Neutral Citation Number: [2019] EWHC 366 (Comm)

Case No: CL-2014-000348

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BUSINESS & PROPERTY COURTS
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 February 2019

Before:

THE HON. MR. JUSTICE PICKEN

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Between:

MARME INVERSIONES 2007 SL	**Claimant**
- and -	
(1) NATWEST MARKETS PLC **(2) HSH NORDBANK AG** **(3) BAYERISCHE LANDESBANK** **(4) ING BANK NV** **(5) CAIXABANK SA**	**Defendants**

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Pushpinder Saini QC, Alastair Tomson and **Andrew Rose** (instructed by **Kobre & Kim (UK) LLP**) for the Claimant, Marme Inversiones 2007 S.L..
David Quest QC, Laura John and **Max Evans** (instructed by **Simmons & Simmons LLP**) for the First Defendant, NatWest Markets PLC.
Timothy Howe QC and **Adam Sher** (instructed by **Allen & Overy LLP**) for the Second to Fifth Defendants, HSH Nordbank AG, Bayerische Landesbank, ING Bank NV and Caixabank SA.

Hearing dates: 3-5 October, 8-11 October, 23-24 October and 5-7 November 2018.
Draft judgment supplied to the parties: 18 February 2019

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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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THE HON. MR. JUSTICE PICKEN:

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Introduction

1. These high value and complex proceedings arise out of events which led to the recent convictions of two individuals involved in rate fixing. They involve two connected actions. The first action concerns a claim by Marme Inversiones 2007 SL ('Marme') against NatWest Markets Plc (which was at all relevant times known as RBS plc, and is, therefore, referred to in this judgment as 'RBS') and the Second to Fifth Defendants (referred to as the 'Non-RBS Banks') (together with RBS, the 'Banks' or the Defendants), and the Non-RBS Banks' counterclaims in that action. The second action concerns RBS's claim against Marme, which mirrors the counterclaims made by the Non-RBS Banks in the first action. These proceedings arise primarily out of interest rate swaps entered into between Marme and each of the Defendants in September 2008, a few days prior to the collapse of Lehman Brothers. It is common ground that the issues raised in both actions are the same.

2. Marme is a Spanish special purpose vehicle which was incorporated in Spain by Mr Glenn Maud and Mr Derek Quinlan on 22 November 2007 for the purpose of buying the Spanish headquarters of Banco Santander SA ('Santander'), 'Ciudad Financiera'. Marme is a wholly owned subsidiary of Delma Projectontwikkeling BV ('Delma'), a Dutch company, which is in turn a wholly owned subsidiary of Ramblas Investments BV ('Ramblas'), also a Dutch company. In 2008, the ultimate beneficial owners of Ramblas were Mr Maud and Mr Quinlan in equal shares. Marme, Delma and Ramblas are all currently subject to a liquidation procedure in Spain.

3. RBS is a Scottish bank headquartered in Edinburgh and is a subsidiary of the Royal Bank of Scotland Group plc.

4. The Non-RBS Banks are, respectively: the Second Defendant, HSH Nordbank AG ('HSH'), a publicly owned and regulated German state bank based in Hamburg and Kiel, Germany; the Third Defendant, Bayerische Landesbank ('Bayern'), a publicly owned and regulated German state bank based in Munich; the Fourth Defendant, ING Bank NV ('ING'), a Dutch bank based in Amsterdam which is part of the publicly listed ING Group; and the Fifth Defendant, Caixabank S.A. ('Caixa'), a Spanish financial institution based in Barcelona.

5. The actions concern the question of Marme's liability to make payments to the Defendants in relation to interest rate swaps entered into by Marme on 12 September 2008 (the 'Swaps'). The context was the purchase of Ciudad Financiera by Marme, which was financed in part by a loan of €1.575 billion to Marme by a syndicate of eight lenders, including the Defendants (the 'Senior Loan'). The terms of the Senior Loan required Marme to enter into hedging arrangements in relation to the interest payable; the Swaps were entered into to satisfy this requirement. The parties' respective liabilities under the Swaps were set by reference to the Euro Interbank Offered Rate ('EURIBOR').

6. Marme seeks rescission of the Swaps *ab initio* and/or damages of up to €996 million on the basis that RBS, fraudulently or otherwise, made representations

(on its own account and as agent for the Non-RBS Banks) regarding the integrity of the process of setting EURIBOR which were untrue.

7. Mr Saini QC relied, for these purposes, on the behaviour of one individual, Mr Philippe Moryoussef, who was employed at Barclays from 2005 to March 2007 and who subsequently joined RBS as Head of European Interest Rate Derivatives, a position which he held from August 2007 to September 2009. Mr Moryoussef was, in July 2018, convicted of conspiracy to defraud in respect of EURIBOR. Marme contends that Mr Moryoussef was manipulating EURIBOR whilst at RBS and submitted that, as a result of his activities, RBS should be regarded as, as Mr Saini QC put it, a "*rotten bank*".

