Neutral Citation Number: [2022] EWHC 1776 (Comm)

Case No: CL-2021-000046

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12th July 2022

**Before** :

**SIR RICHARD FIELD**
**sitting as a Deputy High Court Judge**

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**Between :**

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| **(1) AXA FRANCE IARD SA (THE SUCCESSOR TO FINANCIAL INSURANCE COMPANY LIMITED) (2) AXA FRANCE VIE SA (THE SUCCESSOR TO FINANCIAL ASSURANCE COMPANY LIMITED)** | **Claimants** |
| **- and -** | |
| **(1) SANTANDER CARDS UK LIMITED (2) SANTANDER INSURANCE SERVICES UK LIMITED** | **Defendants** |

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**Andrew Green QC, Fraser Campbell and Timothy Lau** (instructed by **Quinn Emanuel Urquart & Sullivan LLP**) for the **Claimants**
**Adam Zellick QC and David Murray** (instructed by **Reed Smith LLP**) for the **Defendants**

Hearing dates: 22nd & 23rd February 2022

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# Approved Judgment

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

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SIR RICHARD FIELD SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on Tuesday 12th July 2022 at 10:30am.

## Sir Richard Field :

1. There are before the Court two applications. The Defendants, respectively ("SCL") and ("SISUK"), together ("Santander") apply to strike out under CPR 24.2 (no real prospect of success) and CPR 3.4 (2) (a) (statement of case discloses no reasonable grounds for bringing the claim) certain parts of the Claimants' Particulars of Claim ("POC"). In relation to the Claimants' claim founded on a settlement agreement, the Defendants additionally contend that this claim amounts to an abuse of process under CPR 3.4 (2) (b).

2. The Claimants apply to amend their Particulars of Claim ("POC") in certain respects.

3. I take the background to this litigation largely from the Claimants' Skeleton Argument which is not in all respects common ground between the parties. The Claimants are domiciled in France and carry on business as insurance underwriters as part of the AXA corporate group headed by AXA SA.

4. On 1 January 2019, the businesses, rights and obligations of two English insurance companies known as Financial Insurance Company Limited ("FICL"), which was engaged in general insurance and Financial Assurance Company Limited ("FACL", which was engaged in life insurance), were transferred to the Claimants. The AXA group had acquired FICL and FACL from the Genworth corporate group ("Genworth") on 1 December 2015 pursuant to a Sale and Purchase Agreement dated 17 September 2015 ("the SPA"). All of the policies to which this claim relates were sold by a company named GE Capital Bank Limited ("GECB"). At the time of the relevant sales, FICL, FACL and GECB were all part of the General Electric group of companies. GECB was acquired by the Santander group in 2009, and then changed its name to SCL. SISUK became involved later in 2010, as more fully described below.

5. Between around 1988 and 2011, FICL and FACL were engaged in the business of underwriting PPI for store credit cards. The Santander Defendants are part of the Santander corporate group. They are domiciled in England and are subsidiaries of Santander UK Plc ("SUK"). At all material times, SCL marketed and sold PPI underwritten by FICL and FACL. The PPI policies were attached to store credit cards, which were offered by SCL to customers of high street retailers, either via point-of-sale retail staff, or Santander call centre staff post-sale. PPI premiums were collected by SCL from customers' accounts and remitted to FICL/FACL. Santander earned substantial commission from the PPI premiums that customers paid (the mean average initial commission was 47.9%) in addition to profit share entitlements.

6. On 1 December 2000, FICL/FACL and SCL entered into an agreement formalising the historic agency arrangements under which SCL acted as agent in marketing and selling PPI products underwritten by FICL/FACL ("the Agency Agreement"). SISUK assumed the rights and obligations of SCL under the Agency Agreement in respect of the UK (but not Irish) business pursuant to a novation agreement dated 22 January 2010 ("the Novation Agreement").

7. The marketing and sales by Santander of PPI underwritten by FICL/FACL gave rise to extensive PPI mis-selling complaints by customers against FICL/FACL. The scale of the mis-selling led the Financial Services Authority ("the FSA") on 1 August 2010 to send a letter to relevant industry participants that identified common "point-of-sale"

failings concerning PPI sales. Large numbers of mis-selling complaints in respect of PPI policies were also made in relation to policies underwritten by other insurers and sold by other intermediaries. Three years earlier, the FSA had issued a final notice to SCL on 30 January 2007 requiring it to pay a financial penalty of £610,000 in relation to a large number of PPI mis-selling practices ("the Final Notice").

8. Broadly, the regulatory redress system for consumers involves: (i) a consumer making a regulatory complaint relating to PPI mis-selling directly against the regulated financial services company: and (ii) if that complaint is rejected by the company, or the consumer disputes the amount of redress offered, the complaint is referred to the Financial Ombudsman Services ("the FOS") for determination.

9. The regulatory compensation regime draws a distinction between insurance policies written before and after 14 January 2005. In particular: (i) for the period prior to 14 January 2005, the regime treats insurers (e.g. AXA) as being responsible for PPI mis-selling complaints; and (ii) for the period from 14 January 2005 onwards, the regime treats the party conducting the insurance mediation (e.g. SCL) as also being responsible. As such, any regulatory complaint about PPI mis-selling prior to 14 January 2005 can only be made against FICL/ FACL and not Santander. Accordingly, FICL/FACL/AXA have been exposed to significant liabilities from complaints of historic mis-selling by Santander.

10. Initially, SCL took full responsibility for all complaints in relation to PPI sales, whether prior to or after 14 January 2005. This included SCL handling complaints and, if it accepted a complaint, paying compensation without contribution from FICL/FACL. Where FOS references led to FICL/FACL having to pay compensation in respect of policies sold prior to 14 January 2005 (because FOS have no jurisdiction over SCL in respect of such policies), SCL reimbursed FICL/FACL the compensation paid, plus FOS fees.

11. From 2012 there were exchanges between the parties concerning the allocation of responsibility for the handling of complaints in respect of PPI policies sold by SCL and the payment of compensation to customers. The Claimants contend that over a number of years, Santander gradually resiled from its practice of taking full responsibility for all PPI complaints.

12. In June 2015, given the dispute between them as to the proper allocation of liabilities, the parties attended a settlement meeting. It is AXA's case that this meeting resulted in a settlement agreement. Santander disputes this.

13. In July 2017 Santander notified AXA that they would no longer reimburse AXA in respect of any payments and costs in relation to PPI mis-selling prior to 14 January 2005. Santander then ceased handling complaints in respect of such mis-selling. Faced with this situation, on 7 December 2017, AXA and SUK entered into a Complaints Handling Agreement pursuant to which SUK provided complaints handling services on behalf of AXA in respect of PPI complaints in exchange for substantial charges to cover its costs ("the CHA"). SUK would determine the complaints, but all compensation and associated costs would be borne by AXA i.e. for SCL's mis-selling as determined by SCL's parent, SUK. On the same date as entering into the CHA, AXA and Santander also entered into a standstill agreement, pursuant to which the running of time for the

claims now advanced by AXA in the POC was suspended for the purposes of limitation ("the Standstill Agreement").

14. Clause 10.8 of the SPA under which the AXA group had acquired FICL and FACL provided that 90% of the responsibility for the "Relevant Distributor Mis-Selling Losses" would be allocated to Genworth. This liability was expected to be short lived as it was anticipated that Santander, shortly after the SPA had been executed would enter into a formal written agreement (referred to in the 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. As it transpired the "Relevant Distributor Agreement" was not entered into with Santander and AXA sought to enforce clause 10.8 which Genworth resisted, with the result that AXA brought a claim against Genworth in this Court ("the Genworth Proceedings") which was decided in AXA's favour by Bryan J on liability and quantum. Thereafter, Genworth and the AXA group entered into a confidential settlement agreement in July 2020.

*AXA's claim against the Santander Defendants*

15. AXA claims approximately £644 million (before interest) as compensation for losses AXA have incurred in relation to the mis-selling of PPI by SCL prior to 14 January 2005, following complaint determinations by the FOS, AXA, or SUK (pursuant to the CHA).

16. AXA pleads that it is entitled to the £644 million under four sub-claims as follows:

    (1) Breach of a settlement agreement between the Claimants and the Defendants alleged to have been concluded following a settlement meeting on 4 June 2015 ("the June 2015 meeting") attended by several senior individuals from each side including Mr James Rember (General Counsel) and Paul Caprez (Chief Risk Officer) for the Claimants, and Steve Pateman (Executive Director, UK Banking), Simon Lloyd (Chief People Officer and General Counsel, Santander UK), David Hazell (Compliance Director, Santander UK), Caroline Waters (Product Solutions), Joanna Day (Director of Legal Services), and Alan Conway (Legal Services for SUK) on behalf of the Defendants ("the Settlement Agreement Claim"). (Paras 72 – 83 POC).

    (2) The entitlement to an indemnity under clause 12.2 of the Agency Agreement for all costs and losses arising from SCL's acts and omissions in mis-selling PPI policies as AXA's agent ("the Indemnity Claim"). (Para 84 POC).

