Neutral Citation Number: [2018] EWHC 304 (Comm)

Case No: FL-2017-000003

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

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

Date: 20/02/2018

Before :

MR JUSTICE POPPLEWELL

- -

Between :

(1) CCUK FINANCE LIMITED **(2) CIAC CORPORATION**	**Claimants**
- and -	
BARCLAYS BANK PLC	**Defendant**

- -
- -

Stephen Cogley QC and Turlough Stone (instructed by **Gateley PLC**) for the **Claimants**
Sonia Tolaney and Emma Jones (instructed by **Hogan Lovells International LLP**) for the **Defendant**

Hearing dates: 12 & 13 February 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE POPPLEWELL

The Honourable Mr Justice Popplewell :

Introduction

1. I shall refer to the Claimants as CompuCredit and the Defendant as Barclays.

2. CompuCredit's application arises out of a Sale and Purchase Agreement dated 4 April 2007 ("the SPA") under which Barclays sold to CompuCredit a portfolio of Monument-branded credit card accounts and associated assets at a substantial discount to face value. The credit card accounts formed part of a wider portfolio of accounts acquired by Barclays from Providian in 2002, some tranches of which were not transferred to CompuCredit pursuant to the SPA but retained by Barclays.

3. According to CompuCredit cardholders on approximately 40% of the accounts within the transferred portfolio had been sold a product known as a Payment Break Plan ("PBP"). In broad terms, PBP enabled a customer to freeze his/her account for a period of time in certain circumstances, during which period the customer was not required to make minimum monthly payments other than payments to clear any outstanding arrears, and did not incur any interest, charges or fees. CompuCredit allege that Barclays systemically mis-sold PBP in relation to accounts within the transferred portfolio. At the time of the SPA it was envisaged that CompuCredit might thereafter itself sell PBP to cardholders on the transferred portfolio who did not have it or to new cardholders, but in the event they did not do so. Accordingly any claims by cardholders for PBP mis-selling arise out of Barclays selling the product prior to the transfer of the portfolio under the SPA.

4. Clause 11.2 of the SPA provides in relevant part:

> "……[Barclays] shall remain liable for and shall pay, discharge and perform in accordance with their respective terms when due all Retained Liabilities and shall indemnify and hold [CompuCredit]…harmless against any Losses relating to any Retained Liabilities…."

5. The clause therefore contains two forms of potential protection for CompuCredit in relation to Retained Liabilities, one being the obligation on Barclays to "pay, discharge and perform" them ("the Performance Obligation"), and the other being to indemnify and hold CompuCredit harmless against Losses (as defined) in relation to them ("the Indemnity"). It is common ground that to the extent that PBP was mis-sold by Barclays in relation to the transferred portfolio, the liability of CompuCredit to compensate cardholders constitutes a Retained Liability such as to engage the Indemnity. There is a dispute, to which I shall return, as to whether it engages the Performance Obligation.

6. On 19 July 2011 Gateley PLC wrote to Barclays on behalf of CompuCredit drawing attention to the number of PBP mis-selling complaints received by CompuCredit and seeking to reach agreement on the way forward as to how the complaints were to be dealt with. The two alternatives proposed were either that Barclays assume responsibility for dealing with the complaints or that CompuCredit would handle them and Barclays would indemnify CompuCredit in accordance with the terms of the SPA (the letter refers to clause 19.3, but CompuCredit's case is that the indemnity entitlement arises under clause 11.2). It is common ground that the parties agreed to

adopt the latter process with CompuCredit dealing directly with the cardholders; and over the subsequent years there was a good deal of mutual cooperation and exchange of information between the parties at an operational level as a result of which CompuCredit compensated cardholders for mis-selling PBP products in relation to the transferred portfolio and presented invoices to Barclays for sums so paid plus an agreed handling fee, which Barclays then paid. The sums paid by Barclays were in excess of £350 million.

7. Barclays claims that it made the payments on the basis and in the belief that the sums invoiced fell within the scope of the Indemnity. Barclays says that it accepts, and has always accepted, that where customers made valid complaints of PBP mis-selling taking place prior to the transfer of the portfolio, thereby requiring CompuCredit to remediate them, Barclays is and was liable to reimburse CompuCredit for the sums paid out in respect of valid complaints under the Indemnity. Barclays also accepts that complaints could either be made by customers of their own accord or, from late 2014, in response to a "write and invite" remediation exercise by which CompuCredit wrote to customers and invited them to seek compensation if they considered they had been mis-sold PBP. But in July 2017, Barclays says that it identified posts on consumer websites indicating that customers had received unsolicited payments from CompuCredit, under the guise of PBP redress, in circumstances where customers had not made any complaint of PBP mis-selling. It claims that such payments would plainly be unjustified and outside the scope of the Indemnity. Barclays suspended payment of CompuCredit's invoices in August 2017 pending its concerns being addressed. It says that those concerns have not been addressed, but have been exacerbated by examples of payments made by CompuCredit and reimbursed by Barclays over the years where there was no valid complaint or no justification for payment in the amounts paid. Barclays has not paid the subsequent invoices. The unpaid invoices, which are for August, September, October and November 2017 are said to amount to about £44 million.

8. Barclays says that the relevant issue in these proceedings is whether CompuCredit have paid cardholders and have recovered, and are seeking to continue to recover from Barclays, sums which do not fall within the scope of the Indemnity, as for example where the invoices seek reimbursement of sums paid to customers voluntarily without any complaint of PBP mis-selling at all, or in response to a complaint which is not well founded. Barclays has advanced a counterclaim for unjust enrichment in respect of such part of the paid invoices, presently unquantified, as it says were paid in respect of amounts which did not fall within the scope of the Indemnity.

The Application and Relief Sought

9. As formulated by the conclusion of the hearing, the principal relief sought by CompuCredit on the current application can be described in general terms as being (1) summary judgment for an order that Barclays now take over the remediation exercise pursuant to the Performance Obligation (described now as the primary relief sought); alternatively (2) a declaration that Barclays is liable to continue to indemnify CompuCredit under the Indemnity provided CompuCredit continues the remediation exercise in accordance with its current and past practice; and in either event (3) summary judgment for the outstanding invoices; and (4) summary dismissal of Barclays' counterclaim by way of strike out or summary judgment. However this

general description is insufficient because the precise form of relief is of importance to consideration of the applications and I must set it out in detail.

10. By its application notice issued on 20 October 2017, CompuCredit sought the following (among other) relief:

    i) summary judgment for a declaration that Barclays is liable to indemnify CompuCredit under the terms of the SPA in relation to the invoices raised by CompuCredit on 1 August 2017 and 1 September 2017; further or alternatively, summary judgment on CompuCredit's claim for damages for breach of contract and/or an indemnity in respect of Barclays' failure to pay the invoices raised by CompuCredit on 1 August 2017, 1 September 2017 and 2 October 2017;

    ii) summary judgment for a declaration that Barclays is and remains liable to indemnify CompuCredit in respect of any remediation payments made by CompuCredit in accordance with the Agreed Practice adopted by CompuCredit hitherto in the Remediation Exercise, using the Flowchart and Calculator (as described in the Reply and Defence to Counterclaim);

    iii) further or alternatively, summary judgment for an order that Barclays do remediate the remainder of the Portfolio as Retained Liabilities under clause 11.2 of the SPA and all necessary declarations in relation thereto; and

    iv) an order that Barclays' counterclaim be struck out pursuant to CPR rule 3.4 as disclosing no reasonable cause of action or an abuse of the court's process, alternatively summary judgment in CompuCredit's favour pursuant to CPR Part 24 on the Counterclaim with an order dismissing it.