8. For its part, RBS does not accept that Mr Moryoussef manipulated, or attempted to manipulate, EURIBOR whilst he was employed at RBS, although RBS accepts that he did so whilst he was with Barclays. It was RBS's position that Mr Moryoussef was, given his prior conduct when employed by Barclays, a "*rotten apple in the RBS barrel*" but that this did not make RBS a *"rotten bank"*.

9. As well as defending Marme's claim, the Defendants (RBS by way of claim and the Non-RBS Banks by way of counterclaim) seek various declarations that they have lawfully terminated the Swaps, as to the contractual termination values of their Swaps and as to the sums due thereunder. The Defendants say that Marme's total contractual liability is to pay approximately €710 million plus interest.

Background to these proceedings

10. There is some dispute between Marme and the Defendants as to the underlying facts and a number of factual and evidential issues will have to be resolved. The following sets out the relevant common ground between the parties.

The Ciudad Financiera transaction

11. The background to the dispute is the signing by Marme, on 25 January 2008, of a Sale and Leaseback Agreement in what was apparently Europe's "*largest ever property deal*" namely the purchase and lease-back of Ciudad Financiera (the 'Transaction'). Marme acquired Ciudad Financiera from Santander, which in turn entered into a lease of the property back from Marme.

12. Mr Maud and Mr Quinlan were originally presented with the opportunity to purchase Ciudad Financiera in September 2007 whilst they were negotiating the financing for the Citigroup Tower, in which Santander was also involved. Mr Maud and Mr Quinlan were originally competing against JP Morgan and Goldman Sachs for the purchase of Ciudad Financiera; however, Marme was the successful bidder, in part as it was able immediately to commit to the purchase.

13. Mr Maud and Mr Quinlan negotiated and agreed the acquisition with Santander through their respective vehicles, Propinvest Group Limited ('Propinvest') and Quinlan Private. The Sale and Leaseback Agreement was

signed on 25 January 2008 between Marme, various subsidiaries of Santander as vendors, and Santander as depository for the vendors.

14. The purchase price agreed was €1.9 billion (plus various costs and taxes) albeit that this was subsequently increased slightly. Marme leased Ciudad Financiera back to one of Santander's subsidiaries for a term of 40 years with a starting rent of €74.08 million per annum (ultimately increased to €82,693,711 per annum), which was subject to an annual rent review. Mr Maud and Mr Quinlan between them provided a non-refundable deposit to secure completion of the Transaction, originally in the sum of €50 million but later increased to €75 million.

15. Completion was originally due to take place on 31 March 2008 and the initial plan was that the Transaction would be funded by a bond issue backed by the revenue streams from the lease-back of Ciudad Financiera, but the process of raising finance took longer than Marme had expected. Completion was, therefore, extended a number of times. The first occasion involved an extension to 16 May 2008, agreed on 31 March 2008, which entailed Mr Maud and Mr Quinlan providing, in return, the increased completion guarantee of €75 million. The completion date was, then, extended, successively, to 31 May 2008 (on 18 April 2008), 20 June 2008 (on 23 May 2008), 31 July 2008 (on 27 June 2008) and 28 August 2008 (on 1 August 2008) and, finally, to 12 September 2008 (on 29 August 2008).

16. The Transaction completed on 12 September 2008 for a total completion cost of approximately €2 billion. On 15 September 2008, Lehman Brothers filed for bankruptcy.

Financing the Transaction

17. Marme explored various options for financing the Transaction and commenced negotiations in respect of financing in late 2007. Marme's original plan was to obtain bond financing through the securitisation of the anticipated rental stream under the lease. However, it became clear in early 2008 that this was not a viable option given the deepening credit crunch. Marme, instead, directed its attention towards traditional (or 'vanilla') secured debt financing by way of a syndicated loan. Mr Maud and Mr Quinlan, nonetheless, continued to believe that a bond issue would become viable and would serve as their exit strategy from the deal.

18. After shifting its focus to traditional debt financing, in March 2008 Marme contacted a number of banks with a view to their participating in the syndicate and/or acting as a joint lead arranger. The banks contacted included Bayern and RBS. Although not yet formally appointed as an arranger, Bayern began to communicate with other banks which it thought might be interested in participating and provided a term sheet for financing the Transaction to Marme on 27 March 2008.

19. RBS was offered involvement in the loan syndicate in March 2008 and held some discussions with Bayern and Propinvest, however, it did not join the syndicate at that point. Despite having declined participation in the syndicate,

RBS remained in touch with Propinvest over the next few months. This included communications in relation to two other financing projects – known as 'Sparkle' (the refinancing of the acquisition of Citigroup Tower by Propinvest and Quinlan Private) and 'Blade' (the refinancing by Propinvest of an £879 million senior loan facility provided by RBS in 2007).

