out of pocket and is to be "made whole" by an additional payment, but equally there is no reason why the parties would have intended Clause 18.5 to gift AXA a windfall (it being common ground that AXA's construction of Clause 18.5 is likely to benefit AXA rather than Genworth). Clauses 18.4 and 18.5 are all to do with making AXA whole. This also impacts on the timing of any payment – given the fact that the purpose is to ensure that AXA is not out of pocket and is to be made whole the time for the additional payment is when the actual tax is paid (which accords with the wording of Clause 18.4 as already identified above). AXA needs the additional payment at the time the actual tax is due and not before. If it were to receive payment at an earlier time, not only would the payment not be needed or necessary at that time, a (very valuable) benefit would be conferred upon AXA in terms of an interest benefit, with a corresponding detriment to Genworth (in terms of cashflow) and there is no mandate to conclude that such an outcome would reflect the objective common intention of the parties at the time of entering into the SPA.

200. Equally when considering the (un)commerciality of AXA's construction, AXA's construction is simply inconsistent with the obvious purpose of Clauses 18.4 and 18.5 as making "whole" provisions as it is divorced from the actual tax (if any) which will be payable by IARD and Vie to HMRC and AXA to the French tax authorities and as such does not and cannot make AXA "whole" in respect of tax (no more no less). AXA's approach leads to a payment being made according to a hypothetical calculation, not of the actual tax, but of the sum representing a percentage of the gross sum derived from the highest rate in a theoretically applicable tax regime.

201. As to the UK tax position, and on the basis of the submissions of Genworth's tax junior (Mr Michael Jones), IARD and Vie will not be liable to pay <u>any</u> UK corporation tax whereas on the basis of the submissions of AXA's tax junior (Ms Laura Inglis), IARD and Vie will (or may) be liable to pay UK corporation tax (although, importantly, the actual amount payable (if any) cannot be known at this time as it will involve consideration of various variables including accounting treatment and available reliefs). However HMRC are not party to these proceedings and whatever might be decided in these proceedings as to the English tax position, such a View is not binding on HMRC with the result that the actual tax position could well be different to that which might be found in these proceedings, and the actual tax payable (if any) would on any View not corelate to AXA's proposed formulae (which only takes into account any applicable headline rate e.g. of UK corporation tax).

202. As to the French tax position, there is a difference of opinion as to the position under French law between two experienced, and independent, expert witnesses on French tax law. In the opinion of AXA's expert, Mr Derouin, a payment to AXA under Clause 10.8 or 15.1 would be included in the corporate income tax basis of AXA. In the opinion of Genworth's expert, Mr de Bourmont, any such payment to AXA would be treated as a purchase price adjustment and would therefore be tax exempt in France. On any View therefore there are differing Views as to the correct tax treatment, and on what is an issue of foreign law. The parties (and their experts) are also not *ad idem* as to whether or not a ruling on the legal character would be determinative of the French tax treatment of a Clause 10.8 payment.

203. As already noted, AXA acknowledges that the consequence of its construction would be that a grossed up sum will be payable by Genworth immediately at this time, when the actual tax burden of IARD and Vie and/or AXA is not known, when any tax burden will not be established for some considerable time and in circumstances where this sum will not represent (or is unlikely to correspond to) the actual tax burden (albeit on its submission as to the UK tax position and the evidence of its expert on French tax law at least some tax may ultimately be payable).

204. AXA submits, however, that the words "subject to Taxation in the hands of the receiving party" means "within the scope of a Tax and not exempt". However that is not what is stated in Clause 18.5, nor is that the ordinary and natural meaning of the words used (as I have identified above), nor is such a construction consistent with the obvious purpose of Clauses 18.4 ad 18.5, nor is it a commercial construction.

205. Whilst said in the context of a differently worded provision (referring to tax "payable") the sentiments expressed by Leggatt LJ in *Minera* at [31] are, I am satisfied equally apt, in relation to AXA's construction of Clause 18.5:-

> "[31] A second and related reason for preferring the Sellers' interpretation is that it does not make commercial sense to require the Sellers to pay an amount of money to the Purchasers which is not at present needed, and may never be needed, to satisfy a liability to pay tax…
> It is commercially unreasonable to interpret cl 10 as obliging the Sellers to put the Purchasers in funds for an amount of money which they may, or may not, come under an enforceable obligation to pay in the future. If the intention were to oblige the Sellers to provide what would in substance be security for a potential future payment obligation, rather than simply to prevent the Purchasers from being left out of pocket through being compelled to make a payment, I would expect to find language used which established such an arrangement in clear and direct terms."