11. The primary relief sought at that stage was therefore under the Indemnity (head (ii) above) rather than the Performance Obligation (head (iii) above). The expression "Agreed Practice" which is referred to in head (ii) is used extensively in the pleadings and is an important aspect of the current applications. I shall return to the detail of what is alleged, but in essence it is that a consensual procedure for CompuCredit remediating PBP mis-selling complaints was agreed by Barclays as the basis on which Barclays would indemnify CompuCredit for the payments made to cardholders, with the legal effect that Barclays was obliged so to indemnify it if the procedure was followed, and remains obliged to indemnify it in the future if the procedure continues to be followed, even if an entitlement would not otherwise arise under the terms of the Indemnity.

12. In their skeleton argument served for the hearing of the applications, counsel for CompuCredit indicated that the primary relief of the two alternatives in (ii) and (iii) was now that sought by (iii) i.e. an order that Barclays take over the remediation process under the Performance Obligation.

13. A new draft order as to the relief being sought was then served, after service of that skeleton but before the hearing ("draft order version 2"). In draft order version 2:

    i) What was now being put forward as the primary relief which had been head (iii) was reformulated in the following terms: "[a declaration that] the

Defendant is liable and obliged to continue from the date hereof the pro-active remediation exercise that the Claimant is currently engaged in, and then continue and carry out a remediation programme and in particular, but without limiting the foregoing, to proactively contact all individuals who have been or currently are within the group of Monument cardholders whose credit card agreements were the subject matter of the SPA dated 4th April 2007 or subsequently acquired by the Claimant for the purposes of remediating them and that such remediation exercise:

a) shall comply with all regulatory obligations and requirements of the FCA and without limiting the foregoing DISP1.3.6G of the FCA Handbook; and

b) shall include any cardholders who have contacted the Claimant in relation to PBP and who are then dealt with in accordance with DISP1.7.1R."

ii) The alternative relief which had been head (ii) was reformulated in the following terms: "[a declaration that] the Defendant is liable and obliged to indemnify the Claimant in relation to all and any payment it makes to any Monument cardholder whose credit card agreement was the subject matter of the SPA dated 4th April 2007, providing such payment is made pursuant to the remediation exercise currently being carried out by the Claimant or any variation thereof for so long as the same do continue and provided that any variation complies with all applicable regulatory requirements then in force."

iii) A further declaration was sought (in addition to the relief originally sought in head (iii), alternatively head (ii)), which I shall call the Additional Declaration, in the following terms: "[t]hat the Defendant is liable and obliged to indemnify the Claimant and hold it harmless in relation to any Losses in relation to any Liabilities where:

a) Liabilities means "*all liabilities, duties and obligations of every description, whether deriving from contract, common law, statute or otherwise, where the present or future, actual or contingent, ascertained or unascertained or disputed and whether owed or incurred severally or jointly and as principal or surety and* ***"Liability"*** *means any one of them";* and

b) *Losses means "any and all claims, actions, losses, liabilities, costs, penalties, fines, expenses (including reasonable professional fees), damages, obligations to third parties, expenditures, proceedings, judgments, awards, settlements or demands that are imposed upon or otherwise incurred, suffered or sustained by the relevant party*".

Arising out of or connected with the Claimant's entry into the SPA dated 4th April 2007." (Emphasis in original).

14. It is to be observed that the new primary relief in the reformulated head (iii) seeks to impose an obligation on Barclays to carry on the remediation exercise in the same manner as it has been conducted by CompuCredit; it requires compliance with all

FCA regulatory requirements which fall on both CompuCredit and Barclays; and it is now in the form of a declaration rather than an order for specific performance. The alternative in reformulated head (ii) no longer refers in terms to the "Agreed Practice", but nevertheless seeks an order that the indemnity obligation on Barclays is established if CompuCredit continues to do what it is currently doing.

15. In the course of his oral submissions, Mr Cogley QC for CompuCredit attempted to reformulate yet again the relief which was being sought ("draft order version 3"). In relation to the primary relief sought in head (iii), that CompuCredit take over the remediation, he submitted that he was not seeking to oblige Barclays to conduct a remediation exercise itself in accordance with the Agreed Practice or CompuCredit's current practice or indeed any particular methodology or practice, which Barclays would be free to determine for itself, save only that the order would expressly require Barclays to comply with the FCA regulatory requirements applicable to Barclays (but not, he submitted, the FCA requirements applicable to CompuCredit). The necessary corollary of this submission was that the Agreed Practice was irrelevant to this head of relief.

16. On the morning of the second day of the hearing, after Mr Cogley had completed his submissions and Ms Tolaney QC for Barclays had commenced her submissions, Mr Cogley produced a further revised draft order ("draft order version 4"). Each of the three declarations sought was reformulated. It is convenient to set out in full the revised draft of those declarations, showing the additions (underlined) and deletions (struck through) that were made. The declarations sought were:

> "(1) That <u>in relation to the Monument card holders whose Accounts were transferred to the Claimants, from the date hereof</u> the Defendant is liable and obliged to ~~continue from the date hereof the pro active remediation exercise that the Claimant is currently engaged in,~~ <u>carry out</u> and then continue ~~and carry out~~ a <u>pro-active active</u> remediation programme and in particular, but without limiting the foregoing, to proactively contact all individuals who have been or currently are within the group of Monument cardholders whose credit card agreements were the subject matter of the SPA dated 4th April 2007 or subsequently acquired by the Claimant for the purposes of remediating them and that such remediation exercise:
>
> > (i) shall comply with all regulatory obligations and requirements of the FCA and without limiting the foregoing <u>PRIN 6 and</u> DISP 1.3.6G of the FCA Handbook; and
> >
> > (ii) shall include any cardholders who have contacted the Claimant in relation to PBP and who are then dealt with in accordance with DISP 1.7.1R
>
> [ALTERNATIVE <u>TO</u> NUMBER 1 <u>ABOVE</u>]
>
> (1) That the Defendant is liable and obliged to indemnify the Claimant in relation to all and any payment it makes to any Monument cardholder whose credit card agreement was the subject matter of the SPA dated 4th April 2007, providing such payment is made <u>after receipt of a compliant [sic.] as defined in DISP and</u> pursuant to the remediation exercise currently being carried out by

the Claimant or any agreed variation thereof for so long as the same do continue and provided that any variation complies with all applicable regulatory requirements then in force.

(2) That the Defendant is liable and obliged to indemnify the Claimant and hold it harmless in relation to any Losses in relation to any Liabilities where:

(i) Liabilities means "*all liabilities, duties and obligations of every description, whether deriving from contract, common law, statute or otherwise, whether present or future, actual or contingent, ascertained or unascertained or disputed and whether owed or incurred severally or jointly and as principal or surety and* ***"Liability"*** *means any one of them*"; and

(ii) Losses means "*any and all claims, actions, losses, liabilities, costs, penalties, fines, expenses (including reasonable professional fees), damages, obligations to third parties, expenditures, proceedings, judgments, awards, settlements or demands that are imposed upon or otherwise incurred, suffered or sustained by the relevant party*".

~~Arising out of or connected with the Claimant's entry into~~ relating to the remediation exercise currently being undertaken by the Claimants as a Retained Liability as defined in the SPA dated 4th April 2007."

17. It is to be observed that, contrary to the oral submissions of Mr Cogley, the reformulated head (iii) does not permit Barclays to conduct the continuation of the remediation in any manner it sees fit, provided regulatory compliant, but on the contrary seeks to impose an obligation to conduct "a pro-active active remediation programme" which involves having to contact *all* Monument cardholders whose credit card agreements were the subject matter of the SPA, irrespective of whether they have already been fully and fairly remediated and irrespective of whether they had PBP on the accounts.