    (3) Damages for SCL's negligence in mis-selling PPI policies as AXA's agent prior to 14 January 2005 ("the Negligence Claim"). ( Paras 85 – 87 POC).

    (4) Contribution from SCL under section 1(1) of the Civil Liability (Contribution) Act 1978 ("the Contribution Claim"). ( Paras 88 – 95 POC).

*The strike out/abuse of process applications*

17. The Defendants seek to strike claims (1), (2) and (4) and, on the basis that claims (1) and (2) are struck out, seek an order removing SISUK as a party to the proceedings.

18. The principles to be applied on an application under CPR Part 24 and CPR 3.4(2)(a) were helpfully set out by Lewison J (as he then was) in *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) as follows:

> "(1) The court must consider whether the claim has a "realistic" as opposed to a "fanciful" prospect of success. A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable."
>
> (2) The court must not conduct a mini-trial. However, this does not mean that the court must take at face value and without analysis everything that the claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if they are contradicted by contemporaneous documents.
>
> (3) The court must take into account not only the evidence placed before it on the application but also the evidence that can reasonably be expected to be available at trial.
>
> (4) The court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available and so affect the outcome of the case.
>
> (5) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. This is because, if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim. Similarly, if the applicant's case is bad in law, the sooner that is determined the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgement because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

*The Settlement Agreement Claim (paras 72 – 83 POC)*

19. The agreement contended for by AXA ("the Settlement Agreement") which it is alleged was breached by the Defendants is pleaded as follows in paragraph 74 POC: (1) in relation to all complaints determined prior to the Settlement Agreement the Defendants

would fund the compensation payments, the FOS fees and any administrative costs; (2) in relation to future complaints, the Defendants would conduct the claims handling thereof (and would bear the costs of the administrative work), and would fund the compensation payments and the FOS fees; (3) any monies currently owing by the Defendants to the Claimants in respect of historic or existing complaints would be paid by the Defendants subject to setting off any profit share payments owed to the Defendants by the Claimants under the Agency Agreement; (4) a formal document recording the agreement in relation to liability and management of complaints would be entered into.

20. Paras 75 - 82 POC plead as follows:

> 75. On 5 June 2015 [the day after the meeting on 4 June 2015] Mr Rember sent Mr Hazell and Ms Day on behalf of the Defendants a summary of the matters that had been agreed at the previous day's meeting and sought confirmation that this represented an accurate summary. On 9 June 2015, Ms Day (after "*obtaining the relevant inputs*" on the Defendants' side) confirmed that Mr Rember's summary was correct. She stated (emphasis added):
>
> "*I can confirm that your understanding of the position is correct and naturally, it makes sense for this to be incorporated into an agreement. We have no objections to Genworth preparing a first draft, as requested, but would request that it is kept as uncomplicated as possible and would suggest an effective date of 1 July 2015.*
>
> *<u>At the meeting Steve [Pateman] agreed that Santander would be responsible for the redress payments, FOS fees and Genworth administration costs that have been incurred to date</u>. As you will appreciate, our concern is to contain costs going forward and whilst Santander [i.e. the Defendants] will agree to meet FOS costs and redress payments going forward, we will not be meeting Genworth administration costs going forward as, given that we will be taking on the handling of the complaints, there should not be any…*
>
> *Finally, could you please let me have details of all outstanding invoices and nominate a contact within Genworth so that we can deal with reconciling amounts. We will do likewise for Santander*".
>
> 76. Mr Rember replied thanking Ms Day for her confirmation that his understanding of the Defendants' position was correct.
>
> 77. Over the course of the following months, the parties corresponded with a view to recording formally the terms of the Settlement Agreement that had been agreed at the June 2015 meeting. The correspondence focused on the agreement of

ancillary matters as well as the precise figures the parties owed to each other, after a reconciliation of outstanding amounts. This correspondence was primarily conducted by Mr Rember on behalf of the Claimants and Mr Conway on behalf of the Defendants. Ms Day was also copied on all the communications cited below. Both Mr Conway and Ms Day had attended the June 2015 meeting.

78. On 20 October 2015, Mr Conway emailed Mr Rember with a proposed final version of a formal agreement which embodied the terms agreed at the June 2015 meeting. Mr Conway requested Mr. Rember to "*arrange for 5 copies to be executed by both Genworth companies then send these for my attention. I will pass these around each of the Santander companies, then send you 2 fully executed versions*".

79. Pursuant to Mr Conway's email, Mr Rember arranged for the agreement to be executed by Mr Jeffrey Whiteus (a director of the relevant Claimant companies) and emailed Mr Conway back two days later on 22 October 2015, stating: "*We have signed 4 copies (we only need one original) and will send these to you today for countersignature and dating*".

80. In the event, despite the Claimants chasing for several months, the Defendants never sent back to the Claimants any executed versions of the signed written agreement. The Defendants initially suggested, on November 2015, that the delay in signing was due to the fact that Mr Pateman had left the Defendants' employment. 0n 7 January 2016, however, they informed the Claimants that there had been a change of heart regarding "*the position we have reached with Genworth regarding settlement of this matter*", and that they would be conducting a review of "Genworth products on offer prior to 2005 [that] were so fundamentally flawed that they should never have been offered for sale". Despite repeated requests from the Claimants, the Defendants have never shared the outcome of any such review, or properly explained the basis for their contention that any products were "*fundamentally flawed*". In any event it is averred that no such review could result in the Defendants being released from their obligations under the Settlement Agreement.

81. In the premises, the parties entered into the Settlement Agreement at the June 2015 meeting, or alternatively by the exchange of emails immediately thereafter, as referred to at paragraph 75 to 76 above. The Settlement Agreement was legally binding from that point, notwithstanding that it was contemplated that a formal written agreement would be entered into in due course (and which was in fact executed by the Claimants).

> 82. In the further alternative, the Settlement Agreement became legally binding by the communications between Mr Conway and Mr Rember on 20–22 October 2015, as referred to at paragraphs 78 to 79 above. Such communications demonstrated an objective shared intention between the parties that the terms of the written agreement were in final form and had been agreed and that all that remained were execution formalities.

21. I deal first with the Defendants' case advanced under CPR Part 24.2. Mr Zellick QC, leading counsel for the Defendants, submitted that it was clear from: (a) the emails and the letter at the end of the series; and (b) the many travelling draft agreements that passed between the parties in the period 5 June 2015 to 7 January 2016, that the parties never reached a concluded binding agreement. These documents were contained in Bundle B. The parties' negotiations and communications in respect of a proposed settlement agreement were all conducted on "without prejudice" terms. It is because the Claimants assert that those negotiations and communications culminated in the alleged pleaded agreement that these documents are in evidence.

22. Tedious though it is, I find it necessary to set out the relevant parts of the emails and to note the several draft agreements that the parties exchanged giving the Bundle B references. All the emails and the exchanges of draft agreements occurred in 2015. The final relevant communications were in the form of letters from Santander to Genworth dated 7 January 2016 and from Genworth to Santander dated 23 March 2016.

(1) B 14, 5 June - Mr Rember ("Rember") to Ms Day ("Day") and Mr Hazel ("Mr Hazel").

> Thank you for your time yesterday and the very constructive meeting. I noted the following as the agreed next steps and would be grateful if you could confirm that these are correct.
>
> 1.Santander and Genworth to sign an agreement confirming that Santander are liable for funding all redress payments and FOS fees and any Genworth administration costs. Subject to the outcome of point 2 below, this agreement would also set out how existing and future complaints would be managed. Genworth to prepare the first draft of this.
>
> 2. Santander to obtain FOS agreement to FOS contacting Santander about complaints rather than Genworth and Santander assuming management of complaints. Genworth and Santander to agree with FOS the ongoing process for managing existing complaints and future ones.
>
> 3. Santander and Genworth to agree a reconciliation of the amount owing to each in order to settle any outstanding amount.
>
> 4. Genworth to restart its discussions with NewDay with a view to commencing profit share payments to NewDay once the appropriate agreement had been signed.…

Did Steve talk to FOS about point 2 and if so, what was their response?

(2) B 20 – 21, 9 June – Day to Rember

"I can confirm that your understanding of the position is correct … it makes sense for this to be incorporated into an agreement … At the meeting Steve [Pateman] agreed that Santander would be responsible for the redress payments, FOS fees and Genworth administration costs that have been incurred to date. … our concern is to contain costs going forward, and whilst Santander will agree to meet FOS costs and redress payments going forward, we will not be meeting Genworth administration costs going forward … What Steve had in mind was that we would approach FOS and ask them to recognise us as Genworth's agent and we would then process these complaints on Genworth's behalf… We would also like to formally terminate the historical GE Agency Agreement as part of these arrangements… Finally, could you please let me have details of all outstanding invoices and nominate a contact within Genworth so that we can deal with reconciling amounts."

(3) B 20, 9 June - Rembert to Day and Hazell.

We are preparing a draft agreement which we will try to keep as uncomplicated as possible.