206. For my part, I too would have expected the parties to have used language which established a requirement to make a payment up front and without regard to actual tax due, in circumstances where no tax might ever be payable, and might result in a windfall to AXA, to be expressed in clear and distinct terms. The words of Clause 18.5 do not do that, and AXA's construction does not reflect the obvious commercial purpose of Clauses 18.4 and 18.5 and does not make commercial sense. There is no commercial sense in requiring Genworth to make payments which are said to be in respect of tax, yet no tax is yet payable or due, tax may never be payable and almost certainly will not be payable in such amount,

and is likely to result in a windfall to AXA. Far clearer words would have been used had that been the objective common intention of the parties, and far clearer words would be needed to justify such a construction.

207. I have already explained why I do not consider that the meaning ascribed to the words "subject to tax" in particular tax contexts to be apt to apply to those words in Clause 18.5 (and meaning is always context specific), and indeed such a meaning does not in any event reflect the ordinary and natural meaning of the words that are used read in the context of Clauses 18.4 and 18.5 as a whole. Equally the words "as if the liability were a deduction of withholding required by law" bears neither the meaning, nor the consequence, that AXA advocates, as already addressed.

208. Nor do the other points relied upon by AXA lead to the conclusion that AXA's construction, uncommercial and unbusiness-like though it is, represents the objective common intention of the parties.

209. In this regard it is said that if the parties had intended Clause 18.5 to operate only where the recipient faces an actual tax liability they could and would have provided for that expressly. AXA notes that elsewhere (in the context of the Tax Covenant), in paragraph 2.1 of the Tax Covenant the parties created various payment obligations that operate by reference to Actual Tax Liabilities, with paragraph 1.1 of the Tax Covenant defining an "Actual Tax Liability" as meaning "a liability of a Target Group Company to make or suffer an actual payment of Tax". There is nothing in this point. These definitions are in a different context, where it was necessary to set out particular definitions in relation to (separate) complex tax provisions, and in any event it is clear from the context that Clauses 18.4 and 18.5 are concerned with the situation where actual tax arises. The language actually used is clear enough and no further definition or provision was needed. Ultimately what is being construed are the words that are used, not that the parties might have used.

210. In any event the boot is, in reality, very much on the other foot, and the point being made by AXA very much tells against AXA's construction. If the parties had intended Clause 18.5 to operate where there was no extant actual tax liability, and might never be a tax liability, and it was envisaged that the payment be made up front and when AXA was not out of pocket, and that additional sum would not be refundable even if no tax was ever payable, the parties could and would have provided for that expressly (as Leggatt LJ noted in a similar context).

211. An even more tangential point is made by AXA that elsewhere in the SPA the parties made provision for the Sellers to benefit from Tax Reliefs available to the purchasers in respect of underlying matters (see paragraph 11.3 of the Tax Covenant), and it is said that the parties could have made similar provision in Clause 18.5 for the payer to benefit from any deductibility of the underlying matter, but they did not do so. This is a bad point, not least because like is not being compared with like. In the context of actual tax (in considering whether that is what Clause 18.5 is concerned with), tax relief only arises as part of the ordinary assessment of tax by HMRC – it is an inherent feature of the tax calculation between the taxpayer (IARD ad Vie) and HMRC to arrive at the actual tax due. That is not an exercise between IARD, Vie and Genworth, nor is it something that needs to be (or indeed that it would be appropriate to be) addressed in Clause 18.5, given that it is the tax assessment process that will determine what actual tax is payable. In addition the

Tax Relief provisions in the Tax Covenant are, once again, dealing with a specific provision where it is appropriate to define particular provisions.