18. After Ms Tolaney had concluded her submissions, and towards the end of the second and final day of the hearing, Mr Cogley sought in his reply submissions to rely on a yet further reformulation ("draft order version 5"). Although I agreed to look at it *de bene esse* in the face of Ms Tolaney's objection, I do not regard it as fair for it to be introduced at a time when Ms Tolaney had no opportunity to consider it or to make submissions in response to it. On the day after the conclusion of the hearing Mr Cogley sent by email a further radically different formulation of head (iii) relief ("draft order version 6"). I regard this as much too late, for the same reason. I shall therefore treat draft order version 4 as reflecting the relief which is being sought on these applications.

Legal Principles

19. The relevant principles on applications under CPR Rule 3.4(2) to strike out statements of case, and under Rule 24.2(a) for summary judgment, are not controversial.

20. On an application to strike out the question is whether the whole or the material part of a Statement of Case discloses reasonable grounds for bringing the claim (or, in a case such as the present, counterclaim).

21. In relation to summary judgment, the principles have been summarised in a number of cases, most recently by Hamblen LJ in ***Global Asset Capital Inc v Aabar Block SARL*** [2017] 4 WLR 163 approving the well-known passage in the judgment of Lewison J, as he then was, in ***Easyair Ltd v Opal Telecom Ltd*** [2009] EWHC 339 (Ch) at [15], and that of Simon J, as he then was, in ***Arcadia Group Brands Ltd v Visa Inc*** [2014] EWHC 3561 (Comm) at [19]. For present purposes it is sufficient to identify five points which are of potential relevance to the current applications.

    i) The court must consider whether the respondent to the application has a "realistic" as opposed to a "fanciful" prospect of success; a "realistic" prospect of success is one that carries some degree of conviction and not one that is merely arguable.

    ii) The court must avoid conducting a "mini-trial" without the benefit of disclosure and oral evidence, and should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by a trial process.

    iii) In reaching its conclusion, the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.

    iv) This does not mean that the court must take at face value and without analysis everything that a respondent 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 contradicted by contemporaneous documents. But the court can only dispose of factual issues in this way if there is no real prospect of the evidence of one side on that issue being accepted, and such a disposal must be justified by particularised reasoning as to why the witness is to be disbelieved: see per Floyd LJ in ***Optaglio Ltd v Tethal*** [2015] EWCA Civ 1002 at [31]-[32].

    v) Some disputes on the law or the construction of a document are suitable for summary determination. If the application gives rise to a short point of law or construction, then 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". On the other hand it may not be appropriate to decide difficult questions of law or construction on an interlocutory application where the facts may determine how those legal issues will present themselves for determination and/or where the legal issues require more detailed argument and mature consideration than can be accommodated in a summary judgment hearing.

Primary relief under head (iii): that Barclays take over the remediation process

22. It is convenient to set out here the relevant terms from the SPA (with emphasis retained from the original).

"RECITALS

(A) The Seller has agreed to sell the Assets and to transfer the Business to the Purchasers (or in respect of CCIA to Raphael Bank as CCIA's designee) and the Purchasers have agreed to purchase (or, in respect of CCIA, to procure the acquisition by Raphael Bank as CCIA's designee of) the Assets and the Business on and subject to the terms of this Agreement.

[…]

IT IS AGREED:

1. INTERPRETATION

1.1 In this Agreement:

[…]

"Assets" means collectively the Credit Card Assets and the Infrastructure Assets to be sold and purchased under this Agreement and includes (where the context permits) each or any of the Assets;

[…]

"Assumed Liabilities" has the meaning given in clause 11.1;

[…]

"Business" means the business of the Seller consisting of the origination and administration of the Sale Accounts (including that part of the business transferred to the Seller by the Predecessor);

[…]

"Cardholder Agreement" means an agreement regulated by the CCA under which a Credit Card has been or is in the course of being issued or re-issued by the Seller or a Predecessor to a Cardholder and containing the terms and conditions of the relevant Sale Account;

[…]

"Claim" means any claim arising under this Agreement;

[…]

"Credit Card" means a card which has been issued or re-issued for use in connection with a Sale Account;

"Credit Card Account" means the account which records the amount owed by each Cardholder under his or her Cardholder Agreement;

"Credit Card Assets" means collectively those assets described in clauses 2.1 and 2.2 to be sold and purchased under this Agreement and includes (where the context permits) each or any of them;

[…]

"Customer Data and Files" means collectively, all data, files and information (whether current or historic) relating to Cardholders, Sale Accounts and the operation of the business, including all…

[…]

"Goodwill" means the goodwill associated with the Business, the right of the Seller to use the Trade Mark in relation to the Business and the exclusive right of the Purchasers to represent themselves as carrying on the Business in succession to the Seller;

[…]

"Liabilities" means all liabilities, duties and obligations of every description, whether deriving from contract, common law, statute or otherwise, whether present or future, actual or contingent, ascertained or unascertained or disputed and whether owed or incurred severally or jointly and as principal or surety and **"Liability"** means any one of them;

[…]

"Losses" means any and all claims, actions, losses, liabilities, costs, penalties, fines, expenses (including reasonable professional fees), damages, obligations to third parties, expenditures, proceedings, judgments, awards, settlements or demands that are imposed upon or otherwise incurred, suffered or sustained by the relevant party;

[…]

"Retained Liabilities" has the meaning given in clause 11.2;

"Sale Account" means a Credit Card Account in respect of which a credit card branded with the Trade Mark has been issued or re-issued to a Cardholder which is not either an Excluded Account or a Charged-Off Account as of the Cut-Off Time and which is identified by account number on the Signing Date Account List;

[…]

[…]

2. SALE AND PURCHASE

2.1 The Seller shall sell (and, in the case of (b), (c), (d) and (e), assign, by way of legal assignment) free from all Encumbrances and Raphael Bank as CCIA's designee shall acquire the following Credit Card Assets:

(a) all Sale Accounts;

(b) the benefit of the Cardholder Agreements;

[…]

(e) the Customer Data and Files and the Signing Date Account List (save that the Seller will be entitled to retain a copy of all or some of the Customer Data and Files and the Signing Date Account List in so far and for such time as they may reasonably be required by either the Seller or any Seller's Group Company for on-going regulatory compliance, accounting, auditing, litigation or tax reasons or to comply with the Seller's obligations under the Transitional Services Agreement;

[…]

(g) the Credit Cards;

[…]

2.2 The Seller shall sell free from all Encumbrances and CCIA shall purchase the Goodwill, the Monument Credit Card Intellectual Property and the Excluded Accounts Customer Data.

2.3 The Seller shall sell (and, in the case of (d) and (g), assign) free from all Encumbrances and CompuCredit UK shall purchase the following Infrastructure Assets:

[…]

(e) the Records (save that the Seller will be entitled to retain a copy of all or some of the Records in so far and for such time as they may reasonably be required by either the Seller or any Seller's Group Company for on-going regulatory compliance, accounting, auditing, litigation or tax reasons or to comply with the Seller's obligations under the Transitional Services Agreement);

[…]

[…]

6. POST-CREDIT CARD COMPLETION MATTERS

[…]

6.6 With effect from the date of this Agreement, the Seller shall not take any actions in its capacity as originator or acquirer of the Cardholder Agreements which may adversely affect the ability of CompuCredit UK, CCIA or Raphael Bank to exercise or enforce any rights of CompuCredit UK, CCIA or Raphael Bank under the Cardholder Agreements including failing to maintain its CCA licence, amending (or purporting to amend) the terms and conditions applicable to any Cardholder Agreement or making any other communication to the Cardholders in their capacity as Cardholders without the prior written consent of CCIA; provided that for the avoidance of doubt the Seller may take any action it is directed to take by CCIA either under this Agreement or the Transitional Services Agreement.

