



Neutral Citation Number: [2016] EWHC 1570 (Comm)

Case Nos: 2014 Folio 1086, 2014 Folio 1474

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

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

Date: 29/06/2016

**Before:**

**MR JUSTICE BLAIR**

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**Between:**

**MARME INVERSIONES 2007 S.L.**

**Claimant**

**- and -**

**(1) THE ROYAL BANK OF SCOTLAND PLC**

**Defendants**

**(2) HSH NORDBANK AG**

**(3) BAYERISCHE LANDESBANK**

**(4) ING BANK N.V.**

**(5) CAIXA D'ESTALVIS I PENSIONS DE  
BARCELONA**

**And between:**

**THE ROYAL BANK OF SCOTLAND PLC**

**Claimant**

**- and -**

**MARME INVERSIONES 2007 S.L.**

**Defendants**

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**RICHARD HILL QC and ALASTAIR TOMSON** (instructed by **Kobre & Kim (UK) LLP**)  
for the **Claimant**

**ADRIAN BELTRAMI QC and LAURA JOHN** (instructed by **Simmons & Simmons**  
**LLP**) for the **First Defendant**

**TIMOTHY HOWE QC and SIMON ATRILL** (instructed by **Allen & Overy LLP**)  
for the **Second to Fifth Defendants**

Hearing dates: 9-11 May 2016  
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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.

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MR JUSTICE BLAIR

**Mr Justice Blair:**

1. This is the hearing of the claimant's ("Marme") applications (1) to stay the counterclaim of the 2<sup>nd</sup> to 5<sup>th</sup> defendant banks ("the Non-RBS defendants") in these proceedings (2014 Folio 1086), and (2) to stay an equivalent claim of the 1<sup>st</sup> defendant Royal Bank of Scotland plc ("RBS") brought by way of a separate action (2014 Folio 1474).
2. Marme's claim in these proceedings is for rescission of interest rate swaps entered into between it and the banks. As well as defending the claim, the banks seek declarations that they have lawfully terminated the swaps. Marme seeks to stay these claims for declarations pending the conclusion of (including the exhaustion of appeals in) insolvency proceedings in Spain relating to the insolvency of Marme, and its effect on the swaps. Marme submits that the issues raised by the banks in their claims for declarations in the English proceedings are properly before the Spanish insolvency court, which is the court with jurisdiction to determine them.
3. I have already communicated the outcome of the applications to the parties, and this judgment contains my reasons.

**The facts**

4. Marme is a company which was incorporated in Spain in November 2007 as a special purpose vehicle for the acquisition of a building in Spain called the Ciudad Financiera, the global headquarters of the Santander bank group. The investment plan involved the leaseback of the property to Santander under a 40 year lease with no break clause and an inflation-proof rental income starting at €2.53 million per annum.
5. A significant proportion of the acquisition costs was met by way of a senior loan totalling €1.575 billion from a syndicate of banks, led by RBS which made the largest single commitment of €66 million. The acquisition of the Ciudad Financiera completed on 12 September 2008 at a total cost of €2 billion. Unfortunately, the acquisition broadly coincided with the failure of Lehman Brothers, and the attendant market consequences.
6. Interest on the loan was by reference to EURIBOR. Of the syndicate of lenders, the five defendant banks entered into hedging arrangements with Marme by way of swaps under ISDA Master Agreements, Marme being the fixed rate payer. The swaps had a term of about 15 years. The swaps have resulted in large losses for Marme (currently stated by the banks as being around €710 million). Each is governed by English law and subject to an exclusive jurisdiction clause in favour of the English courts.
7. The senior loan was for a term of 5 years, coming to an end on 12 September 2013. On that day, Marme defaulted on the loan, and says that it was unable to obtain refinancing.
8. Following an application made for a protective administration order under Spanish insolvency law, Marme was placed into voluntary insolvency (*concurso voluntario*) on 4 March 2014, and an Insolvency Administrator was appointed. A year later on 4 March 2015, Marme entered liquidation (*administracion concursal*).

9. The events which are of most relevance to these applications for a stay and the interrelationship between the sets of proceedings in the two jurisdictions is contained in a chronology agreed between the parties, which is annexed to this judgment.
10. The key points are as follows. On 11 June 2014, the banks commenced a claim in the Spanish liquidation challenging the way the Insolvency Administrator proposed to deal with the accruing payments due under the swaps (the "Main Claim" in the insolvency).
11. On 10 September 2014 Marme began proceedings in the English courts (2014 Folio 1086) for rescission of the swaps on the basis of alleged implied misrepresentations in relation to EURIBOR ("the Rescission Claim"). This seeks rescission of the swaps *ab initio* on the basis that RBS made representations (on its own account and on behalf of the other Defendants) which were untrue about the process by which EURIBOR was set, and the knowledge of RBS, as a rate-setting bank, as to the manipulation that Marme says was taking place.
12. The allegation is largely based at present on a press release issued on 4 December 2013 by the European Competition Commission to the effect that it had fined RBS €131 million for its participation in a cartel of banks which had colluded to distort the EURIBOR rate between September 2005 and May 2008. I should emphasise that the Non-RBS banks have not themselves been accused of, or implicated in, any alleged wrongdoing in connection with EURIBOR, but are said by Marme to be responsible on an agency basis.
13. On 31 October 2014 in the insolvency proceedings, Marme filed its opposition to the banks' Main Claim in the insolvency, and issued a counterclaim. This counterclaim is made pursuant to Art. 61.2 of the Spanish Insolvency Law 22/2003 (the "Insolvency Counterclaim") for a termination of the swaps "in the interests of the estate".
14. Marme's evidence (which is not in dispute) is that Art. 61.2 is a provision of Spanish insolvency law which allows, either by agreement of creditor and debtor, or by order of the court, the termination of reciprocal contracts if that is in the interests of the estate/insolvency, with the court then deciding what amount should be paid to the creditor (if any). In the Insolvency Counterclaim, Marme contends that there should be no payment to the swap counterparties upon termination under Art. 61.2.
15. Art. 61.2 has been described as similar in effect to the disclaimer of onerous contracts in an English liquidation. Marme's counterclaim was given leave to proceed on 17 November 2014.
16. On 8 December 2014, RBS issued a claim in the English court (2014 Folio 1474) for declarations that it had terminated its swap under a termination notice of 12 November 2014 and that Marme was liable for the amount in its statement served under clause 6(d) of the relevant swap ("the RBS Declaration Claim"). It had to issue a fresh claim rather than a counterclaim, it says, because at that point no Particulars of Claim had been served by Marme in the English Rescission Claim.
17. On 9 December 2014, RBS filed a motion with the Spanish Court asking it to decline jurisdiction on Marme's Insolvency Counterclaim. This was largely based on the contention that the relevant swap had been terminated prior to the commencement of