212. AXA also submits that its construction is consistent with the wide scope of part (a) of the definition of "Taxation" in clause 1.1 of the SPA, which it submits uses sweepingly broad language ("any charge, tax, duty…"), without any qualification that such amount be "actually payable". In contrast (it is said) part (b) of the definition (dealing with penalties, fines, interest, etc) expressly requires that such amounts be "payable". I have already commented above on the definitions of "Taxation" or "Tax". The definition of "Taxation" or "Tax" is, indeed, widely drafted but I do not consider the definition particularly assists AXA, as particular phrases may or may not relate to actual tax, and there are aspects of the definition in Clause 1.1 that are apt to describe actual tax – for example "tax on…income" and part (b) of the definition expressly refers to "additions to taxation payable in relation to any tax within (a) above" which is referring to actual tax, and AXA's submission also ignores the fact that part (b) of the definition is itself within the overall definition of "Taxation" or "Tax". The definitions do not take the issues of construction any further.

213. Next AXA submits that Clause 18.6 of the SPA, which refers to "an additional amount…paid under clauses 18.4 or 18.5" supports its construction of Clause 18.5. However Clause 18.6 simply provides for a payment back to the payer in a very specific circumstance where the paying of an amount under Clause 18.4 or 18.5 results in the payee obtaining a "Relief" as defined in the Tax Covenant. This provision only operates in limited circumstances and it is Clauses 18.4 ad 18.5 that define when any payments are to be made thereunder. Equally it is common ground that Clause18.6 does not apply to the grossing up sought by AXA in this claim. It does not make AXA's construction any more commercial, and does not support the submission that the parties thereby put their mind to, and limited, any question of relief. As already noted, and in any event, any question of deductions/allowances/reliefs is an inherent feature of a calculation of UK corporation tax between the taxpayer and HMRC, rather than a matter to be addressed in the likes of Clause 18.5.

214. Furthermore AXA's submission that Clause 18.6 is, *"highly relevant to the question of construction, because it is inconsistent with the elaborate implied obligations/restrictions relating to Clause 18.5 for which Genworth now contend"* is misplaced, as is the submission that it *"shows that, where the parties intended subsequent tax assessments to be taken into account, they did so expressly".* As to the former, Genworth's construction is based on the ordinary and natural meaning of the words of Clause 18.5 having regard to its purpose and that of Clause 18.4/the true construction of Clause 18.5, and any consequences that flow (in terms of deductions and allowances etc) are simply an inherent feature of the fact that Clause 18.5 is concerned with actual tax that is payable, after an assessment. As to the latter point, and once again, there is no need for the parties to address tax assessment – that is an inherent aspect of calculating the actual tax.

215. When it comes to identifying the purpose of Clauses 18.4 and 18.5, AXA ultimately simply has no answer to the fact that the obvious purpose of Clauses 18.4 and 18.5 is to ensure that AXA is not "out of pocket" in terms of tax on amounts received, neither more nor less, and that is achieved on Genworth's construction, but not AXA's, with AXA's construction meaning that Clause 18.5 would not ensure that the additional payment would *"equal the full amount which would have been received or retained by it had no such deduction or withholding been required to be made"* but rather would be likely to lead to

AXA receiving a "windfall" with no mechanism for repayment, and with the benefit of interest in the meantime. It is no answer to this for AXA to submit that a subsequent increase in tax rates between the date of grossing up and the date of assessment could leave AXA under-protected. This fails to grapple with the fact that the purpose of Clauses 18.4 and 18.5 is to ensure that AXA is not out of pocket, so this potential consequence tells against AXA's construction, not in favour of it. The reality however (as AXA knows and has acknowledged) is that its construction is likely to favour it in monetary terms. AXA's submission (based on the rate of tax) also ignores the possibility that AXA may ultimately pay not only less tax but no tax on the £100million+ that it claims under this head (were HMRC to agree with the approach identified by Genworth's tax counsel on UK tax and Mr de Bourmont's opinion to reflect the position in French law in relation to French tax) – a windfall to AXA for which no mechanism for repayment is provided in the SPA.