6.7 With effect from Credit Card Completion, and without prejudice to clause 11.1, the Seller and the Purchasers agree that Raphael Bank as CCIA's designee, will be appointed to perform, on behalf of the Seller, all of the obligations of the Seller under the Cardholder Agreements to be discharged after Credit Card Completion (including in respect of Raphael Bank as CCIA's designee, the Seller's obligation to provide credit on use of a Credit Card and to honour the terms and conditions of the Cardholder Agreements).

[…]

11. ASSUMPTION OF ASSUMED LIABILITIES AND APPORTIONMENT OF BUSINESS RESPONSIBILITY

11.1 On the terms and subject to the conditions in this Agreement, the Seller directs and CCIA agrees that it shall procure that Raphael Bank as CCIA's designee shall, upon Credit Card Completion, assume and thereafter pay, discharge and perform in accordance with their respective terms when due on the Seller's behalf the following Liabilities and obligations of the Seller, but only to the extent they relate exclusively to the Credit Card Assets:

(a) all duties and obligations under the Cardholder Agreements arising on or after the Cut-Off Time, including in respect of Raphael Bank as CCIA's designee the obligation to provide credit on use of a Credit Card and to honour the terms and conditions of the Cardholder Agreements (but without prejudice to any possible or actual Warranty Claim), and including all Liabilities arising after the Cut-Off Time under the CCA, but for the avoidance of doubt excepting all Liabilities related to events occurring before the Cut-Off Time (including any claims made by a Cardholder in respect of the enforceability or lawfulness of any default charges made under any relevant Sale Account before the Cut-Off Time) for which the

Seller shall be solely responsible and subject to clause 11.1(b) and 11.2;

[…]

The Liabilities and obligations expressly assumed by the Purchasers pursuant to this clause 11.1 shall collectively be known as the **"Assumed Liabilities"** and the Purchasers shall indemnify and hold the Seller harmless against any Losses relating to any Assumed Liabilities except any Losses to the extent that such Losses fall within the scope of the indemnity provided by the Seller in clause 11.2. For the avoidance of doubt, the Assumed Liabilities shall not include any Liabilities of the Seller or any member of the Seller's Group for Taxation relating to the Business, for any Liabilities relating to any other business of the Seller or any member of the Seller's Group or, save as expressly set out in this clause 11.1, Liabilities arising prior to the Cut-Off Time (including in relation to any claim made by a Cardholder in respect of the enforceability or lawfulness of any default charges made under any Sale Account before the Cut-Off Time).

11.2 The Liabilities and obligations of the Seller in respect of the Business and Assets which are not Assumed Liabilities or Post Closing Payment Events pursuant to clause 7.5 and any Liabilities relating to any other business of the Seller or any member of the Seller's Group, any Liability for which the Seller is liable for under the Infrastructure Assets Apportionment Statement or the Information Technology Infrastructure Assets Apportionment Statement and, save as expressly set out in clause 11.1, for Liabilities arising prior to the Cut-Off Time shall collectively be known as **"Retained Liabilities"**. For the avoidance of doubt, the Seller shall remain liable for and shall pay, discharge and perform in accordance with their respective terms when due all Retained Liabilities and shall indemnify and hold the Purchasers (and Raphael Bank as CCIA's designee) harmless against any Losses relating to any Retained Liabilities and in relation to the following Liabilities:

(a) all Liabilities in relation to duties and obligations under the Cardholder Agreements which were due to be undertaken or discharged before the Cut-Off Time, including the obligation to provide credit on use of a Credit Card and to honour the terms and conditions of the Cardholder Agreements, and including all Liabilities arising before the Cut-Off Time under the CCA;

[…]

[…]

13. POST COMPLETION COVENANTS

[…]

13.2 Except as otherwise specifically provided in this Agreement, on and after Credit Card Completion, the Completion Date and the Final Completion

Date (as applicable), the Seller shall, at the Seller's expense, perform such acts (including procuring the necessary assistance of third parties) and execute such documents as may be reasonably required after Credit Card Completion, Completion or the Final Completion Date (as the case may be) by the Purchasers to relieve and discharge the Purchasers from any Retained Liabilities.

13.3 The Seller and the Purchasers shall co-operate, to the extent reasonably requested by the other, in the handling and disposition of any action, suit, arbitration, proceeding, investigation or regulatory inquiry relating to any of the Assets and whether or not pending or threatened prior to Credit Card Completion (with respect to the Credit Card Assets)…

[…]

13.5 Upon becoming aware of any action, suit or proceeding brought by any person who is not a party to this Agreement which may give rise to a claim or potential claim under which a party to this Agreement may be entitled to the benefit of an indemnity under clause 11 and/or clause 12 of this Agreement, the person having the benefit of that indemnity (the **"Indemnified Party"**) shall notify the party liable under that indemnity (the **"Indemnifying Party"**) by written notice of that claim, which notice shall include details of the nature and amount, or potential amount, of that claim.

13.6 Subject to paragraphs (a) to (c) below and clause 13.7, an Indemnifying Party may, at its sole cost and expense, control the defence of any such action, suit or proceeding. …

[…]

13.8 An Indemnified Party shall make available to the Indemnifying Party and its counsel and accountants at reasonable times and for reasonable periods, during normal business hours, all books and records of the Indemnified Party relating to any such possible claim for indemnification, and each of the Indemnified Party and the Indemnifying Party will render to the other such assistance as it may reasonably require of the other to ensure prompt and adequate defence of any suit, claim or proceeding.

13.9 Each of the Indemnified Party and the Indemnifying Party shall render to the other such assistance as may be reasonably required in order to ensure the proper and adequate defence of any such action, suit or proceeding. Neither the Seller nor the Purchasers shall admit any Liability or make a settlement of any claim for which indemnity is or will be sought without the written consent of the other, which consent shall not be unreasonably withheld or delayed.

[…]

16. FURTHER ASSURANCE AND AVAILABILITY OF INFORMATION

[…]

16.2 For the avoidance of doubt, the parties hereby acknowledge, agree and confirm for all purposes that the benefit of the Cardholder Agreements shall be assigned to Raphael Bank as CCIA's designee subject always to clause 2.5 and to the Purchaser's obligations under clause 11 in respect of the burden of the Cardholder Agreements and no party intends to, or shall be obliged to, novate the Cardholder Agreements on Credit Card Completion.

[…]

16.5 Without prejudice to the preceding provisions of this clause 16 each party shall use its reasonable endeavours to take, or cause to be taken, all such actions and do, or cause to be done, all things proper, necessary or advisable to give effect to the transactions contemplated by this Agreement and the documents referred to herein including, in the Seller's case, enforcing any rights that it has against a Predecessor.

[…]

22. ENTIRE AGREEMENT AND VARIATION

[…]

22.4 Any variation of this Agreement shall not be binding on the parties unless set out in writing, expressed to vary this agreement and signed by authorised representatives of each of the parties.

23. GENERAL PROVISIONS

[…]

23.2 No failure, delay or indulgence on the part of any party in exercising any power or right under this Agreement shall operate as a waiver of such power or right.

[…]"

The construction point

23. Mr Cogley argues that there is no room for doubt about the construction of the Performance Obligation. Barclays has accepted that the liability to remediate cardholders for mis-sold PBP is a Retained Liability for the purposes of the Indemnity, and accordingly it must equally be so for the purposes of the Performance Obligation. The plain terms of clause 11.2 ("the Seller… shall pay, discharge and perform…all Retained Liabilities") oblige Barclays to pay and discharge the liabilities

to cardholders arising out of the mis-selling of PBP. Moreover, he argues, the Retained Liabilities encompass not only payment obligations to cardholders, but because of the width of the definition of "Liabilities" they include the wider regulatory obligations to investigate and adopt processes which arise under the FCA regulations, especially PRIN 2.1 principles 6 and 7 and DISP Rule 1.3.3 and Guidance paragraphs 1.3.3 B and 1.3.6. Accordingly there is a clear obligation imposed by clause 11.2 for Barclays to conduct the remediation exercise.