We would like Santander to reimburse us for any administrative costs we do incur. We had understood at the meeting that Steve intended to ask FOS whether it would accept dealing directly with Santander rather than Genworth … Did we misunderstand the proposal and have you spoken to FOS about this?

[…] I note your wish to terminate the agreement between Genworth and GE Money/Santander. We will consider this but it will depend on the new agreement between us and our agreement with NewDay.

(4) B24, 18 June First Draft Settlement Agreement marked "privileged" and confidential. This draft agreement is a detailed agreement with a large number of items required to settled in order for the matter to be capable of being settled between the parties.

(5) B39, 24 June - Day to Rember

I understand the operational implications but this is not an area that I am directly involved in so I will check who is best to pick up with you on this aspect and perhaps you could let me have a contact within Genworth.

> We have considered the draft agreement although have numerous stakeholders to obtain input from but I am pleased to say that we should be able to let you have the mark up within the next few days.

(6) B 46, 6 July - Day to Rember at 10.55

> Please find attached draft settlement agreement together with tracked changes.
>
> It may be more appropriate to consider whether Santander UK plc should be the contracting party.
>
> We will need to give some thought as to how the payments are effected, particularly in light of the withholding of profit share.

The email then sets out a series of detailed requirements desired by FOS which Ms Day says could be incorporated into the Complaints Handling Agreement.

(7) B 48, Santander's copy of the draft Settlement Agreement.

There are many marked up comments and proposed changes.

(8) B 57, 9 July - Rember to Day.

> I refer to your email below and attach a revised draft of the Settlement Agreement marked to show our suggested changes from the draft sent by you. You will see that we have incorporated some of your proposed amendments. We have included some notes setting out our views on those of your amendments that we have not included. We are keen to finalise the agreement.

(9) B 59, Genworth responds to Santander mark up. There is a good deal of red ink in the agreement produced by Genworth.

(10) B73, 16 July - Day to Rember

> James, I do apologise but I am sure that you will appreciate that I have to obtain the views of various business heads as, even though Steve Pateman agreed to close this matter on the basis discussed, the Settlement Agreement contains a level of detail that was not contemplated, let alone captured at our meeting. To keep the ball rolling below are some high-level principles I hope to let you have a markup on Monday at the latest but in the meantime these are our current ideas of focus:
>
> 1. We believe that the position set out in the Settlement Agreement on liabilities is more onerous than that set out in the historically acquired Agency Agreement. We would like Genworth to consider our amendments to the effect that:

(i) Santander will pay Genworth's reasonable operational costs plus all third-party liabilities (including, FOS costs and redress for upheld complaints) incurred prior to the date of settlement; and

(ii) Santander will only be responsible for third-party liabilities after the date of settlement. The whole idea behind our agreement was to reduce operational costs via the current "merry-go-round" and therefore we believe that Genworth should be responsible for its own operational costs (if any) after the date that the new Complaints Handling Agreement comes into effect.

We do not believe that we should be liable for all liabilities, costs and expenses incurred before and after the date of the Settlement Agreement, including Genworth's operational costs. As mentioned above we would like to reinstate the requirement that these operational cost should be "reasonable" as we should be afforded the right to challenge the basis of your internal costs.

(11) B79. 21 July - Mr Jeffrey Hunter ("Hunter") to Mr Conway at 17:24

As promised, I set out our proposed solution on two issues raised by Joanna (Ms Day) in her 16 July note.

1. Payment of operational costs. We can accept Santander's position … subject to the following …

2. Termination of the Agency Agreement. We continue to believe that termination of the Agency Agreement in respect of UK business should only occur at the same time as our agreement with NewDay is signed.

(12) B77. 30 July – Conway to Hunter at 15.02

Is it also possible that you could provide an outline of what Genworth will expect to see in the Complaints Handling Agreement? …. [I]t would be helpful to know what the key issues/principles are from Genworth's perspective.

(13) B 77. 31 July - Hunter to Conway at 16:34.

As promised, please find attached an updated draft Settlement Agreement reflecting our proposals (in track changes). With respect to the key items we would like to include in the Complaints Handling Agreement, they are set out in Schedule 2 of the attached.

(14) B 117, 12 August - Conway to Hunter.

Please find attached a further markup of the Settlement Agreement, in which I have highlighted our main points of difference. As discussed, the main issue concerns when

the current agency agreement can be terminated. It does not seem likely that you and I will be able to resolve this point between us.

(15) B 130, further revised draft settlement agreement dated 30 July.

This contains an insistence that the word "reasonable" be inserted into the definition of mis-selling costs. There are also several other proposed amendments.

(16) B 142, 14 August - Hunter to Conway 10.28

Thanks for your recent revision of the Settlement Agreement. Given the significant changes, we propose a call among the four of us the week commencing 24th August to discuss.

(17) B151, 28 August – Rember to Day

I refer to our discussions yesterday and attach a revised draft of the agreement marked to show our proposed changes to the draft you sent us on 12 August. We have included the changes we discussed yesterday and some other tidying up edits. I look forward to hearing from you with any comments you may have.

(18) B 152 The revised draft agreement sent by Rember to Day

This draft agreement includes many additions and excisions.

(19) B 169, 3 September - further revised draft agreement

(20) B 186, further revised draft agreement

(21) B 196, 17 September – Conway to Rember

Proposed amendment to clause 2.8 of draft agreement.

(22) B 196, 17 September – Rember to Conway

Proposed amendment to clause 2.8 accepted but additional words at the beginning of this clause proposed

(23) B 200, further revised draft agreement

(24) B 210, 25 September – Conway to Rember

I have reviewed the final draft in detail and can confirm that we are generally comfortable with its terms. We will however, need to make two further amendments.

(25) B215, Revised draft agreement, close to final version but still being marked up

(26) B225, 13 October – Rember to Conway

I attach what I believe is the agreed final version of the agreement including the figures and your suggested changes to clause 2.7. Could you let me know if we can now proceed in signing and how many signed originals you would like us to provide.

(27) B 267, 16 October – Conway to Rember

The agreement that you recently sent through does not appear to take into account the revised Redress amount, set out below. It is my understanding that this revised amount has been agreed with Genworth finance, so I have amended the sums in the attached agreement accordingly... I also made a few "tweaks" in clauses 2.3 to 2.6 which should be non-controversial.

(28) B 266, 20 October – Conway to Rember

We should probably aim to have each party holding its own copy of the agreement, which has been executed by all other parties. Please would you arrange for 5 copies to be executed by both Genworth companies then send these for my attention.

(29) B 285, 19 November – Conway to Rember

In reply to a request from Mr Rember to know when the countersigned Settlement Agreement would be received, Mr Conway replied:

I have made further enquiries and am sorry to advise that this matter will be delayed in light of Mr Pateman's decision to leave Santander UK. The Santander directors, who are now authorised to sign agreements such as this, have requested that Santander UK's Executive Committee … reviews the position reached and provides approval that the agreement can be executed.

(30) B 288-289, 7 January 2016 - letter from Santander (Ms Day) to Rember

Ms Day identifies in this letter various weaknesses in respect of Genworth products prior to 2005 that have emerged from a dialogue with FOS and refers to feedback from the FOS that suggests that some of these products were so fundamentally flawed that they should never have been offered for sale. She goes on to state that if this is indeed the case Santander should not be liable to indemnify Genworth in respect of any flawed products and pending these matters being thoroughly investigated Santander will not proceed with executing any settlement agreement with Genworth relating to the Agency Agreement.

(31) B 290 – 293, letter dated 23rd March 2016 from Genworth to SUK

> "In May 2014 we received notice from Santander that it had taken a view that all prior PPI-related payments to Genworth LPI had been made on a goodwill basis only and that such payments did not indicate any acceptance that Santander was liable to pay these sums. It was both a surprising and disappointing change in position for us. However, the issue was resolved in principle at a meeting of 4 June 2015, which Santander confirmed that the change in position in May 2014 had not been considered at a sufficiently senior level and that in accordance with the Agency Agreement and subsequent confirmations it did indeed accept liability for all the PPI related losses and costs incurred by Genworth LPI. … At the June 2015 meeting it was agreed that it was in the interests of both parties to bring the matter to a swift conclusion and that the parties should codify and regulate the basis for addressing all costs and complaints-handling going forward to avoid any future uncertainty. In light of this, the parties agreed to enter into a settlement agreement and a separate complaint-handing agreement."

Under the heading Recent Developments the letter states,

> On 7 January 2016, we received a letter from Joanna Day… stating that Santander had changed its position on the matter and that there would be a delay to its resolution while Santander conducted further internal investigations. This was an extremely unexpected and disappointing development as we had received no prior indication that Santander had any of the concerns described in Ms Day's letter. Our business has continued to incur losses since the date of Santander's last payment in July 2014 and… it was clear from our previous discussions and agreements, Santander's past conduct … and the agreed form Settlement Agreement that Santander had accepted financial and operational responsibility for complaints relating to the mis-selling of Santander PPI products under the Agency Agreement. We have written to Ms Day expressing our disappointment and explaining our disagreement with the conclusion reached in the letter of 7 January … if we do not receive a satisfactory response within 10 days of receipt of this letter we will need to enforce all of our rights in relation to this dispute.