Marme's proceedings. RBS has been supported in its submissions by the Non-RBS banks, though they have not filed motions themselves.

18. On 2 June 2015, the Non-RBS banks (followed by RBS on 3 June 2015) filed defences and counterclaims in the English Rescission Claim. Having applied for a stay of the RBS Declaration Claim on 8 April 2015, Marme applied for a stay of these defences and counterclaims on 16 June 2015. Together, these are the stay applications that are the subject of the present ruling.
19. On 26 June 2015, the Spanish Insolvency Court dismissed the jurisdiction challenge by RBS to Marme's counterclaim, finding that the timing point was bad because the counterclaim was treated as brought on filing, not when leave to proceed was given, and so came before the notices of termination. The judge confirmed this ruling on 8 March 2016, also rejecting Marme's application for a stay of the insolvency proceedings pending final determination of the English Rescission Claim.
20. This somewhat complex picture can be summarised as follows. In Spain, the insolvency judge has rejected a challenge by RBS to the counterclaim brought by Marme in the insolvency proceedings. She has also refused to accede to Marme's application to stay the insolvency proceedings including its counterclaim pending the trial of its rescission claim in England. Marme is seeking a further review of the judge's refusal—in other words, it continues to contend in Spain that the rescission claim in England should come first, on the grounds that if it succeeds, all insolvency questions relating to the swaps become moot. No further decisions of substance have been made by the Spanish Court.
21. In the English Court, Marme is pressing ahead with its claim to rescind the swaps on the basis of alleged fraudulent misrepresentation. It seeks to stay the banks' counterclaims because it says these should be resolved in its counterclaim in the insolvency proceedings in Spain. If it succeeds in its arguments in each jurisdiction, the effect will be that only its rescission claim will go forward presently. Everything else will be stayed.
22. Pending the resolution of the jurisdiction challenge, no steps beyond pleadings have been taken in the English proceedings.
23. Finally, I should say that the parties put in evidence witness statements as to Spanish law and procedure made by their respective legal representatives in the proceedings in Spain. It is common ground that the court need make no findings as to Spanish law and procedure.

#### Marme's contentions

24. Marme's case as put in its written submissions "in a nutshell" is that:
  - (1) From the date on which the Spanish Counterclaim under Art. 61.2 was issued in the Spanish insolvency proceedings seeking termination of the swaps in the interests of the insolvent estate (viz. 31 October 2014), the Spanish court has, as a matter of international jurisdiction, been seised of the question of the termination of the swaps (to the extent they are not void *ab initio*) under the European Insolvency Regulation (EC) 1346/2000 ("the Insolvency

Regulation”): the Spanish Counterclaim is an effect of the insolvency on current contracts for the purposes of Article 4.2(e) of the Insolvency Regulation.

- (2) The Spanish court has considered the question of its jurisdiction in the face of an application from RBS challenging its jurisdiction over the termination of the swaps, and has held at first instance, and on appeal [*it is common ground that this should be a reference to a review by the judge*], that it has jurisdiction over all questions relating to the termination of the swaps and that the *lis pendens* took effect on the commencement of the Spanish Counterclaim (i.e. 31 October 2014). Whether the swap counterparties’ (that is, the banks’) purported contractual terminations of the swaps are effective in the face of the Spanish Counterclaim (which if successful will result in the swaps being terminated as of 31 October 2014, a date which precedes the purported contractual termination by the swap counterparties) is a substantive matter to be decided in the Spanish Counterclaim.
- (3) The English court is required to recognise the Spanish insolvency proceedings under Articles 16 and 17 of the Insolvency Regulation; and it is required to recognise and enforce the Spanish court’s judgments in those insolvency proceedings pursuant to Article 25 of the Insolvency Regulation. Such recognition requires, necessarily, a stay of the RBS Declaration Claim and the Non-RBS banks’ counterclaim given the Spanish court’s determination that it is seised of all questions relating to the termination of the swaps as substantive matters in the Spanish Counterclaim proceedings.
- (4) Accordingly, Marme seeks a stay of the RBS Declaration Claim and the Non-RBS counterparties’ counterclaim in the English Rescission Claim pending the determination of Marme’s Spanish Counterclaim in the Spanish insolvency proceedings, that court already having been seised of all questions relating to the termination of the Swaps, including contractual termination, and the amounts due in relation to that termination prior to the commencement of any of the claims of the Swap counterparties in this jurisdiction.
- (5) Additionally, Article 28 of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“the Judgments Regulation”) is engaged: the Spanish Counterclaim is a related action to the RBS Declaration Claim and the Non-RBS counterparties’ counterclaim within the meaning of that Article, and the Spanish court was seised of the question of the termination of the swaps prior to this court being seised. Accordingly, this court has a discretion under Article 28 which it should exercise given the risk of inconsistent judgments if no stay is ordered, and the problems that would cause for enforcement given Article 34(3) of the Judgments Regulation if the Spanish and English courts were to give inconsistent judgments on the termination of the swaps.
- (6) The risk of inconsistent judgments should no stay be ordered is clear given that both the Spanish court and this court is being asked to determine (a) whether, and as of what date, the swaps are terminated, whether by contractual termination or under provisions of Spanish insolvency law; and (b) the