216. Nor does AXA have any answer to the (obvious) uncommerciality of its construction. It is left to submit that *"this mutual exposure to risk exposure was not uncommercial, but was instead the result of a mechanism designed to ensure a quick and final determination of the grossing-up sum due on any clause 10.8 principal sum".* This does not begin to justify, or explain, the uncommerciality of AXA's construction. First, it is contrary to the obvious purpose of Clauses 18.4 and 18.5, which is to ensure that AXA is not out of pocket, no more no less. Secondly, it is wrong to talk of "mutual" exposure as the risk is not mutual, AXA acknowledges it is likely to benefit from its construction and its construction gives rise to the possibility of a "windfall" benefit to it without any commercial rationale for the same or as to why that would reflect the objective common intention of the parties. Thirdly, there is no justification (and no justification given) for the conclusion that Clause 18.5 was a *"mechanism designed to ensure a quick and final determination of the grossing-up sum due on any clause 10.8 principal sum".* Such a mechanism is contrary to the purpose of Clauses 18.4 and 18.5 and would be an uncommercial bargain that makes no commercial sense. Fourthly, it is to be borne in mind that whilst, at the time the SPA was entered into, there was an anticipation by AXA and Genworth that Santander would shortly enter into a Relevant Distributor Agreement, Clause 10.8 was capable of being a long term payment mechanism (as I found in the Liability Judgment) and there is no reason why such a one-sided, and uncommercial, mechanism would have been agreed to by Genworth.

217. It is said by AXA that Genworth's construction would introduce complexity and delay, and undermine the commercial efficacy of Clause 10.8 as a clause intended to provide AXA with prompt compensation "on demand". But again there is nothing in this point. First, the issue of construction is nothing to do with Clause 10.8 – that is, as I have found, an on demand provision with the sums being payable if the Five Criteria are met. Secondly, the trigger under Clause 18.5 being an actual tax liability does not undermine the commercial efficacy of Clause 18.5 itself and indeed it furthers that – it ensures that the commercial purpose of Clauses 18.4 and 18.5 are met, namely that AXA is not out of pocket, no more, no less, not that it obtain an advance payment that is likely to be to its advantage, and to Genworth's detriment, with no mechanism for repayment.

218. In closing, AXA developed its submission, suggesting that there could be difficulties in calculating what the actual tax liability was, or as to how it might be calculated positing various examples/scenarios. I do not consider that this was a useful or fruitful exercise in relation to ascertaining the proper construction of Clause 18.5. It certainly does not detract from the commerciality of Genworth's construction in comparison with that advocated by AXA – a construction based on the actual tax liability is a commercial one and one which

is readily understandable. In any event, the actual tax payable by IARD or Vie (for example UK corporation tax) will be calculated based on an assessment in accordance with the principles that I have identified, resulting in a tax figure due by way of debt as between HMRC and IARD or Vie. The application of such tax liability between AXA and Genworth under Clause 18.5 ought to be capable of agreement between AXA and Genworth but absent agreement it would have to be determined by the court at that time. It is a sterile, and inappropriate, exercise to undertake in advance of knowing the actual tax treatment, how the tax calculations have been arrived at, and what (if any) tax IARD Vie or AXA are actually found to be liable for. Ultimately if agreement could not be reached as to any sums due under Clause 18.5 the matter would have to be determined by the Court at that time, rather than in an hypothetical environment at the present time. This possibility does not detract from the commerciality of Genworth's construction.

219. Finally, AXA submitted (on the basis of its construction of Clause 18.5) that "Genworth may now regret having agreed to the broad gross up obligation set out in clause 18.5. However contracts are not to be interpreted with the objective of relieving a party from a bad bargain", relying on what Lord Hodge said in *Wood v Capita* at [11] that. *"[I]n striking a balance between the indications given by the language and the implications of the competing constructions the court… must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest".* The Court is, indeed, alive to that possibility, but the sentiment expressed is not apt in the present case.

220. I am satisfied that the ordinary and natural meaning of the words in Clause 18.5, as advocated by Genworth, and identified herein, accords with the obvious commercial purpose of Clause 18.5 and is a construction which is not only more consistent with business common sense *(Wood v Capita* at [11]) but accords with business common sense, in contrast to AXA's construction, which is not dictated by the wording of Clause 18.5, is inconsistent with the obvious commercial purpose of Clause 18.5 and is an unbusiness-like construction that flouts business common sense. Commercial contracts are to be construed in a way that makes good business sense, and in the often quoted words of Lord Diplock in *Antaios Compania NaViera S.A. v Salen Rederierna A.B. ("the Antaios")* [1985] A.C. 191, 201, referred to with approval by Lord Hoffmann in *ICS v West Bromwich* at p. 913E, *"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense"*

221. Of course, as I noted at [105] of my Liability Judgment, by reference to what Lord Neuberger PSC said in *Arnold v Britton* at [17], reliance on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. They are not so invoked in the present case but as part of the "iterative process" identified at [12] and [13] in the judgment of Lord Hodge in *Wood v Capita*. Such matters complement and reinforce the ordinary and natural meaning of Clause 18.5 Viewed together with Clause 18.4 and their obvious purpose to make AXA whole no more no less in relation to actual tax that is due.