23. In submitting that no final and binding agreement was reached at any stage of the negotiations, including during the oral discussions held on 4 June 2015 and by the exchange of emails (1) and (2), Mr Zellick contended that at all material times it was common ground and understood that if there was to be a settlement, the terms had to be agreed and there should be a written agreement. He submitted that the idea that major corporations looking to resolve a dispute involving hundreds of millions of pounds would settle that sort of liability without a written agreement was completely untenable. In support of this submission, he cited the following passages in the judgment of Morritt C in *Whitehead Mann Ltd v Cheverny Consulting Ltd* v [2006] EWCA Civ 1303 at [42] and [45]:

> With exceptions immaterial to this case, it is possible to make a contract orally. But the more complicated the subject matter the more likely the parties are to want to enshrine their contract in some written document to be prepared by their solicitors. This enables them to review all the terms before being committed to any of them. The commonest way of achieving this ability is to stipulate that the negotiations are 'subject to contract'. In such a case there is no binding contract until the formal written contract has been duly executed, see The Chinnock v Marchioness of Ely 4 De GJ&S 638. But it is not essential that there should have been an express stipulation that the negotiations are to be 'subject to contract'. As Jessel MR pointed out in relation to negotiations conducted through correspondence in Winn v Bull (1877-78) LR 7 Ch.29, 32: "When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail.
>
> Obviously each case depends on its own facts but in my view where, as here, solicitors are involved on both sides, formal written agreements are to be produced and arrangements made for their execution the normal inference will be that the parties are not bound unless and until both of them sign the agreement.

24. Referring to email (1), Mr Zellick submitted that this classically evidenced an agreement in principle "subject to contract." This is clear, he argued, from:

    (1) the reference to the fact that the parties would need "to sign an agreement" and that Genworth (i.e. the claimants) would prepare the first draft of this;

    (2) the fact that the agreement was intended to provide for the Defendants rather than the Claimants to handle future PPI mis-selling complaints, which could not happen until approval therefor had been given by the FOS which had not yet happened;

    (3) the fact that it was intended that any agreement would reflect an agreed "reconciliation of amounts" owing by each party, which had not yet happened; and

    (4) the fact that the Claimants were to hold discussions with NewDay about profit share payments "once the appropriate agreement had been reached"[1] .

[1] In footnote 21 in their skeleton argument, the Defendants aver as follows: "SCL transferred its right to a profit share from the claimants under the Agency Agreement to NewDay Partnership Transferor PLC ("NewDay") in a 2012 agreement with NewDay to which the Claimants were not parties but which contemplated a novation of the Agency Agreement from the Defendants to NewDay. From August 2014 the Claimants withheld profit share payments from the Defendants claiming set-off rights with respect to alleged claims under the Agency Agreement. There were discussions between the Defendants and the Claimants regarding the proposed novation of the Agency Agreement and payment of profit share directly to NewDay but

25. Mr Zellick also pointed out that in this email Mr Rember asked for confirmation that his understanding of the meeting "was correct" and did not say that a legally binding contract had already been concluded.

26. Turning to email (2), Mr Zellick laid stress on the fact that Ms Day agreed with the proposal that a written contract should be drawn up and proposed that the agreement should contain the following different or additional terms all of which were inconsistent with any binding agreement with the Claimants having been reached: (a) the agreement should have an effective date of 1 July 2015; (b) the Defendants would not agree to cover the Claimants' administration costs (contrary to Mr Rember in email (1)); (c) the Agency Agreement should be terminated and that this should happen simultaneously with "the new arrangements" with the Claimants.

27. Next Mr Zellick submitted that the words in email (3), "we are preparing a draft agreement which we will try and keep as uncomplicated as possible. I hope to send you this draft by early next week," indicated that Mr Rember did not regard the parties as having already reached a binding agreement. Rather, these words are consistent only with an understanding that the agreement would not be concluded unless and until an agreed written contract was signed by both parties. Further, the draft agreement (at no. (4)) sent by Mr Rember does not refer to the meeting of 4 June 2015 or suggest that the draft agreement was merely a reduction into writing of an agreement that had already been concluded.

28. Dealing with the emails and the exchanges of draft agreements in the period 9 June 2015 to 19 November 2015 [i.e.(3) to (29)] Mr Zellick argued that it was manifest that the parties throughout this period were negotiating the terms of the proposed agreement on the conventional basis that they were discussing the detailed terms of the actual agreement to concluded and there would be no agreement until the terms of the document had been settled and it had been signed.

29. Referring to Genworth's letter dated 23 March 2016 (no. 31), Mr Zellick drew attention to the assertion that "the issue" [of liability for mis-selling losses] was resolved "in principle" at the meeting of 4 June 2015 and noted that the letter did not say that the Defendants' failure to execute the agreement was irrelevant because they were already bound by an oral agreement concluded in June 2015. On the contrary, the letter recognised that the Defendants' decision not to execute the agreement meant that no binding agreement had been concluded at all.

30. Mr Zellick also referred to a note of the 4 June meeting that Mr Rember had typed up on the following day, the pertinent parts of which read:

> After a brief discussion, SP [Mr Pateman] acknowledged that Santander as the distributor, was liable for any mis-selling and should therefore be funding redress costs and FOS fees and reimbursing Genworth for its administrative costs. He questioned why Santander were not managing these complaints in the same way as it managed other PPI mis-selling complaints. It was explained that FOS currently was only prepared to

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these had stalled pending resolution of the Claimants' Agency Agreement claims which were the subject of the without prejudice settlement negotiations".

> communicate with Genworth on the complaints as they related to policies sold before 2005. SP said he would prefer that Santander directly manage the complaints without Genworth involvement unless required and it was agreed that Santander would contact FOS to obtain FOS' approval to this. DH [Mr Hazell] said that if FOS did not agree to this arrangement, Genworth could appoint Santander as its agent to manage the complaints on its behalf.
>
> It was also agreed that any moneys currently owing by Santander to Genworth in respect of historic or existing complaints should be paid by Santander subject to any setting off against profit share payments owed to Santander by Genworth …
>
> It was acknowledged by Santander that it would remain liable for mis-selling regardless of the agreement between GNW and NewDay. This agreement would also regulate the payment of profit share by Genworth to NewDay.…
>
> It was agreed that the following steps should be taken to reflect the agreed outcomes of the meeting. [These steps are those set out in email No. (1)]

31. Mr Zellick observed that amongst the stated agreed outcomes of the meeting was the need for the Settlement Agreement to be in writing. He also submitted that given the existence of this note and the fact that the subjective intentions of those attending the meeting were irrelevant to the question whether a binding agreement was entered into, it was fanciful to imagine that individuals who attended the meeting were likely to be called as witnesses as contended by the Claimants.

32. Responding to the Defendants' submissions, Mr Green QC, leading counsel for the Claimants, began by contending that this issue was fact sensitive and quite unsuitable for summary determination. He emphasised that the Claimants' primary case was that the Settlement Agreement was reached orally in the discussions held during the June 2015 meeting. This meant that at the trial there will be oral evidence as to what words were used at the meeting and what was agreed, and those witnesses will be cross-examined. As stated in *Easyair*, the Court must take into account not only the evidence placed before it in the strike out proceedings but also the evidence that can be reasonably expected to be available at trial. It is the Claimants' case that Mr Pateman of Santander was authorised to and did enter into the Settlement Agreement. It was to be anticipated, submitted Mr Green, that Mr Pateman would give evidence and so would others who had attended the 4 June 2015 meeting.

33. Mr Green laid emphasis on the following:

    (1) as pleaded in paragraphs 62(a) and (b) of the POC there had been implemented oral agreements between the parties that had been implemented until February 2014: (a) in August 2012, under which SISUK accepted that the Defendants were responsible for bearing the costs of all PPI complaints regardless of when the relevant PPI product had been sold, which costs would be paid by the Claimants by withholding those costs from the profit; and (b) in July 2013, when

the level of profit share was inadequate to cover compensation costs, under which it was agreed that the Claimants would invoice SISUK for these costs; this latter agreement was performed until July 2014;[2]

(2) the agreement reached at the meeting on 4 June 2015, attended as it was by senior management on both sides with their in-house lawyers, was very simple: Santander agreed to revert to the pre-July 2014 position and would be liable for all mis-selling costs; the other matters that came to be discussed after this core agreement had been concluded were in the margin and did not undermine the existence and enforceability of that agreement.