amounts (if any) due to each of the swap counterparties as a result of termination, and any judgment of this court which was inconsistent with the judgment of the Spanish insolvency court would be unenforceable in Spain pursuant to Article 34(3) of the Judgments Regulation.

25. Accordingly, this court is being asked to stay the RBS Declaration Claim and the Non-RBS defendants' counterclaim in the English proceedings pending a determination of Marme's Insolvency Counterclaim in the Spanish insolvency court.
26. This case was modified in certain respects in oral submissions. Marme's primary case for a stay was put on the basis of Art. 28 of the Judgments Regulation. This covers (5) and (6) above. Its main point is that its counterclaim under Art. 61.2 of the Spanish Insolvency Law is unquestionably properly before the Spanish court and is unquestionably a proper matter of Spanish insolvency law as a matter of international jurisdiction. It is clear, Marme submits, from the submissions on the merits which are made by the counterparties, that the determination of that issue involves all of the matters that are the subject of the RBS Declaration Claim and the other banks' counterclaim in the English proceedings. The contractual choice of English law and jurisdiction does not have such force where the banks have themselves placed the contractual position before the Spanish court.
27. Alternatively, its case is that a stay should be granted under the court's inherent jurisdiction to manage cases so as (among other things) to avoid the risk of conflicting judgments. This covers (1) to (4) above.
28. In that regard, there is, Marme submits, a difference in the position of the banks:
  - (1) RBS makes the same claim in both English and Spanish insolvency proceedings: there is, Marme submits, an entire overlap.
  - (2) In the counterclaim of the Non-RBS banks in the English Rescission Claim, there is a reservation to the effect that the claim for a declaration is "without prejudice to the questions of the effect of Spanish insolvency law on Marme's obligations under the Swaps as raised in [Marme's Insolvency Counterclaim], which are a matter for the Spanish court".
  - (3) There is no such reservation in the RBS English pleading.
29. In the case of all banks however, there is the risk of conflicting judgments if the English claims/counterclaims are not stayed, and the court should exercise its discretion under Art. 28 or under the court's inherent case management powers to stay them pending the determination of the Spanish Counterclaim in the Spanish court.
30. An alternative case based on the compulsory stay provisions of Art. 27 of Judgments Regulation was not pursued.

#### The banks' contentions

31. RBS says that it wished to ensure that any issues concerning termination of the RBS Swap as a matter of English law were dealt with properly and alongside/together with the issues raised by Marme in the English Rescission Claim. However as RBS was

unable to bring its Declaration Claim as a counterclaim in the rescission proceedings at that time (because Marme had not filed and served its particulars of claim) its claim was issued separately on 8 December 2014.

32. RBS' position is that the English court has exclusive jurisdiction to determine the RBS Declaration Claim under the Judgments Regulation by virtue of an express contractual term. Article 28 of the Judgments Regulation is inapplicable and there is in any event no reason to grant a stay on discretionary grounds. That being the case, the Insolvency Regulation is irrelevant and cannot operate to transfer such exclusive jurisdiction to Spain even if (which it plainly did not) the Spanish court thought otherwise. Marme's argument in respect of the Insolvency Regulation is unprincipled and unsupported by any authority.
33. RBS submits that the court should decline to grant the stay sought by Marme and instead consolidate these proceedings or have them tried together with the English Rescission Claim, as it is plainly sensible that the issues in this claim are resolved at the same time as the issues in the counterclaim brought by the Non-RBS defendants.
34. The Non-RBS defendants contend that:
  - (1) The English declaration claims fall within the Judgments Regulation (as Marme accepts). Further, as is common ground, each of the swaps has an exclusive jurisdiction clause in favour of the English court. Therefore, pursuant to Art. 23 of the Judgments Regulation, the English Court must take jurisdiction to determine the declaration claims. Further, in the case of the Non-RBS defendants, the court also has jurisdiction under Art. 6, since in their case the declaratory claim is brought by way of counterclaim to proceedings already commenced before the English court by Marme as of right against RBS.
  - (2) The English declaration claims are not within the defined "carve-out" from the Judgments Regulation (in Article 1(2)(b)) for insolvency proceedings. That carve-out is intended to dovetail with the scope of the Insolvency Regulation and falls to be narrowly construed under applicable EU and English authority. Consequently, the English declaration claims are not matters within the Insolvency Regulation.
  - (3) Notwithstanding the ongoing Spanish insolvency proceedings, which involve insolvency-specific claims, there is no requirement—under either the Insolvency Regulation or the Judgments Regulation—that all actions in connection with an insolvent entity, including claims that are not based on insolvency law, such as the English declaration claims, must be brought within, or before the court hearing, the insolvency proceedings.
  - (4) Marme's argument confuses a choice of law provision (Article 4 of the Insolvency Regulation) with the rules of international jurisdiction (contained in the Judgments Regulation, and Article 3 of the Insolvency Regulation). The two are conceptually distinct and independent. It would be contrary to principle, policy and precedent for this court to circumvent that regime by the application of a choice of law provision under the Insolvency Regulation so as



to apply Spanish domestic provisions to prevent the English declaration claims from proceeding in this court.