Bayern as sole MLA

20. In April 2008, Bayern was mandated by Marme to act as sole mandated lead arranger ('MLA') of the Senior Loan syndicate (the 'Syndicate'). The draft financing terms attached to Bayern's mandate letter, which was signed and returned by Propinvest on 16 April 2008, envisaged, *inter alia*, that the term of the Senior Loan would be 7 years, that there would be interest rate hedging and that there would be an arrangement fee of 25 basis points (or 'bps') and an underwriting fee of 75bps.

21. In its role as MLA, Bayern was tasked with putting together the syndicate of banks which would participate in the Senior Loan. An Information Memorandum was negotiated and agreed between Bayern and Marme, which was then circulated by Bayern with an introductory letter and cashflow model to a number of potential funders in April and May 2008. The terms which were contained within the Information Memorandum included a 15-year stepped interest rate swap and a minimum Interest Cover Ratio ('ICR') of 105%.

22. In early May 2008, Bayern instructed Allen and Overy LLP ('A&O') to act on behalf of the syndicate, including in the preparation of initial drafts of the Senior Loan agreement and security documents. Early drafts of the agreement prepared by A&O in May 2008 included: a term that interest under the Senior Loan would be determined by reference to EURIBOR; a requirement that Marme maintain interest rate hedging satisfactory to the Facility Agent; and a requirement that the ICR was at least 105%.

23. Berwin Leighton Paisner LLP ('BLP') acted for Marme in the UK and Garrigues acted for Marme in Madrid. BLP circulated and commented on drafts of the Senior Loan Agreement in June and July 2008.

24. On 20 May 2008, Bayern wrote to Propinvest informing it that Bayern had received commitments from various banks totalling €2.5 billion, although that these commitments were subject to board approval. The banks were Bayern, HSH, Bank of Ireland, Helaba, RZB, Postbank, Caixa and Allied Irish Bank. At that stage, the financing was said to be significantly oversubscribed. On 19 June 2008, however, Bayern told Propinvest that it had received commitments amounting only to €1.1 billion albeit that it expected to reach the full amount shortly.

25. At that time, the (postponed) date for completion was 20 June 2008. Propinvest obtained a further extension to 31 July 2008.

26. By the beginning of July 2008, Bayern had only obtained commitments of €1.15 billion, with Bayern itself contributing just €150 million (compared to

its original suggestion that it would participate to the extent of €500 million). Helaba had also withdrawn by this point, having failed to obtain its board's sanction for participation.

Bayern, HSH and RBS as joint MLAs

27. In July 2008, Marme and Santander approached RBS directly to invite it to join the Syndicate in order to help to resolve the shortfall and to take over arranging the Senior Loan.

28. By mid-July 2008, RBS had agreed to participate in the Syndicate, proposing to cover the shortfall of €475 million.

29. On 22 July 2008, RBS provided a term sheet to Propinvest and Mr Quinlan. It is common ground that RBS introduced certain 'take it or leave it' terms, namely that the loan term be reduced from seven years to five, that an LTV covenant be introduced after the first two years and that RBS would be paid an Agency fee of €100,000 per annum. Mr Maud attempted to negotiate the terms as to the fee structure and LTV covenant. However, RBS did not accept any changes. The terms also included a 15-year stepped interest rate swap. Marme's position is that RBS sought to impose also as a condition of its participation that it replace Bayern as sole MLA, but that this was not accepted.

30. On or around 24 July 2008, RBS formally agreed to join the Syndicate and both RBS and HSH were appointed by Marme to be joint MLAs with Bayern. RBS was also appointed later as Facility Agent and Security Agent for the Syndicate.

31. There is a dispute between Marme and the Defendants as to the extent of RBS's role as joint MLA. Marme contends that RBS was *de facto* sole lead arranger and the "*face*" of the Transaction, with Bayern and HSH's roles being nominal. The Defendants say that, although RBS's involvement in the arrangement of the financing increased, each of the MLAs remained "*substantially involved in the finalisation of the Transaction*", including by attending meetings and inputting into legal documents (both directly and through A&O).

32. In July-September 2008, the legal documentation (including the ISDA Master Agreements) was prepared.

Terms of the financing

33. The Transaction was ultimately financed by: (i) a five-year Senior Loan of €1.575 billion to Marme from the Syndicate of eight banks; (ii) a €200 million mezzanine Junior Loan from RBS to Ramblas in respect of an onward loan to Marme; and (iii) a €150 million equity injection from Mr Maud and Mr Quinlan.

34. From April 2008 to early August 2008, Marme had hoped that the Libyan Investment Authority ('LIA') would provide equity for the deal. However, the

LIA withdrew from the transaction in early August 2008. RBS ultimately met Marme's additional funding needs by providing the €200 million loan to Ramblas and a personal loan to Mr Quinlan and Mr Maud of €75 million which funded half of their equity injection.