34. Mr Green went on to argue that the contemporaneous documents had to be objectively appraised and on such an approach, in the context of what was going on, those documents were not inconsistent with the contention that a binding agreement covering the essential matters in issue between the parties had been concluded at the 4 June 2015 meeting. He cited paragraphs 549 – 551 of Picken J's judgment in *Avon Holdings Ltd v Azitio Holdings Ltd* [2020] EWHC 1844 (Comm):

> Turning to the relevant English law, the principles which determine whether or not a binding contract has been concluded are well known. They were summarised by Lord Clarke in **RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH Co KG (UK Production)** [2010] UKSC 14, [2010] 1 WLR 753 at [45]:
>
> "*The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.*"
>
> 550. Thus, Lord Clarke summarised the decision in **Pagnan SpA v Feed Products Ltd** [1987] 2 Lloyd's Rep 601 in the following terms at [48] of his judgment in RTS:

[2] Paras (i) and (ii) are in accordance with the following finding by Bryan J in the *Genworth Proceedings* [2019] EWHC 3376 Comm at [15]: "*Up until July 2014, Santander reimbursed FICL/FACL in respect of redress payments, FOS Fees, and administrative costs in relation to the determination of such complaints. However, on 6 May 2014, Santander informed Genworth that its previous policy of reimbursing them for PPI liabilities had been conducted on a "goodwill" basis. Further, Santander took the stance that GECB (now SCUK) was not a member of the ABI, IOS or GISC, and only became regulated by the FSA from 14 January 2005. As such, Santander contended that it was not subject to the FOS jurisdiction in respect of PPI sold before that date and would no longer reimburse Genworth for administrative costs or FOS Fees. The last such reimbursement payment by Santander was in July 2014*".

> "*although certain terms of economic significance to the parties were not agreed, neither party intended agreement of those terms to be a precondition to a concluded agreement. The parties regarded them as relatively minor details which could be sorted out without difficulty once a bargain was struck. The parties agreed to bind themselves to agreed terms, leaving certain subsidiary and legally inessential terms to be decided later.*"
>
> 551. As Andrew Smith J put it in **Bear Stearns Bank plc v Forum Global Equity Ltd** [2007] EWHC 1576 (Comm) at [171]:
>
> "*The proper approach is, I think, to ask how a reasonable man, versed in the business, would have understood the exchange between the parties. Nor is there any legal reason that the parties should not conclude a contract while intending later to reduce their contract to writing and expecting that the written document should contain more detailed definition of the parties' commitment that had previously been agreed.*"

35. In my judgment, the Defendants have failed by some distance to show that the Settlement Agreement Claim should be struck out. In my view this claim as pleaded should be allowed to go to trial at which, in my judgment, it can be reasonably anticipated that some of those who attended the meeting, particularly Mr Rember and Mr Pateman, possibly several others, will give evidence and be cross-examined and it will be for the trial judge to decide whether a binding agreement was reached: (i) on 4 June 2015 regardless of the fact that no written agreement came to be executed by the parties; or (ii) during the subsequent period when the parties were exchanging draft agreements; or (iii) when the final version of the proposed Settlement Agreement was executed by the Claimants and sent to Santander for execution by them.

36. I turn now to address the Defendants' case that the Settlement Agreement Claim is an abuse of process and should be struck out under CPR 3.4 (2) (b) which provides:

> (2) The court may strike out a statement of case if it appears to the court –
>
> (a) …
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings…

37. In *Allsop v Banner-Jones Ltd* [2021] EWCA Civ 7 the Court of Appeal declared:

> The jurisdiction to strike out proceedings as an abuse of process is one that should not be tightly circumscribed by rules or formal categorisation. It is an exceptional jurisdiction, enabling a court to protect its procedures from misuse. Thus, a court is able to -- indeed, has a duty to -- control proceedings which, although not inconsistent with the literal application of its procedural rules,

> would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people. [44 (i)]:

The Defendants submit that the Claimants are abusing the process of the court in advancing a case that a binding settlement agreement was concluded between FICL/FACL and the Defendants in 2015 when this contention is diametrically opposed to the position they took in the Genworth Proceedings and is inconsistent with the findings made by Bryan J in those proceedings in accordance with the submissions made by the Claimants in that case.

38. AXA's case in the Genworth Proceedings as previously noted was brought under clause 10.8 of the SPA. This clause provides in relevant part:

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

39. FICL and FACL were "Target Group Companies" and the "Relevant Distributor" is defined to include SCL and SISUK. The "Relevant Distributor Agreement" is defined as "the agreement proposed to be entered into between certain Target Companies, the Relevant Distributor and certain of its affiliates, in connection with liabilities relating to the sale of Insurance Contracts". The parties to the SPA initialled an "Agreed Form" of Relevant Distributor Agreement for the purposes of identification.

40. The Defendants submit that Clause 10.8 reflected the fact that, as at the date of the SPA, it was anticipated by AXA and Genworth that FICL/FACL and the Defendants would shortly enter into an agreement ("the Relevant Distributor Agreement") under which the Defendants would accept liability for mis-selling complaints in respect of PPI policies underwritten by FICL/FACL and distributed by the Defendants, including policies sold before 14 January 2005.

41. On the basis that it is plain on the wording of Clause 10.8 that if the negotiations for a settlement agreement did not result in the conclusion of a binding settlement agreement between the Claimants and the Defendants, clause 10.8 was to continue to allocate responsibility for 90% of the relevant losses to Genworth until the settlement of the Genworth Proceedings in 2020, the Defendants contend that accordingly it was a necessary part of AXA's case in the Genworth Proceedings that the Relevant Distributor Agreement had not been concluded, for otherwise Genworth would have had no liability under clause 10.8. The Defendants go onto argue that AXA's evidence and submissions in the Genworth Proceedings contained numerous assertions that the anticipated settlement agreement between FICL/FACL and the Defendants was never concluded. In support of this contention, the Defendants rely, inter alia, on the following findings made by Bryan J in the Genworth Proceedings:

(1) "contrary to the parties' expectations after completion of the SPA, the Relevant Distributor Agreement was **not** entered into with Santander" (para 21 liability judgment)

(2) "This obligation [to pay on demand 90% of all Relevant Distributor Mis-selling Losses] was expressed to endure until the date on which FICL/FACL entered into the "Relevant Distributor Agreement" with Santander … In the event, and as already noted, that never took place." (para 52 of the liability judgment)

(3) "… contrary to the parties expectations after completion of the SPA the relevant distributor agreement was **not** entered into Santander" (para 25 quantum judgement).

42. Mr Zellick accepted that Santander were not the subject of a *res judicata* as a consequence of the decisions of Bryan J in his liability and quantum judgments. In Mr Zellick's submission this was nothing to the point since the issue is whether the Claimants' Settlement Agreement claim is an abuse of the process in light of the Claimants' position in the Genworth proceedings that the Relevant Distributor Agreement referred to in clause 10.8 had not been executed. Facing up to the point that the settlement agreements pleaded by the Claimants were not substantially in the agreed form as contemplated by clause 10.8, Mr Zellick contended that if it had been revealed in the Genworth Proceedings, as it should have been, that the Claimants were claiming that a settlement agreement had been entered into by Genworth and Santander, Genworth would have argued that the "agreed form" requirement was one of form and not substance. Secondly, the contention that an oral settlement agreement had been entered into would have been there and then knocked on the head for the reasons the Defendants relied on in moving to strike out the pleaded Settlement Agreement Claim.

43. The Defendants drew to the Court's attention the decision of the *Court of Appeal in LA Micro Group (UK) Ltd v LA Micro Group Inc* [2021] EWCA Civ 1429 and on which Mr Timothy Lau, junior counsel for the Claimants provided me with a helpful Note. In

this case the Court of Appeal analysed the situation where a party in later proceedings adopted a different stance than that taken in earlier related proceedings in terms of estoppel by conduct. It was there held that a party could be estopped from taking a position in later proceedings that was contrary to the position he or she had adopted in earlier proceedings but this form of estoppel by conduct was one which is approached by means of a broad, merits-based assessment, and is not constrained by strict rules (as, for example, issue estoppel). The matters to be considered include, but are not limited to, those enumerated by Justice Ginsburg in *New Hampshire v Maine* 532 US 742 (2001)[3] it being material to ask the question whether it is apparent that the earlier decision was obtained on the footing of, or because of, the stance taken by the party in the earlier proceedings. Absent that factor, whilst the change of position may affect the credibility of the party or the witness concerned, there will not be an impression that one or other court was misled into giving its decision, so that the administration of justice risks being brought into disrepute.

44. The Claimants' case in opposition to the Defendants' abuse of process contention was succinctly put by Mr Green. It was plain, he submitted, that on the wording of clause 10.8 it was only when the First Termination Date was reached when the Relevant Target Group Company and the Relevant Distributor entered into the Relevant Distributor Agreement that the Purchaser's covenant would cease to operate. And for this to occur the Relevant Distributor Agreement was required to be substantially in the "agreed form" initialled for the purposes of identification by the Seller's Solicitors and the Purchaser's Solicitors, which contemplated both parties signing the agreement. None of the three alternative Settlement Agreements pleaded by the Claimants – (i) the oral agreement on 4 June 2015; (ii) the agreement reached during negotiations down to the delivery of the agreement signed by the Claimants for execution by the Defendants; and (iii) the agreement signed by the Claimants and sent for execution which was never signed by the Defendants, satisfied the definition of the "Relevant Distributor Agreement" referred to in clause 10.8 since none of the alleged agreements was substantially in the agreed form. This being the case, it was common ground between Genworth and AXA in the Genworth Proceedings that the First Termination Date in clause 10.8 had not arisen, in consequence of which the clause remained an operative covenant.