- (5) Even if Marme's interpretation of the Insolvency Regulation were correct (which is denied), its interpretation of the particular provisions of Spanish domestic law is in any event incorrect, when considered in the full and proper context of the relevant Spanish law as a whole: not only are the Spanish domestic provisions on which Marme relies not rules of international jurisdiction, but they also do not apply here.
- (6) Contrary to Marme's suggestion, the Spanish court has not ruled that it has jurisdiction over all matters connected with the swaps, including the English declaration claims that were not before it. It has ruled that it has jurisdiction to entertain the Spanish Insolvency Counterclaim. The Spanish court was not ruling that it had jurisdiction over the English declaration claims that the English court has jurisdiction over by reason of the Judgments Regulation. Nothing that the Spanish court held suggests that it was seeking to arrogate to itself a jurisdiction that it did not have. In fact, the Spanish court accepted that the Insolvency Counterclaim and Marme's rescission claim could continue in parallel; if the Spanish court had been suggesting that it had jurisdiction over all matters connected with the swaps that would include Marme's claim for rescission in the English proceedings. The Spanish court did not suggest it had jurisdiction over such claim, and Marme does not contend that Marme's rescission claim should be stayed.
- (7) The *lis alibi pendens* provisions in Art. 28 of the Judgments Regulation are inapplicable here: the two sets of proceedings are not 'related' in the requisite sense under the Judgments Regulation; further, there is no risk of irreconcilable judgments resulting from the continuation of the two sets of proceedings here sufficient to justify granting a stay of the English Declaration Claims.

### **Discussion and conclusions**

- 35. Marme's overall position as to jurisdiction is that the banks' English claims should be stayed on the ground that they are within the ambit of Marme's Spanish insolvency counterclaim—which Marme is itself seeking to stay pending the resolution of its English rescission claim. Though the Spanish insolvency judge has not accepted this contention to date, Marme is seeking a review of her decision. It is frankly accepted on behalf of Marme that this is an unattractive position to be taking. It also has the practical demerit that if this court is going to deal with its claim to rescind the swaps, it does not on the face of it make much sense not to deal at the same time with the banks' contractual claims should rescission not run.

### ***The position under the Insolvency Regulation***

- 36. However a decision of principle arises on the stay applications, and as Marme submits, the starting point is the effect of the Insolvency Regulation. This has a number of consequences in this case none of which are in dispute.

- (1) The Spanish court has jurisdiction under the Insolvency Regulation over Marme's counterclaim by virtue of Art. 3(1), Spain being the Member State in which the centre of Marme's main interests is situated.
  - (2) Art. 4(2)(e) determines that Spanish law is the law determining the conduct of the insolvency proceedings, and the effects of insolvency proceedings on the swaps as current contracts to which Marme is a party.
  - (3) Art. 25 concerns the recognition and enforcement of judgments relating to the insolvency proceedings, providing that judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Art. 16 and which concern the course and closure of insolvency proceedings shall be recognised with no further formalities, and enforced in accordance with the relevant articles of the Judgments Regulation.
37. All matters deriving directly from the insolvency proceedings and closely linked with them are for the Spanish court, and this court has no jurisdiction over them (*Gourdain v Nadler* C-133/78 [1979] ECR 733 at 744, applied in *UBS AG v Omni Holdings AG (in liquidation)* [2000] 1 WLR 916). This is unaffected by the exclusive English jurisdiction clause in the swap contracts, as the "insolvency carve-out" in Art. 1(2)(b) of the Judgments Regulation makes explicit. This states that the Regulation does not apply to "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings". (Both Regulations have since been recast, but the recast versions are inapplicable in this case.)
38. On this basis, it is common ground that Marme's counterclaim under Art. 61.2 of the Spanish Insolvency Law seeking termination of the swaps in the interests of the insolvent estate falls within the insolvency carve-out and that its application is a matter exclusively for the Spanish court.

### ***The interrelationship with the Judgments Regulation***

39. There is authority at the European level as to the interrelationship between the Regulations (e.g. *German Graphics Graphische Maschinen GmbH v van der Schee* C-292/08 [2009] ECR I-8421). As stated by the CJEU in *Nickel & Goeldner Spedition GmbH v "Kintra" UAB* C-157/13 [2015] Q.B. 96 at [27]:
- "It follows that the decisive criterion adopted by the Court to identify the area within which an action falls is not the procedural context of which that action is part, but the legal basis thereof. According to that approach, it must be determined whether the right or the obligation which respects the basis of the action finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings."
40. The distinction is between contractual claims and claims directly deriving from the insolvency proceedings and closely linked to them: only the latter fall within the insolvency carve-out (see in this regard Recital 35 of the Recast Insolvency

Regulation, and generally Goode, *Principles of Corporate Insolvency Law*, 4<sup>th</sup> ed., at 15-02).

41. Further, the banks do not seek a monetary remedy in their claims/counterclaims, which are limited to claims for declaratory relief as to the contractual position under the swaps. In any case, it is common ground that the Judgments Regulation applies to the banks' claims/counterclaims. Such proceedings comprise the determination of a contractual entitlement, distinct from any issue of insolvency, and which could have been advanced against Marme whether or not it had entered into an insolvency process.