24. Ms Tolaney argued that although the Indemnity and the Performance Obligation were both expressed to apply to "Retained Liabilities", that expression covered a wide range of circumstances, and it did not follow that both remedies were intended to apply to the entire cohort of Retained Liabilities, whatever form they might take. The clause can and should be construed as applying one or other or both remedies to particular liabilities or losses depending upon their nature, the context of the other terms of the SPA, and the commercial consequences of doing so. She submitted that the context of the SPA terms taken as a whole was that as between Barclays and CompuCredit the whole administration of the transferred credit card business was transferred to CompuCredit and was to be managed by it, including all aspects of the customer relationship which in turn included the handling of complaints. She relied on the definition of Business, which was being transferred in accordance with the Recital, the transfer of the Goodwill, and in particular the terms of clauses 6.7, 11.1(a), 16.2 and of the prescribed Notice of Assignment to cardholders attached to the SPA. The contractual scheme involved, both legally and commercially, a transfer as between Barclays and CompuCredit of the burden and the business of managing the accounts and the customer relationships after completion, with all contact and relationships thereafter being maintained and developed by CompuCredit. It carried with it transfer of all relevant data and records under clauses 2.1(e) and 2.3(e), and the necessary corollary of creation of new data and records by CompuCredit post-transfer in relation to the accounts. There was a transfer of the relevant premises and of staff who had been conducting the business, under other SPA provisions. Against that background the intention of the parties in relation to liabilities to cardholders for mis-selling was that they were a particular subset of Retained Liabilities which came within the Indemnity part of clause 11.2 but not within the Performance Obligation wording. The Performance Obligation wording, it was submitted, was inappropriate for these particular circumstances and would be unworkable if it were to apply to these particular liabilities which were mis-selling claims being advanced against CompuCredit rather than against Barclays; Barclays had not been, and would not or at least not primarily be the recipient of such claims from cardholders. Barclays simply could not address such claims without further information and cooperation from CompuCredit for which the SPA made no provision: clauses 13.3, 13.8, 13.9 and 16.5 were by their terms inapplicable or insufficient to perform this function.

25. I see considerable force in these submissions, with which Mr Cogley did not really grapple. Particular commercial and practical difficulties were identified in relation to the proposal that Barclays should take over the remediation in a letter sent by Barclays' solicitors on 27 October 2017. The letter identified examples of what Barclays needed to know in order to better understand the implications of the proposal, including: how the proposal could be implemented in practice; the steps which would need to be taken in order to effect a transfer from CompuCredit of the remediation process; details of the data, files or systems that would need to be

transferred; how such transfer would be achieved; and other practical matters of that nature. There was no answer to the questions which were asked, which supports the submission that there would be particular practical difficulties in Barclays taking over the remediation process. It is important to keep in mind that the question is not whether in abstract terms the Performance Obligation is to extend to a remediation process, but whether it obliges Barclays to do what is sought in draft order version 4 in the particular circumstances of this case in which CompuCredit has been conducting a remediation process, as the parties agreed it would, for many years. Any taking over of such remediation process would involve all the practical difficulties which Barclays identified and full information as to the detail of the process already carried out by CompuCredit.

26. I am not satisfied that I can resolve this point of construction in CompuCredit's favour on a summary basis. Construction involves an iterative process in which account needs to be taken of the practical and commercial consequences of rival constructions. There was little evidence addressed to this question, understandably on a summary judgment application, and the argument was not developed in any great detail. Although the court will seek wherever possible to grasp the nettle and decide a construction point on a summary basis where it is satisfied that it has had all the evidence and the argument which is relevant, that is not the position in this case. The argument may well be affected by the nuances which arise from the commercial background and the practical and commercial consequences which are said to arise from the construction contended for, which requires more detailed evidence and greater argument and mature reflection than has been permitted on the present application.

Specific Performance

27. Had I reached a conclusion in favour of CompuCredit as a matter of construction, I would still not have been prepared to grant the relief sought in head (iii) on a summary basis. Mr Cogley accepts that although the relief sought is in form a declaration, it is in substance an order for specific performance. Specific performance is, of course, a discretionary remedy, and there are well known principles governing whether the court should exercise its discretion.

28. First the claimant must show that damages will not be an adequate remedy. On a summary judgment application, CompuCredit must show that an argument to the contrary has no real prospect of success. CompuCredit relies on what Mr McCamey, a Statutory Director of the First Claimant, Executive Officer of the Second Claimant and the Chief Financial Officer of the parent company of both Claimants, says in his third witness statement at paragraph 17:

> "I can confirm that the Claimant cannot continue to make payments past the determination of the Summary Judgment application, unless it has the comfort that it will be indemnified by Barclays in respect of those payments. As a result, consumers will suffer detriment."

29. Mr Cogley argues that this demonstrates that damages will not be an adequate remedy because CompuCredit might be put out of business (although Mr McCamey does not say this) and because cardholders will suffer detriment. However Mr McCamey's bald assertion is not supported by any evidence as to CompuCredit's financial

position. No accounts are provided, there is no evidence of its capitalisation or assets or reserves, no evidence of its corporate structure, and no evidence of current and potential future financing. Although the sums in question are large, CompuCredit has obviously managed to fund what I am told is some £44 million of unreimbursed payments over a period of 7 months. As a regulated institution, there is none of the supporting evidence as to what reserves and assets it has, and what funds it might have access to by way of support or financing in order to continue to carry out its own regulatory obligations of remediation. The court would expect such evidence if it is asked to conclude that there is no room for legitimate argument about its ability to continue to remediate legitimate claims by cardholders. The evidence is simply insufficient for me to say with any degree of confidence that there is no room for a realistic dispute as to whether damages would be an adequate remedy.

30. Secondly it is a powerful factor against ordering specific performance if the order requires a succession of acts which would require the constant supervision of the court in the sense explained by Lord Hoffmann in ***Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*** [1998] AC 1. This is especially so where, as here, the order sought requires constant mutual cooperation such that a defendant can only comply if the claimant assists and provides cooperation. The order sought in this case falls squarely within that category.

31. Mr Cogley submitted that all that was required of Barclays was a process to address complaints, or to address mis-selling in general in the absence of complaints, not a requirement to pay or discharge mis-selling liabilities to cardholders; he submitted that "Liabilities" thus comprised not liabilities to cardholders as such, but the regulatory duty to conduct the process. It is difficult to see why it should be so limited if Mr Cogley is right on his primary point of construction of the Performance Obligation. But however that may be, even if all that is required is adherence to the process, it would require continuous activity which might give rise to regular disputes, especially since the process engages CompuCredit's fulfilment of its own regulatory obligations, and would be dependent on provision of data and assistance from CompuCredit, as is clear from the terms of draft order version 4.

32. Thirdly, it also weighs against the exercise of discretionary relief if the terms of the order cannot be drawn with precision. This is because a defendant who is at risk of being in contempt, with the serious consequences which that potentially involves (including, for a bank such as Barclays, serious regulatory and reputational consequences), is entitled to know with precision what the order requires it to do and what it must not do. Moreover if an order lacks precision it gives rise to the risk of a need for constant supervision and resolving of disputes by the court. The constant redrafting of the order in this case has not cured the lack of precision in its final form. What is meant by a "pro-active" remediation programme? Must Barclays really contact all customers irrespective of PBP content in their accounts and even if they have been fully and fairly remediated already? Mr Cogley was constrained in argument to accept not. What is supposed to be covered by the words "or subsequently acquired by the Claimant" as an additional category of cardholder over and above those on the transferred portfolio? The draft order requires compliance with particular regulatory obligations and guidance which is framed at a high level of generality. What this actually requires in practice may well be subject to differing views. The constant revising of the draft order and its current unsatisfactory form

may not be the result of any lack of skill on the part of Mr Cogley or his junior, but rather indicative of the inherent difficulties in framing a workable order with a sufficient degree of precision.