45. In Mr Green's submission, it followed that the common ground adopted by Genworth and AXA was not inconsistent with the Claimants' pleaded Settlement Agreement Claim. If the latter claim succeeded, the Claimants would have the choice of continuing to receive payment under Clause 10.8 or receiving payment under whichever of the pleaded settlement agreements was found by the Court to have been entered into.

46. In my judgment, the Claimants' Settlement Agreement Claim is not an abuse of the process for the reasons advanced by Mr Green. There is no relevant or sufficient inconsistency between the case advanced before Bryan J as to the non-execution of a

[3] "First, a party's later position must be clearly inconsistent with its earlier position. Secondly, the court may enquire whether the party has succeeded in persuading a court to accept the party's earlier position, so that judicial acceptance of an inconsistent position in later proceedings would create the perception that either the first or the second court was misled. Thirdly, the court may ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped".

Relevant Distributor Agreement and the Claimants' pleaded Settlement Agreement for the latter to be found to be an abuse of process.

47. It follows that the Defendants' application to strike out the Settlement Agreement Claim is dismissed.

48. I turn to consider the Defendants' case that the Claimants' indemnity claim against SISUK under clause 12 of the Agency Agreement and by virtue of the Novation Agreement dated 22 January 2010 should be struck out.

49. The Agency Agreement was between FICL/FACL (the "Insurers") and SCL (then named GE Capital Bank Limited ("GECB")).

50. Clause 12 of the Agency Agreement provides:

> 12.1 Subject to GE-CB complying with their duties under this agreement, the Insurers will indemnify GE-CB against any liability which they may incur by reason only of being held out as the Insurers agents.
>
> 12.2. Subject to the Insurer complying with their duties under this agreement, GE-CB will indemnify the Insurer against any liability which they may incur by reason of any act or omission by GE-CB (including negligence) while performing their duties under this agreement.

51. The Novation Agreement was made between FICL/FACL, SCL and SISUK. It provides in relevant part:

> Whereas:
>
> …
>
> (A) …
>
> (B) …
>
> (C) The new structure of SCL's general insurance business requires the transfer of its general insurance contracts to SISUK. Since SISUK is not authorised as an insurance intermediary in Ireland, it can only transfer insurance contracts that cover insurance business in the UK.
>
> (D) The parties to this Novation Agreement have therefore agreed to split the Insurance Agreement into two: a contract for Ireland between Genworth and SCL and a contract for the UK between Genworth and SISUK. To give effect to this split, the parties have agreed to partially novate to SISUK those parts of the Insurance Agreement that relate to insurance business in the UK (the "UK Agreement").

(E) The parts of the Insurance Agreement that relate to insurance business in Ireland remain with SCL (the "Ireland Agreement").

NOVATION OF UK AGREEMENT

The parties to this Novation Agreement agree that as from 1 January 2010 (the "Effective Date"):

1.1.1 SISUK should have the benefit of all rights under the UK Agreement as If SISUK had executed the UK Agreement instead of SCL;

1.1.2 SISUK shall perform all of the obligations of SCL under the UK Agreement; and

1.1.3 Genworth accepts the assumption of liability by SISUK in place of SCL in respect of the UK Agreement.

1.2 SISUK and Genworth hereby acknowledge and agree that each shall have no liability to the other in respect of any duties, obligations, causes of action, claims or liabilities whatsoever pursuant to or in connection with the UK Agreement arising prior to the Effective Date or in connection with the Ireland agreement.

1.3 SCL and Genworth hereby acknowledge and agree that each have no liability to the other in respect of any duties, obligations, cause of action, claims and liabilities whatsoever pursuant to or in connection with the UK Agreement arising after the Effective Date.

1.4 This Novation Agreement shall be without prejudice to any accrued rights of SCL or Genworth arising prior to the Effective Date or under the Ireland Agreement.

52. The Defendants submit that on its true construction the Novation Agreement did not have the effect of making SISUK liable under clause 12.2 against any liability incurred by the Claimants by reason of acts or omissions by GECB (now SCL) before the effective date of the Novation Agreement, nor is any such contention arguable. This conclusion, argued Mr Zellick, follows from: (i) all of the liabilities against which the Claimants seek to be indemnified in these proceedings are alleged to have been incurred by reason of acts or omissions of GECB **before** the effective date of 1 January 2010; (ii) clause 1.2 of the Novation Agreement provides that each of SISUK and SCL agree that neither shall have liability to the other in respect of matters arising **prior to** the Effective Date; (iii) the "duties under this Agreement" referred to in clause 12.1 of the Agency Agreement are those that were in being at the time of the sales in question, which all took place before 2005. Thus, the obvious meaning and intention of the Novation Agreement was prospectively to split the Agency Agreement into the "UK Agreement" and the "Ireland Agreement" with effect from 1 January 2010, but not to make any provision about the consequences of acts or omissions that had already

occurred before that date. Any liability of SCL in respect of such matters would stay with SCL and there is no basis for any transfer of such liability to SISUK. It follows that SISUK has no liability under clause 12.2 in respect of any of those losses.

53. Replying to the Defendants' case for striking out the clause 12.2 indemnity claim, Mr Green began by seeking to show that even after the inception of the Novation Agreement, it was SISUK which made all the payments in respect of mis-selling redress for the pre-January 2005 period until it ceased making such payments in 2017. He also pointed out that in the drafts of the proposed settlement agreement that passed between the parties after the 4 June 2015 meeting, SISUK was named as the paying party.

54. In my judgment, none of the foregoing matters referred to by Mr Green constitutes relevant background for the construction of clause 12.2 and the Novation Agreement.

55. Mr Green then embarked on his proposed construction of the Novation Agreement. He submitted that given that this agreement was brought about by an internal Santander business restructuring, the agreement objectively was not intended to extinguish rights that had either arisen or would otherwise arise but for the agreement as between Santander and Genworth. As regards the Irish business, written either before or after the Novation Agreement, remains the responsibility of SCL. As regards UK business, that is now the responsibility of SISUK, save in respect of accrued rights which remain with SCL. So SISUK is only assuming liabilities for UK business accruing after the Effective Date and the Novation Agreement is allocating liabilities relating to UK business on the basis of when the liabilities arise, hence the repeated use of the word "liability" in clauses 1.1.3, 1.2, 1.3 and 2.

56. In Mr Green's submission, clause 1.3 of the Novation Agreement makes it clear that SCL shall have no liability in respect of UK business after the effective date. But if a UK policy was mis-sold by SCL in 2000 but gives rise to a claim or liability after the effective date, whilst such claim or liability does not lie with SCL, it lies with SISUK, for otherwise there is a lacuna in the Novation Agreement that cannot have been intended.

57. Mr Green then turned to the question of when does the liability accrue under clause 12.2 of the Agency Agreement. He contended that the indemnity in clause 12.2 is triggered at the time the relevant liability crystallises i.e when SUK or FOS determine that FICL/FACL must pay under the DISP regime, rather than at the time the relevant acts or omissions giving rise to liability occurred. In aid of this submission Mr Green cited *Telfair Shipping Corporation v Inersea Carriers SA* [1985] 1 WLR 553 at 566G (Neill J) and *Zurich Insurance Plc v Nightscene Limited* [2019] EWHC 352 (QB) at [28] – [29] (May J), where it was held that liability under an indemnity in general terms normally arises when the liability has been "established and ascertained". Mr Green also contended that the "acts or omissions" referred to in clause 12.2 may occur over a long period of time, particularly if there is a continuing course of negligent conduct over a number of years, and to construe the indemnity as arising as soon as those negligent acts or omissions took place would create uncertainty. Better therefore to construe the indemnity as being triggered when the negligence was "established and ascertained".

58. Replying to Mr Green's "lacuna" argument, Mr Zellick submitted that it was clear that where it provides in clause 1.2 of the Novation Agreement that there is no liability for

duties and obligations prior to 2010, that must mean that there can be no liability for anything to do with duties and obligations before that prior period and that must operate as being an exclusion of SISUK's liability. Clause 1.3 of the Novation Agreement is simply the mirror of this.

59. In my judgment, the issue of the meaning and effect of clauses 1.1.3, 1.2, 1.3 and 2 of the Novation Agreement and clause 12.2 of the Agency Agreement does not involve a short question of construction as Mr Zellick had submitted. On the contrary, I find the question of the correct construction of these provisions, viewed in the context of the agreements in which they are contained and against the background of the parties' historic relationship and the widespread mis-selling of PPI policies by SCL, to be a difficult one. Both sides have advanced arguable submissions on the construction of the relevant clauses in the Novation Agreement and on clause 12.2 of the Agency Agreement. In these circumstances, keeping well in mind that the Court is dealing with a strike out application not a preliminary issue, I have come to the conclusion that the Indemnity Claim should not be struck out but should be determined at trial.