***Marme's case under Art. 28***

42. Based on its written submissions, the banks say that Marme is or was contending that its application to stay their claims in England seeking declarations in relation to the swaps was grounded in the Insolvency Regulation, and that its application under Art. 28 of the Judgments Regulation was "additional" in this respect.
43. It is correct that Marme submits that the Insolvency Regulation forms the essential background for its submissions. However it follows from the above that the grounds for the stay must be found in the Judgments Regulation. As advanced orally, Marme's application is based primarily on Art. 28. (As noted previously, a contention based on Art. 27 was not pursued.) Alternatively, it submits that the court should use its inherent case management powers to stay the banks' claims/counterclaims pending the determination of Marme's Spanish Counterclaim in the Spanish court.
44. Art. 28 of the Judgments Regulation deals with related actions. Unlike Art. 27 dealing with cases involving the same cause of action, the granting of a stay is discretionary. Art. 28 provides that:

**Article 28**

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

***What the Spanish court has determined***

45. In its written submissions, Marme said that, "It is clear beyond any doubt that the Spanish court has determined that it has international jurisdiction over the questions

of: whether the Swaps should be considered terminated as of 31 October 2014, the effect of the purported terminations by the Swap Counterparties, and what (if any) sums should be paid in relation to that termination”.

46. However, in oral submissions Marme accepted that a national court cannot unilaterally enlarge the jurisdiction in this respect. Indeed, the judge’s decisions of 26 June 2015 and 8 March 2016 do not suggest that the Spanish court intended to enlarge its jurisdiction beyond the insolvency matters before it. The court was being asked to rule on a challenge by RBS to its power as a matter of Spanish insolvency law to determine the counterclaim under Art. 61.2. Though it was suggested in submissions by Marme that the Spanish court could decide the contractual position even if the claim under Art 61.2 ultimately fails, read in the context of the issue for decision there is nothing in the court’s reasoning to suggest that it will decide the contractual claims between the parties, as opposed to the insolvency claims. In the event, Marme said that it was not “placing very much store” on this point.
47. It did however strongly submit that the issues of the validity of the contractual termination of the swaps and the amount due contractually on termination have been unequivocally put before the Spanish court by the banks. It did not suggest that this meant that the banks were “stuck” with this as a matter of jurisdiction, but it did submit that this was a relevant factor when considering the exclusive jurisdiction clause in the context of an Art. 28 stay. I shall come back to this point.

### ***The position of the parties***

48. The position of the banks is that this court must take jurisdiction to determine the English declaration claims due to the exclusive jurisdiction clause in the contracts in favour of the English court pursuant to Article 23 of the Judgments Regulation. They submit that the Judgments Regulation and the Insolvency Regulation provide mutually exclusive codes. If a claim falls under the Judgments Regulation, it will by definition not also be within the insolvency carve-out. Equally, if it falls within the carve-out, it will not be within the Judgments Regulation. These are not, as it was put, “porous categories”.
49. Marme’s position is that on any broad, commonsense approach, the claims are related actions for Article 28 purposes in that they concern the termination of the swaps. The question of contractual termination is relevant as a matter of Spanish law to the question of whether an Article 61.2 termination is available, the parties having adopted contrary positions in Spain as to the efficacy or inefficacy of each of their respective types of attempted termination. The Spanish court will also have to determine the amounts payable (if any) in relation to a termination under Article 61.2. The Non-RBS defendants (at least) have asked the court to determine any indemnity by reference to the sums which would have been due on a contractual termination.

### ***The issues and the court’s conclusions***

50. The issues between the parties and the court’s conclusions on them can be conveniently considered under a number of heads.

*(i) Are the claims related?*

51. The banks submit that an action under the Judgments Regulation is not for these purposes “related” to a claim which falls under the Insolvency Regulation, citing *Rahman v GMAC Commercial Finance Ltd* [2012] EWCA 1467. If this is correct, Marme’s submission fails *in limine*. However, whilst this was held at first instance, the point was expressly left open by the Court of Appeal (see [18]), the decision being upheld on the basis that the judge was entitled to refuse a stay as a matter of discretion. Given my conclusions as set out below, it is not necessary for me to express a view on the point.
52. It then becomes a question of applying the Art. 28 test. Actions are deemed to be related for the purposes of Art. 28 where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings (see Art. 28.3).
53. Marme submits that the Spanish court is concerned with the question of the alleged contractual termination of the swaps, and the effect this might have on the availability of the Article 61.2 insolvency protective measure. The Spanish court is also concerned with the question of whether as a matter of Spanish insolvency law there could have been a breach of the contractual obligations owed under the swaps: the Insolvency Administrator’s position is that no breach can have occurred in light of the effect of the *concurso*. These are all questions for Spanish law, including Spanish insolvency law, and the Spanish court is the best placed to deal with them.
54. Marme further submits that if the question of the contractual termination of the swaps were to be heard here, in addition to any defence which Marme may have under English law, this court would be required to determine issues on defences arising out of Spanish insolvency law, including the effect of *lis pendens* on the ability of the swap counterparties to terminate the swaps after the Spanish Counterclaim was issued on 31 October 2014, and the effect generally of the Spanish insolvency proceedings on Marme’s liabilities under the swaps, and whether it was at all in breach. When insolvency proceedings considering precisely those questions are being continued in parallel in Spain, the determination of those questions in this forum would not be in the interests of justice. The result would be a race to judgment, given the risk of irreconcilable judgments between this jurisdiction and Spain.
55. As to the latter point, the banks respond that their claims are purely declaratory and do not extend to seeking payment (see *Gibraltar Residential Properties v Gibralcon 2004 SA* [2010] EWHC 2595 (TCC)).
56. Further, the Non-RBS defendants expressly plead in the English counterclaim that the claim for a declaration is “without prejudice to the questions of the effect of Spanish insolvency law on Marme’s obligations under the Swaps as raised in [Marme’s Insolvency Counterclaim], which are a matter for the Spanish court”. RBS says that if necessary its claim can be amended to contain the same words, but that they are implicit anyway. As I understand it therefore, the banks have abjured contesting matters before the English court that would trespass on the insolvency jurisdiction of the Spanish court. The question of whether as a matter of Spanish insolvency law there could have been a breach of the contractual obligations owed under the swaps will be for the Spanish court. The English court will be concerned exclusively with the contractual position. This answers this aspect of Marme’s objection to the declaration proceedings in England.