33. For all these reasons, I would not have regarded it as appropriate to grant the order sought in head (iii) on a summary basis as a matter of discretion, even had I felt able summarily to determine the construction point in favour of CompuCredit.

Alternative relief under head (ii): continuing entitlement to indemnity

34. I shall treat this head of relief as referable to the future because there is a separate claim for summary judgment for the four outstanding invoices which I will address separately below. Barclays submits that summary judgment for this head of relief should not be granted because:

    i) there is a realistic prospect of Barclays establishing that the remediation exercise which CompuCredit have been carrying out has resulted, and will result, in payments to cardholders which are not liabilities and in payments being sought from Barclays which do not fall within the scope of the Indemnity;

    ii) there is a realistic prospect of Barclays establishing that there is nothing in CompuCredit's allegation of a so-called "Agreed Practice" which would make Barclays liable under the Indemnity for payments which did not fall within its scope; and

    iii) in any event, the form of relief sought is in substance one of specific performance which should fail for discretionary reasons.

Payments by CompuCredit which do not fall within the Indemnity

35. Barclays has identified the following categories of cases where CompuCredit have claimed and been paid by Barclays under the Indemnity for payments to cardholders which do not fall within its scope, or at least there are realistic grounds to believe that that is the case:

    i) cases where cardholders have made no contact with CompuCredit but have been paid "out of the blue";

    ii) cases where cardholders have made contact without making any complaint of PBP mis-selling;

    iii) cases where there is no basis for concluding that there has been mis-selling because no such grounds have been advanced;

    iv) cases where cardholders have been overcompensated because they have been repaid all default fees by way of remediation, not merely those caused by any PBP mis-selling;

    v) cases where Barclays has been invoiced and paid for sums which CompuCredit have not had to bear where:

a) cardholders have not cashed remediation cheques; or

b) CompuCredit have applied part or all of the remediation "payment" to discharge liabilities of the cardholder on the account, paying only the balance to the cardholder but charging Barclays for the full amount, including the amount taken by CompuCredit as a benefit in discharging the cardholders' debt on the account.

36. It is not necessary for me to rehearse in this judgment the detail of the evidence supporting those categories. Each is made good in the evidence to which Ms Tolaney drew attention in the course of the hearing. Mr Cogley suggested that these were but a tiny minority out of many thousands of claims; and that many of the complaints were of matters of which Barclays has been fully aware for many years and in respect of which it has made payments in accordance with the Agreed Practice. I address the latter point under the Agreed Practice issue below. As to the first point, there is good reason to suspect that these are not isolated examples with potentially low monetary value. There is apparent force in Mr Hickson's evidence that the 11 posts found on the internet suggesting cardholders were paid out of the blue without contacting CompuCredit are likely to form a small minority of cardholders experiencing similar unsolicited payments, because most would pocket the money without posting. CompuCredit have provided no explanation for how it came about that these payments were made other than that they were "likely to be" as a result of re-remediation, a suggestion which is inconsistent with the terms of some of the posts; nor have they explained how payments came to be made to those complaining not of PBP but PPI. CompuCredit's evidence is that they have been remediating all those who have made contact, rather than all those who have made a complaint. This implies a cohort who are arguably outside the scope of the Indemnity. The non-cashing of cheques was estimated to apply to 2% of the remediated cardholders. Moreover the overwhelming majority of complaints are now said by CompuCredit to have been made via their website, which it appears requires no more information than an account number and pressing a button marked 'Register Claim'. In the absence of further information this would preclude any meaningful evaluation of the validity of any mis-selling complaint. CompuCredit argue that this is the inevitable consequence of Barclays' failure to provide any point of sale material which would enable such a process to be undertaken. However Barclays did provide some material, and the write and invite letter asked respondents to identify the grounds advanced for contending that PBP was mis-sold, which unlike the website response could have enabled an assessment of plausibility, which was what the Flowchart envisaged. It may have been a matter of regulatory liability for CompuCredit to compensate cardholders who had not complained of mis-selling or had made no plausible complaint, but it would be impossible to reach that conclusion on a summary judgment application, or to conclude that it was clear beyond any arguable merits threshold that payments by CompuCredit on that basis were liabilities which fell within the definition of a Retained Liabilities falling within the Indemnity.

37. These are clearly issues which can only be resolved with disclosure and evidence at trial. I shall address below the question whether what was happening was known and agreed to by Barclays, which is a question which arises under the Agreed Practice issue. However at this stage of the inquiry, the evidence taken as a whole suggests that there is a realistic case that there is good reason to believe: that CompuCredit

have over many years made payments to cardholders, for which they have been paid by Barclays, which do not fall within the Indemnity; that this has occurred on a significant scale, rather than in occasional isolated incidents; and therefore that if head (ii) relief were granted Barclays would be being ordered to indemnify CompuCredit for payments which fell outside the Indemnity on the basis of the continuation of CompuCredit's current practice.

The so-called "Agreed Practice"

38. The next question which arises, therefore, is whether the legal effect of the course of conduct which has been labelled the Agreed Practice is to make Barclays liable, in the past and for the future, for sums which do not in fact fall within the scope of the Indemnity.

39. The Agreed Practice was first referred to in CompuCredit's Reply and Defence to Counterclaim which made numerous references to it. The substance of it, as set out at paragraph 25, is that it was a settled and consensual procedure under which:

    i) CompuCredit would treat as a claimant any cardholder who had made a complaint about PBP mis-selling or had responded to the write and invite letter;

    ii) CompuCredit would use the Flowchart provided by Barclays on 13 October 2014, and a Calculator provided by Barclays which was in the form of an excel spreadsheet, to determine the validity and amount of such claims;

    iii) Barclays knew that although the Flowchart required complaints to be assessed for plausibility, CompuCredit did not have available any point of sale material from Barclays to enable such an assessment to take place, such that any case where a respondent had PBP was to be treated as a valid claim;

    iv) CompuCredit provided Barclays with weekly and monthly management information and participated in weekly/monthly operational calls;

    v) Barclays also attended CompuCredit's premises and audited its remediation process, carrying out a "deep dive" investigation of the process "from end to end";

    vi) On the basis of full knowledge of this remediation process, Barclays paid the monthly remediation invoices presented by CompuCredit in full.

40. Paragraphs 19.4, 54.3, 61, 87 and 92.3 to 92.6 of the Reply and Defence to Counterclaim characterised the legal effect of the Agreed Practice as (a) having contractual effect obliging Barclays to indemnify CompuCredit if it continued to follow the Agreed Practice alternatively (b) giving rise to an estoppel pleaded in general terms to the effect that "the Defendant is estopped by convention or representation (or otherwise) from asserting to the contrary." The representations or common conventional understanding, and when, how and by whom they were made or participated in were not identified.

41. Further Information was served on 21 November 2017 in response to a Request. The Agreed Practice alleged was set out in a Schedule, broadly to the same effect as set out in the Reply. The Further Information asserted that there were 15 named individuals from Barclays who had agreed to the Agreed Practice, that they did so by being involved in (unspecified) day to day operational contacts, exchanges of emails, monthly and weekly telephone meetings and conduct throughout the entirety of the process over which Barclays engaged with CompuCredit in relation to the latter's remediation exercise, with the practice being settled from at least October 2014. The legal effect of the Agreed Practice was said to be that it satisfied, alternatively varied the terms of clause 13 as to the mechanics of handling indemnity claims, alternatively that it gave rise to an estoppel (again unparticularised), and a variation or waiver of clause 22.4 of the SPA which required any variation to be in writing.