222. Accordingly, for the reasons, and in the circumstances, that I have identified, I am satisfied that on the true and proper construction of Clause 18.5, the words "subject to Taxation in the hands of the receiving party" in Clause 18.5 mean "actually taxed in the hands of the receiving party" and the clause operates by reference to tax on the payment in question which the receiving party is under an enforceable obligation to pay, such tax

having been assessed by the relevant revenue authority and determined as being due, so that any additional amount is only payable if and when the recipient is under an enforceable obligation to pay such actual tax, and I so find, and answer Issue 3(a) accordingly.

J. ISSUE 3(b) ON AXA'S CONSTRUCTION HOW IS ANY POTENTIALTAX LIABILITY TO BE DETERMINED

223. In the light of the answer given to Issue 3(a) it is common ground that Issue 3(b) does not arise for consideration as it is predicated on AXA's construction being the correct construction of Clause 18.5.

K. ISSUE 3(c) TAX DEDUCTIONS OR RELIEFS

224. Issue 3(c) is to what extent, if any, does the gross up calculation need to take into account: (1) tax deductions or reliefs prospectively available to the receiving party to reduce the amount of the Tax payable on the principal payment; or (2) tax deductions or reliefs previously obtained for or in respect of the losses, costs, etc to which the principal payment relates?

225. As I found in relation to Issue 3(a), the words "subject to Taxation in the hands of the receiving party" in Clause 18.5 mean "actually taxed in hands of the receiving party" and the clause operates by reference to tax on the payment in question which the receiving party is under an enforceable obligation to pay, such tax having been assessed by the relevant revenue authority and determined as being due, so that any additional amount is only payable if and when the recipient is under an enforceable obligation to pay such actual tax.

226. Tax deductions or reliefs commonly feature in the computation of profits, incomes or gains and assessment of tax due, and as such are an inherent feature of a tax calculation in arriving at an actual tax liability. Precisely what deductions or reliefs may be taken into account are a matter for the particular tax regime, and the particular tax under consideration, and consideration of the same is beyond the scope of the issues arising at the quantum trial. It suffices to find that, in relation to Issue 3(c) that Clause 18.5 operates by reference to an actual liability to pay tax, and any applicable deductions or reliefs will be part of the assessment or calculation giving rise to the actual tax figure that results.

L. ISSUE 3(d) REASONABLE ENDEAVOURS

227. Issue 3(d) asks the question to "what extent, if any, does the entitlement to a gross up under Clause 18.5 require a party to have used its reasonable endeavours to minimise the tax liability by reference to which the gross up payment is sought?"

228. There is no express provision in the SPA that so states. Equally any implied term would fall foul of Clause 20.1 of the SPA. However, as I indicated to the parties during the course of the quantum trial, I consider that it is inappropriate to answer the question in Issue 3(d) in the abstract, as it is possible to envisage factual scenarios that might give rise to questions of causation and remoteness although a court might also regard the issue as turning on the true and proper construction of Clause 18.5 as applied to a particular set of facts. Genworth confirmed that it did not pursue any argument by reference to the existence of an implied term, but rather in terms of causation and/or remoteness. Such issues are best determined against any actual factual scenarios that transpire (as the parties agreed in closing). That is not an invitation for Genworth to advance any arguments on causation or remoteness hereafter, but rather to leave such issues, should they ever arise, as well as any associated

question of the true and proper construction of Clause 18.5 on such facts, to an occasion where a particular factual scenario had played out and gave rise to an issue for determination.

M. ISSUES 4(a) and (b)

229. It is common ground that if, as I have found, Genworth's contention on Issue 3(a) is the correct construction of the words "subject to Taxation in the hands of the receiving party" in Clause 18.5 then I should not go on to examine or determine the tax treatment of any part of the Final Award in the hands of either AXA, IARD or Vie, as in such circumstances the parties must await any actual tax liability being established. Accordingly I have not done so.

N. CONCLUSION

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