57. As to the former point, Marme submits that everything that is at issue in the English cases are at issue in the Spanish case. But as the banks say, the cases are concerned with different issues. The declaration claims/counterclaims are concerned with the meaning and operation of the banks' contractual rights/powers as a matter of English law. The Spanish counterclaim is concerned with whether the judge should exercise her discretion to terminate the contract for the good of the creditors of the insolvent estate and if so the extent to which the banks should be compensated.
58. By the same token, I further agree with the banks that the cases have different objectives. The claims/counterclaims seek declarations as to the banks' contractual entitlement as a matter of English law. The Spanish Counterclaim seeks to invoke a specific power of a Spanish judge in insolvency proceedings for the good of the insolvent estate.
59. I would not go so far as accepting the banks' submissions that there is *no* risk of irreconcilable judgments. It is correct, as Marme says, that the cases in each jurisdiction arise out of same factual matrix. It is for example possible that (as Marme says) the Spanish court may make findings as to the contractual position as to termination, perhaps for the purposes of assessing the total potential contractual liability of Marme, and that the English court might take a different view.
60. But there is no conceptual overlap between the cases, one being concerned with a specific insolvency remedy akin to the disclaimer of onerous contracts, the other with a contractual claim. These are inherently different exercises even if they share a factual background. With that in mind, the possibility raised by Marme that the decision of the Spanish court may have a *res judicata* effect as to the contractual issues it decides does not carry great weight. It is more likely that the Spanish court would be assisted by a decision of the English court as to the contractual position under English law contracts, whether or not under any applicable doctrine of *res judicata*. For that reason, I consider that expediency does not favour staying the English proceedings until the Spanish proceedings are resolved.
61. There are of course issues of timing, in other words, which court is likely to make a determination first. No party has placed great reliance on this, though Marme has raised the possibility of a race to judgment. Participating in such a race does not seem likely to commend itself to either court, and I put it on one side. Taken as a whole, the risk of irreconcilable judgments seems fairly limited. As it was put in *Research in Motion UK Limited v Visto Corporation* [2008] EWCA Civ 153 at [36]-[37]:

“[i]ts effect [i.e. of article 28] is not entirely mechanical. It requires an assessment of the degree of connection, and then a value judgment as to the expediency of hearing the two actions together (assuming they could be so heard) in order to avoid the risk of inconsistent judgments. It does not say that any possibility of inconsistent judgments means that they are inevitably related. It seems to us that the Article leaves it open to a court to acknowledge a connection, or a risk of inconsistent judgments, but to say that the connection is not sufficiently close or the risk is not sufficiently great, to make the action related for the purposes of the Article. Mechanics do not, for once, provide a complete answer.”

62. I consider that this is the position here—the risk of inconsistent judgments cannot be excluded, but is not sufficiently great, in my opinion, to make the actions “related” for the purposes of Art 28.

*(ii) Was the English court first seised?*

63. The court first seised cannot grant a stay under Art. 28 (*The Alexandros T* [2014] 1 All ER 590 at [74]). The Non-RBS defendants submit that the action against it was commenced in September 2014 when Marme issued its claim form, not the date of the counterclaim. The Spanish Insolvency Counterclaim was not commenced until the end of October 2014. Since the English court was first seised on this basis, Marme’s case on Art. 28 therefore falls at the first hurdle. Marme does not accept this, and the position may differ as regards RBS. These are difficult points, and in the light of the view I have taken under heads (i) and (iii), I need not determine them.

*(iii) Discretion*

64. The court has a discretion to decide whether or not the action should be stayed—see the guidance given in Advocate General Lenz’s opinion in C-129/92 *Owens Bank Ltd v Bracco* at paras 74–79, which Lord Clarke applied in *The Alexandros T* (at [92]). Marme says it should exercise it in favour of granting a stay, for reasons stated above.
65. Taking the three particular factors identified by Advocate General Lenz as being of importance, I find as follows:
- (1) Even if the English declaratory claims and the Spanish Insolvency Counterclaim are “related”, it is only in the relatively distant sense that both claims relate to the swaps, and so share the same factual background. I refer to what is said above. There is another factor which may be of some relevance in this regard if correct—the Non-RBS defendants say that the Spanish court dismissed Marme’s application for a stay of the Insolvency Counterclaim pending the outcome of its rescission claim before this court on the basis that there is no risk of irreconcilable judgments. If this is correct, it appears to coincide with my own view.
  - (2) The second factor concerns the stage which has been reached in each set of proceedings—this is neutral in this case, because neither has progressed very far.
  - (3) The third factor is the proximity of each court to the subject matter of the case, and my reasoning in this respect is as follows.
66. There is an exclusive jurisdiction clause in favour of the English court, which has frequently been recognised as “a powerful factor in support of refusal of a stay” because it gives effect to the bargain which the parties struck: see *The Alexandros T* at [95]–[96]; *Nomura International v Banca Monte dei Paschi* [2014] 1 WLR 1584, at [78]–[80].
67. Marme accepts that this can be a powerful factor, but says that this is not so in the present case. This is because it says that the banks have placed the question of the contractual effect of the swaps before the Spanish court in the course of their

submissions, supported by expert evidence as to English law. In such circumstances, Marme submits, the factor of the exclusive jurisdiction clause loses much of its force.