42. In CompuCredit's skeleton argument for this hearing at paragraph 36, it is said: "[t]his consensual arrangement – which the Claimant describes as the "Agreed Practice" – is not contractually binding – i.e. it is not a free standing contract. This is common ground. But this has the consequence that Barclays has no defence to discharging directly its obligations under the SPA, in relation to Retained Liabilities." There is then a footnote which says: "[t]he true effect of the Agreed Practice is set out in the RDCC and the Claimant's Second RFI re the Agreed Practice". Although the position is a little confused, I understand it no longer to be said that the Agreed Practice is a contractual variation of the Indemnity, but that it remains CompuCredit's case that it has similar effect by way of an estoppel.

43. In my judgment, there are four aspects of the case which make it impossible for the court to conclude on a summary basis that there was such a course of conduct which had legal effect so as to override or vary the rights and obligations of the parties under clause 11.2 the SPA.

44. First, the course of dealing relied upon by CompuCredit as establishing the Agreed Practice is that of day to day contact involving 15 named individuals on Barclays' side over a period of several years, as a result of representations or agreements which are not identified, for the most part, by maker, content, date or circumstance other than in widely generic terms. Mr Hickson of Barclays, who is one of the 15 named individuals has spoken to most of the others. He and they deny the existence of the Agreed Practice alleged. It is, of course, impossible to examine such conduct in any detail on a summary judgment application of this nature and neither side has attempted to do so. That merely serves to emphasise that this aspect of the case is not suitable for summary judgment because the court has not seen and has not been able to investigate the full factual material which would be necessary to reach a conclusion. Mr Cogley submitted that there was no real dispute about the essential elements of what CompuCredit relied on. That is not so, as I explain below, but it would not be an answer because it is premised on Barclays having had a fair opportunity to address in evidence the course of conduct alleged with the benefit of all the relevant documents and the input of the relevant witnesses. It simply has not had that opportunity given the width and lack of particularity of the case which has been advanced, comprising as it does unspecified daily or weekly contact between numerous individuals. The material before the court must necessarily be a fraction of that which will be available at trial to determine the issue. This is a classic example of a claimant inviting the court to embark upon a "mini-trial" without reference to the

much fuller evidence which would be necessary and which will only be available following disclosure and witness evidence.

45. Secondly, Mr Hickson states in his witness statement that the extensive course of dealings between the parties demonstrates (a) repeated disagreements between the parties over CompuCredit's approach to the remediation process; and (b) reservations of rights under the SPA on both sides. He gives examples in both respects, supported by documentation. As to the disagreements, Mr Cogley invites me to reject Mr Hickson's evidence as not credible, largely on the basis that what he says differs in some instances from notes made by others of meetings. The notes purportedly made by CompuCredit personnel were apparently made some time after the meetings in question, have been redacted, and were not shared with Barclays at the time. There is no ground for concluding that they must be taken as a more accurate record than Mr Hickson's evidence, especially as there are other examples in the evidence where accounts of meetings were shared and were treated at the time as tendentious and inaccurate. As to the reservations of rights, which are evidenced in some of the documents produced, Mr Cogley's skeleton argument has a passage over two pages citing 10 authorities as to why such reservations of rights were ineffective as a matter of law. He did not invite me to look at any of the authorities either by way of pre-reading or at the hearing. I find it impossible to conclude summarily that the reservations of rights which accompanied the dealings between the parties were irrelevant.

46. In summary, Mr Hickson's evidence raises clear issues as to whether the course of dealing was any more than a cooperative modus vivendi which developed on an ad hoc basis over the period, with disputes and disagreements, and without prejudice to the rights of the parties under the SPA. In a letter of 9 January 2013, Gateley PLC described the process to date as one in which the parties had been able to resolve the matter informally and amicably. The evidence before the court of subsequent dealings, which is but a fraction of all the potentially relevant material, suggests that it is at the lowest realistically arguable that that is an apt description of the dealings throughout the subsequent period.

47. Thirdly, the documentary and other evidence before the court suggests that there are very real issues of fact on the specific aspects of the Agreed Practice on which Mr McCamey of CompuCredit placed reliance in his evidence and on which Mr Cogley sought to place emphasis in the course of his submissions. Four examples may be given:

    i) It is said on behalf of CompuCredit that Barclays knew that the information which Barclays had provided did not enable CompuCredit to make any judgment at all as to whether complaints were valid or even plausible; and therefore that Barclays knew that CompuCredit had no option other than to accept all complaints made as valid provided the cardholder had PBP on the account. That is not self-evident from the material which was supplied by Barclays. On 19 February 2014, Barclays provided two zip files said to contain telephony scripts in relation to how Monument card PBP sales were undertaken plus a process overview of how the product was sold. Depending on the nature of the particular complaint by a cardholder of mis-selling, it is not beyond realistic argument that such materials might be of some use in some cases. Mr Cogley suggested that Mr Tate of Barclays had himself said

that there were no useful materials in an email of 23 December 2013, but this mis-characterises the terms of the email. Mr Tate said, at a point before Barclays had provided the information identified above, that *CCUK* did not have access to point of sale material. The write and invite letter which CompuCredit sent out to cardholders was shared with Barclays. It included the following passage: "it will help us to process your response if you provide us with as much detail as possible about why you consider that you may have been mis-sold PBP". This invitation to cardholders to explain the grounds on which a complaint of mis-selling was being made would have been unnecessary and inappropriate if it were the case that it was known to everybody that there could be no exercise in assessing the validity or otherwise of the complaint. Mr Cogley also placed reliance on what was said in the footnote to paragraph 79 of Mr Hickson's second witness statement namely: "for the avoidance of doubt, Barclays does not deny that it has known at all material times that CompuCredit uphold all (or substantially all) complaints received from customers if CompuCredit's records indicate that the customers concerned had enrolled for PBP. Whether this is the correct approach is the subject of Barclays counterclaim, as I explain below." That is not, however, an acknowledgement that CompuCredit *could not* assess any claims for validity of the complaints or for plausibility, but at most a recognition of knowledge that in substantially all cases they *did not* in fact do so.

ii) Central to the Agreed Practice being advanced is the allegation that CompuCredit was instructed to follow and did follow the Flowchart. In paragraph 52 of his witness statement, Mr McCamey asserts that CompuCredit adopted the methodology set out in the Flowchart in full. However, this is inconsistent with the assertion made by Mr Cogley, and contained in CompuCredit's pleaded case, that it could not follow that methodology because it did not have the necessary information to do so. It is also inconsistent with an email from Ms Sharpe, the Chief Operating Officer of CompuCredit, dated 21 April 2015, which attached the claims process which she said was being adopted by CompuCredit for handling PBP claims from cardholders. That is nothing like the process in the Flowchart. Moreover there is clearly a real issue as to whether Barclays instructed CompuCredit to use the Flowchart, which is expressly denied by Mr Hickson. The covering email of 13 October 2014 by which the Flowchart was sent does not contain any instructions for its use and it was clearly on its face the process which Barclays purported to be using. On several occasions in the correspondence, Barclays made clear that it was for CompuCredit to make its own mind up about what procedure to adopt so as to comply with its own regulatory obligations, and that Barclays could not dictate to CompuCredit what procedure it adopted.

iii) Another central part of CompuCredit's case was that Barclays instructed them to use the Calculator and that they did so. However the so-called Calculator was a spreadsheet template whose application depended upon the data with which CompuCredit chose to populate it. Barclays' evidence, which cannot be rejected on a summary basis, was that it has no accurate understanding as to how the Calculator had been used, and that its use had been a "bone of contention" throughout the dealings with CompuCredit.

iv) A further central part of the case advanced by CompuCredit on the Agreed Practice was that Barclays knew that most of the complaints from cardholders came in via the website of CompuCredit, and knew that because the format of the website did not allow for anything more sophisticated than giving the account number and clicking a button marked 'Register Claim' there would be no information on which to assess the validity or plausibility of any complaint of mis-selling. Although it was asserted that this was the case and Barclays knew it to be the case, I was not provided with any references in the evidence which supported such an assertion. This allegation is flatly inconsistent with the claims process provided by Ms Sharpe in April 2015 which described the complaints being received by telephone call or in writing and made no mention of the website.