60. I now deal with the application to strike out the Claimants' claim for contribution from SCL under section 1 (1) of the Civil Liability (Contribution) Act 1978 ("the 1978 Act"). The provisions of that Act that are relevant in these proceedings are:

> 1(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).
>
> (4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.
>
> (5) A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought.
>
> (6) References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the

> rules of private international law) by reference to the law of a country outside England and Wales.
>
> 2 (1) Subject to subsection (3) below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.

61. The Claimants' contribution claim against SCL is pleaded in paragraphs 88 – 95 POC. In paragraph 89, it is pleaded that the Claimants were liable to complainants for compensation paid to them under the provisions of the Dispute Resolution: Complaints Sourcebook (DISP) or pursuant to a FOS determination or following a bona fide settlement of their complaint. Seeking to introduce by amendment the words "represented by", the Claimants aver that the relevant *damage* for the contribution is represented by such compensation, which comprised for any given complaint, that complainant's PPI premium, costs (that is any consequential loss as a result of the premiums paid, for example, additional charges, administration costs or lost profit), and interest (representing the lost time value of money to the complainants by reference to the DISP Sourcebook).

62. In paragraph 90, it is pleaded that SCL was liable to complainants for the same damage as described in paragraph 89 as a result of the following causes of action:

    (1) **In negligence** insofar as any complaint concerned any statement by SCL (or its agents) that amounted to advice to a complainant to buy a PPI product (whether or not there arose a duty of care to take reasonable skill and care in giving such advice) and such advice was inappropriate or otherwise negligent;

    (2) **In negligent misstatement** and/or misrepresentation including by omissions, insofar as any complaint concerned inaccurate or incomplete information provided by SCL (or its agents) in relation to the PPI product.

    (3) **For an order under section 140B of the Consumer Credit Act 1974** to remedy an unfair relationship arising under section 140A of that Act.

63. In paragraph 91, the Claimants plead that (i) it appears all of the relevant complaints have been upheld on the basis of a reason relating to SCL's conduct (or the conduct of its agents) in mis-selling the relevant product at the point of sale; (ii) it was the persistent custom and practice of SCL at all material times when selling PPI products as agent for the Claimants, to engage in conduct after January 2005 identified by the FSA in the Final Notice dated 30 January 2007 requiring SCL to pay a penalty of £600,000 in relation to breaches of the "Principles"; and such conduct is materially identical to the conduct forming the basis of the complaints in respect of which the Claimants have paid compensation.

64. In paragraph 92, the Claimants seek an assessment of the contribution that is just and equitable having regard to SCL's responsibility for the damage and plead two matters that in particular will be relied on.

65. In paragraph 93, the Claimants plead their case on the responsibility and fault of SCL including:

> (d) Further, and in any event, no steps taken by the Claimants caused the acts or omissions that were the basis for the complaints. As particularised above, complaints were based on acts and omissions of SCL in relation to the sales standards required at the point of sale.
>
> (e) Accordingly, by mis-selling the PPI products, SCL caused the complainants to enter into the relevant transactions, complaints in respect of which have been upheld. SCL had sole responsibility for these acts and omissions

66. Focusing on the words in s. 1 (6), "[r]eferences in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage," Mr Zellick submitted that the liability pleaded to have been incurred by the Claimants (FICL/FACL) and the liability that SCL is alleged to have for the same damage both arise under the pre-14 January 2005 regulatory regime and thus do not arise or potentially arise in court proceedings in England and Wales. It follows that the Claimants' contribution claim is bound to fail. The compensation that the Claimants paid to complainants were either payments made to and accepted by policyholders whose complaints had been upheld by the Claimants, acting through their delegated agent, SUK, or they were made pursuant to a FOS determination made by reference to what was, in the opinion of the Ombudsman, fair and reasonable in all the circumstances of the case in accordance with s. 228 (2) of the Financial Services and Markets Act 2000 ("FSMA"). In neither case were the compensation payments the result of any legal liability.

67. Adverting to the reference to payments made "following a bona fide settlement of [a] complaint", Mr Zellick contended that these words add nothing to his basic submission. He argued that a complaint is "settled" if the complainant accepts an offer of redress which is made, either following the upholding of the complaint by the Claimants or following a determination by the FOS. In neither case is the "settlement" in respect of an alleged legal liability of the Claimants to the policyholder.

68. Mr Green began his submissions in reply with the robust declaration that the Defendants' argument "is simply wrong at the level of axiom." He went on to contend, firstly, that the compensation the Claimants had had to pay PPI policyholders whose complaints had been upheld by the Claimants or FOS in respect of policies sold prior to 14 January 2005 represents the relevant "damage" for the purposes of s. 1 of the 1978 Act, that damage being what the complainants suffered by reason of having purchased PPI policies and, secondly, that the Claimants were "liable" for such damage for the purposes of that section under DISP Appendix 3 (see especially paras 3.7.2 and 3.7.3) and DISP 1.4.1 R and DISP 1.4.4R, the breach of the latter two provisions giving a complainant a right of action under s. 138D of FSMA to sue the Claimants for compensation determined by the Claimants or FOS.

69. Paragraphs 3.7.2 and 3.7.3 of DISP Appendix 3 provide:

> 3.7.2
>
> Where the firm concludes that the complainant would not have bought the payment protection contract he bought, and the firm is not using the alternative approach to redress … or other appropriate redress…… The firm should, as far as practicable, put the complainant in the position he would have been if he had not bought any payment protection contract.
>
> 3.7.3
>
> In such cases the firm should pay to the complainant a sum equal to the total amount paid by the complainant in respect of the payment protection contract including historic interest where relevant (plus simple interest on that amount). If the complainant has received any rebate, for example if the customer cancelled a single premium payment protection contract before it ran full term and received a refund, the firm may deduct the value of this rebate from the amount otherwise payable to the complainant.

70. DISP 1.4.1R requires the regulated entity to: (1) investigate complaints competently, diligently and impartially; (2) to assess fairly, consistently and promptly the complaint and what remedial action or redress may be appropriate; (3) to offer redress if it decides this is appropriate; (4) to explain its assessment in a way that is fair, clear and not misleading; and (5) to comply promptly with any offer of remedial action or redress accepted by the complainant.

71. DISP 1.4.4R requires the regulated entity to co-operate with the FOS "and comply promptly with any settlements or awards made by it."

72. Section 138D (2) & (3) provide:

> (2) A contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions of statutory duty.
>
> (3) If rules made by the FCA so provide, subsection (2) does not apply to a contravention of a specified provision of the rules.

73. According to DISP Schedule 5.2 G, contravention of all the DISP rules is actionable by a person who suffers loss as a result of the contravention, save for DISP 1.11.13R and DISP 1.11.4R.

74. In addition, Mr Green relied on Schedule 17 of FSMA (dealing with the Ombudsman Scheme) which provides in paragraph 16 that "money awards" made by the Ombudsman (and registered in accordance with scheme rules) may be enforced by the complainant as if under a Court Order. Mr Green also contended, citing *Clark v In Focus Asset Management* [2014] EWCA Civ 118, that a FOS award gives rise to a *res judicata* so that, once the award is accepted by a complainant, the complainant is then

precluded from issuing legal proceedings. The conclusions that Mr Green invited the Court to draw from the submissions related in paragraphs 69 – 74 above were:

(1) A FOS award imposes a regulatory obligation on the regulated entity; creates a debt on which the complainant can sue; gives rise to a *res judicata*; and may also be enforced by the complainant as if it was a court order. It follows that AXA is self-evidently liable to pay a FOS determination which is a "liability" for the purposes of section 1 (1) of the 1978 Act.

(2) A bona fide settlement of a PPI complaint also creates a "liability" of the Claimants for the purposes of section 1 (1) & (4) of the 1978 Act because the determination that the complainant is entitled to redress by reason of PPI mis-selling is made pursuant to AXA's obligations under DISP, particularly DISP 1.4.1R, which requires AXA to "comply promptly with any offer of remedial action or redress accepted by the complainant" giving rise to the right of a complainant to bring an action against AXA under s. 138D for non-payment of such a bona fide settlement sum.

75. Replying to Mr Green's submissions, Mr Zellick reminded the Court that nowhere in paragraphs 88 – 95 POC is there any reference to paragraphs 3.7.2 and 3.7.3 of DISP Appendix 3; or DISP 1.4.1R; or DISP 1.4.4R; or s. 138D of FSMA. He also argued that the cause of action contemplated by s. 138D FSMA is not for mis-selling, rather it is for failure to comply with regulatory requirements for dealing with complaints about the mis-selling of PPI. Thus, if FICL/FACL failed to comply with claims handling rules in respect of PPI complaints made before 14 January 2005, the Claimants could be sued for breach of statutory duty which would not require pleading, proving, establishing or having as its basis any form of mis-selling. Instead, the claim would be based on a breach of statutory duty in handling a PPI mis-selling claim and such a claim is not capable of being the subject of s. 1 of the 1978 Act. The 1978 Act requires that there be the same damage and the damage in the context of the postulated breach of duty claim is not damage which Santander contributed to or will have contributed to.