68. I was taken through the submissions made by the banks to the Spanish court, and felt at the time that this point had considerable strength. However, on reflection it seems to me that, assuming that the banks have placed these matters before the Spanish court to the extent Marme says, they had a good reason for doing so. It is pointed out on their behalf that the effect of Marme's insolvency counterclaim may be to reduce their recovery under the swaps to zero. In those circumstances it was inevitable, it is submitted, that the banks would, and would have to, make full submissions as to their contractual entitlement so as to properly put their case to the court. However, I am satisfied that this does not involve a request to the Spanish court to decide the contractual questions. On the contrary, the banks make it clear in their respective submissions that their position is that the English court has jurisdiction over the contractual claims.
69. I agree with these points, and in those circumstances, consider that the position is analogous to that in *Fondazione Enasarco v Lehman Brothers Finance SA* [2014] EWHC 34 (Ch), in which the court refused a stay, although the claimant in the English proceedings had previously filed a claim in the Swiss bankruptcy challenging the rejection of its proof of debt. Each court therefore had the same issue before it. The court's reasoning rested on the exclusive jurisdiction clause in the swaps agreement, and the fact that it was likely that the judgment of the English court as to English law would assist the Swiss court, given that the agreement was governed by English law. The same factors are present in this case.
70. These considerations alone point firmly, in my view, against the grant of a stay in this case as a matter of discretion.
71. There is a further feature of this case which is potentially significant. Marme began these proceedings in England, and it is the banks' claims/counterclaims for declarations that it seeks to stay. As I have explained, Marme intends to press ahead with its own claim for rescission, which the court will have to try in any event.
72. RBS says that it would be manifestly absurd for the English court to try the rescission aspects of the swaps dispute without at the same time trying the other contractual aspects of the dispute raised by the banks.
73. The fact that there will be a trial in England in any event is in principle a strong additional factor against the grant of a stay. My understanding was that the Non-RBS defendants did not rely on it (it is not mentioned in their written submissions) because they wish to have the opportunity to argue that the court should split the trial so that issues relating to whether implied representations as to EURIBOR were made, their scope, RBS's alleged authority to make them on behalf of the Non-RBS defendants and Marme's alleged reliance on them, should be heard at a first trial, with all remaining issues (including falsity and dishonesty) to be determined at a separate trial if required. This is because no allegation of fraud is made against these defendants. At the hearing, I indicated that the Non-RBS defendants should have the opportunity to make their submissions in this regard. In comments on this judgment in draft, the Non-RBS defendants explain that they do rely on this factor as well. In any case, as indicated, the other considerations alone lead me to refuse a stay.



***Inherent jurisdiction***

74. Marme also invokes the court's inherent jurisdiction to make case management orders which minimise the risk of conflicting judgments. It is not in dispute that the court has this power, though the banks say it should not be used so as to produce a result which is contrary to the scheme of the two Regulations (citing *Mazur Media Limited v Mazur Media GmbH* [2004] 1 WLR 2966).
75. I do not exclude the possibility of appropriate case management orders in the future, depending on the course of the proceedings in the two jurisdictions. However, there is no justification in my view for a stay of the banks' claims/counterclaims at this time. The reasons given above in relation to Art. 28 apply equally.

**Conclusion**

76. Marme's applications for stays are refused. I am grateful to the parties for their assistance, and will hear them as to consequential matters.

**AGREED CHRONOLOGY OF EVENTS**

Date	Event	Proceedings in Spain	Proceedings in England
12.9.08	Swaps and Senior Loan entered into.		
12.9.13	Marme defaults on Senior Loan.		
4.3.14	Marme enters the <i>concurso voluntario</i> ("voluntary insolvency") in Spain.		
7.5.14	Insolvency Administrator produces preliminary report (officially served on the Non-RBS Counterparties on 27.5.14) indicating (inter alia) the intended status/classification of the credits to the Swap Counterparties under the Swaps for the purposes of Spanish insolvency law.		
20.5.14	Periodic payments not made under each of the swaps. Requests for payments and reservation of rights letters sent on 21 and 22.5.14.		
11.6.14		Swap Counterparties commence Post Petition Debt Claim (referred to by Marme as the " <b>Main Claim</b> ") challenging the	

Date	Event	Proceedings in Spain	Proceedings in England
		intended status/classification of the credits to the Swap Counterparties under the Swaps according to the preliminary report of the Insolvency Administrator. Swap Counterparties seek a declaration that periodic payments accrued after the insolvency declaration are payable as post-petition debts (i.e. an expense of the voluntary insolvency) and not as pre-petition debts (i.e. not in accordance with the hierarchy among creditors provided for under Spanish insolvency law).	
13.8.14	Notice of 20.5.14 payment default under the RBS Swap served on Marme by RBS. 60 business day contractual grace period under the RBS Swap starts to run.		
20.8.14	Payments not made under each of the Swaps.		
10.9.14			Marme commences 2014 Folio 1086 for rescission of each of the Swaps on the basis of alleged implied misrepresentation(s) in relation to Euribor (“ <b>the English Rescission Claim</b> ”).
31.10.14		<p>Marme:</p> <p>(1) Files opposition to Post Petition Debt Claim pending determination of the English Rescission Claim (i.e. Marme seeks a stay of the Post Debt Petition Claim pending determination of the English Rescission Claim).</p> <p>(2) Issues Counterclaim pursuant to Article 61(2) of the Spanish Insolvency Act, without prejudice to the English Rescission Claim (“<b>the Spanish Insolvency Counterclaim</b>”).</p> <p>(3) Seeks stay of Spanish Insolvency Counterclaim and Post Petition Debt claim</p>	