48. These are but four examples of numerous factual issues which are raised in the evidence in relation to the Agreed Practice and which cannot be resolved on a summary judgment application in CompuCredit's favour.

49. Fourthly, the legal basis for alleging that the Agreed Practice had the effect of rendering Barclays liable under the Indemnity for what would otherwise fall outside its scope appears now to be an estoppel by representation, convention or otherwise. There was no focus in the evidence or argument as to how the necessary ingredients of such estoppels were fulfilled. No attempt was made to identify what representation had been made, when, by whom, and to whom. No attempt was made to identify the common understanding, who held it, or when, nor to identify when, how and by whom CompuCredit was led to believe that Barclays shared the understanding by conduct crossing the line. Any form of estoppel would have to include establishing that it would be inequitable or unfair for Barclays to insist on their strict contractual rights, yet this was nowhere addressed in argument. Why, for example, would it be unfair for Barclays to insist on its strict contractual rights from August 2017 onwards irrespective of any practice or course of dealing prior to that date? As to past rights, what was pleaded was that there was reliance by CompuCredit in making the payments to cardholders; but this is undermined by the documented complaints from CompuCredit throughout the process that although Barclays was making payments it never accepted an obligation to do so. For this reason alone I would feel unable to say that an estoppel was made out on a summary basis.

50. In conclusion on this issue, I am unable to conclude on a summary basis that there was an Agreed Practice as alleged, for each and all of the reasons I have explained. It follows that for the purposes of the current application for summary judgment, the rights and obligations of the parties fall to be judged by reference to the terms of the SPA. If and to the extent that the relief sought depends upon the so-called Agreed Practice, it must fail. That applies to the relief sought under head (ii), because it is premised on CompuCredit continuing to pay in accordance with its current and previous remediation practice, which it is sufficiently arguable falls outside the scope of the Indemnity to a significant extent; and there is a sufficiently arguable case that nothing in Barclays' past conduct precludes it from insisting on its contractual rights under the SPA.

Relief under head (ii)

51. Even if I had regarded CompuCredit as entitled to summary relief of the kind envisaged by head (ii) in principle, I would not have been prepared to make an order in the form sought in draft order version 4. It is in substance an order for specific performance, as is the head (iii) relief to which it is an alternative, and is subject to the same discretionary objections: damages are sufficiently arguably an adequate remedy; it would require constant supervision in the *Co-operative Insurance* sense; and it is not drawn with sufficient clarity or precision. For example the words "a complaint as defined in DISP", "the remediation exercise currently being carried out" and "complies with all applicable regulatory requirements" are each likely to give rise to dispute, as is "agreed variation" in the light of the existing dispute about whether there was an Agreed Practice.

52. In conclusion on this issue, therefore, CompuCredit is not entitled to summary judgment for the relief it seeks under head (ii).

The Additional Declaration

53. The Additional Declaration sought is inappropriate because as currently drafted it is linked to the current remediation exercise which CompuCredit has been conducting, which sufficiently arguably involves payments outside the scope of the Indemnity. If it were reframed to be a recitation of what it is common ground falls within the scope of the Indemnity, it would serve no useful purpose. It also suffers from a number of the drafting defects which its language has in common with parts of the other declarations sought.

The four outstanding invoices

54. It follows from the conclusions I have reached above that there is a sufficiently arguable case that Barclays has a realistic defence to the invoice claim on the basis that a significant, but presently unquantified and unquantifiable, part of those invoices relates to payments which fall outside the scope of the Indemnity. They are also, at least arguably, subject to set-off of the counterclaim in relation to payment of past invoices, unless the latter falls to be struck out or summarily dismissed, which is the issue to which I now turn.

The Counterclaim

55. Barclays' counterclaim is framed as one for unjust enrichment in relation to the payment of past invoices, in an unquantified amount. The legal basis for the plea is (a) payment under a mistake of fact and/or law and/or (b) payment made conditionally and on a basis which is erroneous. It is pleaded that:

    i) Barclays made the payments in the belief and on the basis that:

        a) a substantial proportion (which I take to mean all except the handling fee element) comprised amounts payable by CompuCredit in respect of claims by cardholders to whom PBP had in fact been mis-sold on or before 4 April 2007; and

b) Barclays was contractually liable for them under the Indemnity;

ii) The belief was mistaken and the basis was erroneous because Barclays has reason to believe:

a) that CompuCredit has paid compensation to or otherwise credited the accounts of cardholders who were not in fact mis-sold PBP and who accordingly had no entitlement to compensation; and

b) that CompuCredit has sought to claim under the Indemnity amounts not covered by it and/or amounts greater than its actual loss.

56. The pleaded counterclaim gave particulars of the grounds on which the belief was mistaken and the basis of payment erroneous in only two respects. The first was that CompuCredit had wrongly applied the criteria relevant to mis-selling insurance products, but that they were not relevant to PBP which is not an insurance product. The second was that CompuCredit had claimed and received from Barclays the full amount of the remediation "payment" in cases where that sum had been applied in whole or in part to discharge the cardholder's debt on the account.

57. Mr Cogley did not suggest that the legal basis for the claim in unjust enrichment was unsound, but submitted that (1) the mistaken belief was narrow in its scope and the evidence did not support the mistaken belief alleged in the pleading, or indeed in the wider form in the evidence; and/or (2) CompuCredit was not enriched because it was merely a conduit for payments to cardholders; and/or (3) any enrichment was not unjust because of the Agreed Practice.

58. As to (1), the particularisation of the two respects in which the belief was mistaken and the basis of payment erroneous is supported by the evidence of Mr Hickson. That is sufficient to meet this aspect of Mr Cogley's argument. Moreover, that particularisation has been overtaken by the evidence of the other grounds for believing that significant sums were claimed and paid which did not fall within the scope of the Indemnity, in respect of which I have held that Barclays has raised a sufficiently arguable case. They are further examples by way of particularisation of the case which is pleaded. On a Part 24 or strike out application, a party should not be precluded from giving further particulars of its case if the evidence adduced shows a sufficiently arguable case to support them, unless there is a particular reason why justice requires that such evidence should not be taken into account; there is no such reason in this case. The pleading was served in July 2017 before Barclays discovered the internet posts of unsolicited receipts by cardholders and before it was aware of a number of the other matters now complained of as putting payments outside the scope of the Indemnity. But even if that were not the case, there would be no injustice in Barclays being allowed to rely on the evidence put forward on this application as further particularisation of a case whose essential allegations are already pleaded. Ms Tolaney indicated that an amendment application would be made in due course to reflect the further particularisation contained in the evidence, and I can see no good reasons for any objection to such an amendment.

59. As to (2) the argument is (at the very lowest very arguably) unsound. Money is a universal means of exchange and receipt of money is enrichment: see *Goff & Jones: The Law of Unjust Enrichment* 9th edn (2016), paragraph 4-28.

60. As to (3) the argument is disposed of by my rejection of CompuCredit's case that there can be a summary determination in its favour of the existence of the Agreed Practice.

61. Accordingly the Counterclaim stands and must be determined at trial.

Conclusion

62. The application is dismissed.