76. I can see some force in Mr Green's argument that focused on: (A) the entitlement of a PPI complainant under s. 138D (2) FSMA to sue the regulated entity in court proceedings for breach: (i) of DISP 1.4.1R if the regulated entity does not comply promptly with any offer of remedial action or redress accepted by the complainant for the compensation agreed by the regulated entity or the FOS; (ii) for breach of DISP 1.4.4R for failing to comply promptly with any settlements or awards made by it, by which in both proceedings the Claimants would have to pay a sum that compensated the complainant for the losses he or she suffered in consequence of having been mis-sold a PPI policy; and (B) the Claimants' allegation that Santander, by reason of mis-selling the PPI policies in question, were jointly liable for the losses for which the PPI complainants would be compensated by suing the Claimants in the court proceedings.

77. On the other hand, I think that Mr Green overstated somewhat the position when he submitted that in the light of *Clark v In Focus Asset Management*, a FOS award gives rise to a *res judicata* so that, once the award is accepted by a complainant, the complainant is then precluded from issuing legal proceedings. I say this because as I read paragraph 77 of Arden JA's judgment in that case (with which the other members of the court were in agreement) it is only where the ombudsman decides a question

posed by facts constituting a cause of action that a res judicata will arise where the complainant accepts the award.

78. However, notwithstanding my views of Mr Green's aforementioned submissions, I am of the firm opinion that the Claimants' currently pleaded contribution claim should be struck out. I say this because in light of the wording of s. 1 (1) and (6) of the 1978 Act, it was incumbent on the Claimants when pleading their contribution claim to plead the basis of their case that they were liable for damage that could be established in an action brought against them in England and Wales and that SCL was liable in respect of the same damage, such liability having been established or being capable of being established in an action brought against SCL in court proceedings in England and Wales by the person who suffered the damage. This the Claimants have signally failed to do and, accordingly, as I have said, paragraphs 88 to 95 POC must be struck out. However, I give the Claimants leave to replead their contribution claim spelling out clearly their case that the claim is within section 1 of the 1978 Act. Whether the repleaded claim cuts the mustard if the Defendants seek to strike it out will be for another judge of the Commercial Court to decide.

79. I now turn to the Defendants' application to strike out the references in the POC to the Final Notice issued by the FSA to SCL on 30 January 2007 ("the Final Notice"). Contained in this notice were numerous findings of deficient sales practices by SCL in respect of the sale of PPI policies in the period after 14 January 2005. In paragraphs 36 – 50 POC, the Claimants plead their case of SCL's mis-selling of PPI. The issue of the Final Notice is pleaded in paragraph 37 and in paragraph 38 it is pleaded that the facts and matters relied upon in the Final Notice were agreed as between the FSA and SCL and that the Claimants will rely upon the Final Notice and these agreed facts and matters to their full extent, and in particular upon the findings set out later in the pleading, in establishing their case that SCL mis-sold PPI policies after 14 January 2005. In addition, the Claimants plead in paragraph 49 that it is to be inferred from those findings that at all material times prior to this date, SCL engaged in the mis-selling of PPI policies in breach of the ABI Code and/or the GISC Code.

80. In moving to strike out the pleaded reliance on the numerous findings set out in the Final Notice, the Defendants cited the well-known case of *Hollington v Hewthorn* [1943] 1 KB 587 and Christopher Clarke LJ's restatement of the rule in that case in *Rogers v Hoyle* [2014] EWCA Civ 257, [39] [40]:

> As the judge rightly recognised the foundation on which the rule must now rest is that findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it ("the trial judge"), and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial judge has heard and in reliance on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not

> one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard. [39]
>
> In essence, as the judge rightly said, the foundation of the rule must now be the preservation of the fairness of a trial in which the decision is entrusted to the trial judge alone. [40]

81. In support of his submission that the Final Report was inadmissible pursuant to the re-stated rule in *Hollington v Hewthorn*, Mr Zellick cited the decision of the Court of Appeal in *Secretary of State of Business, Enterprise & Regulatory Reform v Aaron* [2008] EWCA Civ 1146 where the question was whether an FSA investigatory report was admissible in director disqualification proceedings. There, as related in paragraph 19 of the judgment of Thomas LJ, it was common ground that the findings of fact and the conclusions in such an FSA report on the conduct of individuals are ordinarily inadmissible on the basis that they constitute findings in other proceedings and are excluded under the rule in *Hollington v Hewthorn* [1943] 1 KB 587. It was only because there was a special exception to the rule in Directors Disqualification Proceedings that the FSA report was held to be admissible.

82. In *Rogers v Hoyle*, the report in question was an AAIB report produced by experienced experts in the causes of aircraft accidents and it was held that the findings of fact and the opinions expressed in the report were admissible by reason of the expertise of the report's authors. In Mr Zellick's submission, the Final Report was not an expert report comparable to the AAIB report in Rogers v Hoyle but was a determination plainly covered by the *Hollington* rule.

83. The Claimants' reply to the Defendants' case on the Final Report was argued by Mr Green's junior, Mr Fraser Campbell. Mr Campbell submitted that Mr Zellick had erred in stating that the Claimants relied solely on the Final Report as conclusive evidence to prove the Claimants' allegations that SCL had mis-sold PPI policies in the pre-14 January 2005 period. Instead, the Final Report will not be the only evidence that the Claimants will rely on to support the mis-selling case they advance against SCL. In particular, the Claimants will also rely on the complaints files held by SUK who handled the PPI complaints as the Claimants' delegate. And in answer to the point made in the Defendants' skeleton that the Final Report is concerned with mis-selling by SCL after 14 January 2005, whereas the Claimants' mis-selling allegations relate to the period prior to this date, Mr Campbell submitted that there were references in the report to SCL's selling practices in this prior period as well as in the subsequent period.

84. In *Rogers v Hoyle*, Christopher Clarke LJ said in paragraph 34 of his judgment:

> The judge (Leggatt J at first instance) treated the rule as applicable to judicial findings, being, for this purpose, "*an opinion of a court or other tribunal whose responsibility it is to reach conclusions based solely on the evidence before it*". If that definition was intended to exclude a tribunal whose remit is to carry out its own investigation it is too narrow.

85. Founding on this observation, Mr Campbell submitted that the Final Report did not consist of "judicial findings" and was accordingly outside the *Hollington v Hewthorn*

rule. In making this submission he argued that the Final Report was the product of a settlement by the executive branch of the FCA with SCL reached on the basis that SCL would be fined and was therefore not the outcome of a disputed process.

86. In reply, Mr Zellick submitted that the Final Report was manifestly a decision maker's determination as to the mis-selling of PPI by SCL whose conclusions were inadmissible since the Claimants' allegations of PPI mis-selling by SCL in the period prior to 14 January 2005 were to be tried by the trial judge on the evidence before him who was not to be distracted or influenced by the findings contained in the Final Report.

87. In my judgment, the Final Report does not constitute admissible expert evidence and I accept Mr Zellick's submission that it is a decision maker's determination and within the *Hollington v Hewthorn* rule. It therefore cannot be adduced as evidence in support of the Claimants' pleaded causes of action against the Defendants founded on the mis-selling of PPI policies. I deal below with the question whether the Claimants' proposed amendments to paragraphs 38, 39, 49 and 50 POC and the introduction of the new paragraph 49A are sufficient to save those parts of the current POC which plead reliance on the Final Report from being struck out.

*The Claimants' application for permission to amend the POC*

88. In my judgment, the proposed amendments to paragraphs 38, 39, 49 and 50 POC and the introduction of a new paragraph 49A cannot stand with my finding that the Final Report is inadmissible as evidence to prove the allegations against SCL that it mis-sold PPI policies during the relevant period. That said, it remains open to the Claimants to produce a replacement set of amendments which do not rely expressly or by implication on findings in the Final Report as proof of their allegations of SCL's mis-selling of PPI. Thus, I think it would be open to the Claimants to refer to the existence of the Final Report and then to plead the text of such findings in that report as they choose as particulars of the mis-selling they allege against the Defendants in the period before 14 January 2005. It will be a matter for another judge to decide if any replacement amended pleading conforms to my finding that the Final Report is inadmissible if such a pleading is challenged by the Defendants.

*Conclusions*

(1) The Defendants' applications to strike out the Settlement Agreement Claim and the Indemnity Claim and for an order that SISUK be dismissed from the proceedings are dismissed.

(2) The Defendants' application to strike out the Contribution Claim is allowed with liberty to the Claimants to replead this claim spelling out clearly their case that the claim is within section 1 of the 1978 Act

(3) The Final Report is inadmissible and cannot be relied on to prove the allegations of PPI mis-selling made by the Claimants against SCL.

(4) The Claimants' application to amend paragraphs 38 to 50 POC is refused and those paragraphs will be struck out unless the Claimants amend them so as not to rely expressly or by implication on findings in the Final Report as proof of their allegations of SCL's mis-selling of PPI.

(5) The parties must exchange and serve on the court their submissions on costs within 7 days of the issuance of this judgment and must exchange and serve on the court their reply costs submissions within 7 days thereafter.