Date	Event	Proceedings in Spain	Proceedings in England
		pending final determination (including any appeals) of the English Rescission Claim.	
11.11.14	RBS Termination Notice		
11.11.14	HSH Termination Notice		
14.11.14	Marme letters responding to RBS and HSH Termination Notices. Marme rejects assertion Swaps have been terminated contractually by the Swap Counterparties on the basis that (a) Swaps had been rescinded <i>ab initio</i> , and in any event (b) Marme had already sought termination as of 31 October 2014 and that Spanish insolvency court was already seized of the question.		
17.11.14		Marme's Spanish Insolvency Counterclaim granted leave to proceed.	
17.11.14	RBS section 6(d) statement of sums said to be due on termination.		
19.11.14	ING Termination Notice		
20.11.14	HSH section 6(d) statement of sums said to be due on termination.		
25.11.14	Bayern Termination Notice		
25.11.14	Caixa Termination Notice		
26.11.14	ING section 6(d) statement of sums said to be due on termination.		
28.11.14	Marme letter responding to ING, Bayern and Caixa Termination Notices in similar terms to letters to RBS and HSH.		
1.12.14	Bayern section 6(d) statement of sums said to be due on termination.		
3.12.14	Caixa section 6(d) statement of sums said to be due on termination.		
8.12.14			RBS claim in 2014 Folio 1474 for declarations that it had terminated the Swap under its Termination Notice and that Marme was liable for the amount in its s.6(d) statement (" <b>the RBS Declaration Claim</b> ").

Date	Event	Proceedings in Spain	Proceedings in England
9.12.14		RBS files motion to Spanish Court to decline jurisdiction on Spanish Counterclaim (“ <b>the Spanish Insolvency Counterclaim Jurisdiction Challenge</b> ”).	
29.12.14		Insolvency Administrator files submissions on Spanish Insolvency Counterclaim Jurisdiction Challenge.	
30.12.14		Non-RBS Counterparties file a submission making certain statements with regard to RBS’s arguments on its Spanish Insolvency Counterclaim Jurisdiction Challenge.	
30.12.14		Marme response to the Spanish Insolvency Counterclaim Jurisdiction Challenge.	
5.1.15		RBS served with Marme’s response to the Spanish Insolvency Counterclaim Jurisdiction Challenge.	
4.3.15	Marme enters liquidation (“ <i>administracion concursal</i> ”).		
8.4.15			Marme applies in 2014 Folio 1474 for a stay of the RBS Declaration Claim on the grounds of jurisdiction.
18.5.15			Marme serves Particulars of Claim in the English Rescission Claim
2.6.15			The Non-RBS Counterparties serve their Defences and Counterclaims in the English Rescission Claim, seeking similar declaratory relief to that sought by RBS in 2014 Folio 1474.
3.6.15			RBS files its Defence in the English Rescission Claim.
16.6.15			Marme applies for a stay of the non-RBS Counterparties’ Counterclaims to the English Rescission Claim on the grounds of jurisdiction.
26.6.15		First instance ruling by Spanish Insolvency Court on the Spanish Insolvency Counterclaim Jurisdiction Challenge.	

Date	Event	Proceedings in Spain	Proceedings in England
		Dismisses the challenge brought by RBS. (“ <b>the 26 June 2015 Spanish Insolvency Court Ruling</b> ”) (This judgment is served on the Swap Counterparties 3.7.15.)	
6.7.15		Filing of the substantive Defences of RBS and Non-RBS Counterparties in response to Marme’s Spanish Insolvency Counterclaim.	
13.7.15		RBS application for review (by same first instance Spanish Judge) of the 26 June 2015 Spanish Insolvency Court Ruling 15 on the Spanish Insolvency Counterclaim Jurisdiction Challenge.	
31.7.15			Marme serves Replies to Defendants’ Defences in English Rescission Claim.
8.3.16		Further ruling by first instance Spanish Insolvency Court (on review of the 26 June 2015 Spanish Insolvency Court Ruling) confirming its own previous ruling on the Spanish Insolvency Counterclaim Jurisdiction Challenge, rejecting RBS’ application and rejecting Marme’s application for a stay of the Spanish Insolvency Counterclaim and Post Petition Debt claim pending final determination (including any appeals) of the English Rescission Claim (“ <b>the 8 March 2016 Spanish Insolvency Court Ruling</b> ”).	
5.4.16		Marme seek further first instance review of the 8 March 2016 Spanish Insolvency Court Ruling (only) in relation to the rejection of Marme’s application for a stay of the Spanish Insolvency Counterclaim and Post Petition Debt claim pending final determination (including any appeals) of the English Rescission Claim.	
26.4.16		The parties were granted a 5-day time period in which to challenge Marme’s appeal (as filed on 5.4.16).	
12.5.16 and		The Non-RBS Counterparties and RBS file their challenges	

Date	Event	Proceedings in Spain	Proceedings in England
13.5.16		against Marme's appeal in relation to the rejection of Marme's application for stay.	