35. The Senior Loan was executed on 12 September 2008 between Marme, RBS, the Non-RBS Banks, Deutsche Postbank AG, ING Real Estate Finance SE EFC SA and Raiffeisen Zentralbank Osterreich AG.

36. Although when it joined the Syndicate in July 2008 RBS had envisaged participating to the extent of the full shortfall of €475 million, it was not ultimately required to participate to that extent. ING received credit approval for a participation of €150 million and Caixa received approval for an additional €50 million. The resultant reductions in the required commitments by other Syndicate banks were shared between HSH and RBS. The final respective commitments of the Syndicate banks were set out in Schedule 1 to the Senior Loan as follows:

"***Name of Original Lender***	***Commitments***
Bayerische Landesbank	*€150,000,000*
HSH Nordbank AG	*€309,000,000*
The Royal Bank of Scotland plc	*€366,000,000*
Deutsche Postbank AG	*€200,000,000*
ING Real Estate Finance SE E.F.C., S.A.	*€75,000,000*
ING Bank N.V.	*€75,000,000*
Caixa d'Estalvis i Pensions de Barcelona	
'la Caixa'	*€200,000,000*
Raiffeisen [sic] *Zentralbank Österreich*	
Aktiengesellschaft	*€200,000,000.*"

37. The Senior Loan made available to Marme a loan facility in an aggregate amount of €1.575 billion for a term of five years, requiring repayment in full on 12 September 2013. It provided for an annual interest rate of EURIBOR + 1.6% plus a percentage rate in relation to certain regulatory costs of the lenders.

38. Clause 8.3 of the Senior Loan required Marme to maintain Hedging Agreements in relation to interest payable thereunder satisfactory to the Majority Lenders, providing as follows:

"*Hedging*

From and including the Utilisation Date the company must maintain Hedging Arrangements satisfactory to the Majority Lenders in accordance with this Subclause.

(i) The Interest Hedging Arrangements must:

(A) be with a Company; and

(B) have a notional principal amount not less than the aggregate amount of the Loan.

(ii) All Hedging Arrangements must be:

(A) in form and substance satisfactory to the Facility Agent; and

(B) the subject of security under a Hedging and Account Security Agreement.

…".

39. The Junior Loan and the extra €75 million loan from RBS in respect of the equity injection have already been the subject of proceedings in this country: see ***Edgeworth Capital (Luxembourg) S.À.R.L. v Aabar Investments PJS*** [2018] EWHC 1627 (Comm).

The Swaps

40. It was disputed between Marme and the Defendants as to who proposed the Swaps and why these were included alongside the final Senior Loan. It is common ground that swaps were included in the draft terms from early 2008. However, Marme contends that this was against its wishes and that the hedging requirement was ultimately imposed by RBS.

41. The matters to be negotiated included which bank would execute the market risk (namely the market-facing trades by which the Defendants would hedge their own positions); the size of each bank's trade with Marme; whether the Defendants would provide a rebate of part of the credit spread charged by the banks in the event that Marme decided to terminate the Swaps early; and the size of the credit and execution spreads.

42. It eventuated that RBS executed the full market risk and then passed the market hedge on to the Non-RBS Banks through back-to-back swaps. The Defendants refused to give a credit spread rebate. It was agreed that the credit spread would be 13 bps and the execution spread would be 2 bps. There is an issue between the parties as to whether RBS acted as agent of the Non-RBS Banks in negotiating the credit spread.

43. A further area of negotiation was fees. The fees included a sum of €100,000 per annum which would be received by the 'Facility Agent' under the Senior Loan. This role was taken on by RBS.

44. For some time during the negotiations, Marme had envisaged that it would enter into an inflation swap with Santander, which would replace the floating

inflation-linked rent increases in the Lease with a fixed rate. However, on 8 September 2008, Marme and Santander agreed instead to amend the rent clause in the Lease to insert a floor to the rent increase for 10 years.

45. Final negotiations occurred between 10 and 12 September 2008. These included final negotiations on the credit spread rebate and credit spread.

46. On the morning of 12 September 2008, the Transaction was executed. The Swaps were stepped EURIBOR-to-fixed interest swaps in standard ISDA form, under which Marme would pay a stepped (periodically rising) fixed rate to the Defendants in return for the Defendants paying floating rate 3-month EURIBOR to Marme. The fixed rate payable by Marme started at 3.3030% and then rose annually to a final rate of 6.7635% in the period to 20 August 2023. The rates were set on an execution call attended by members of Marme, RBS and Santander. The total notional amount of the Swaps was equal to the balance of the Senior Loan. The Swaps had a term of about 15 years.

47. Although it was suggested at one point during the trial that RBS entered into a swap with Marme for the full notional amount of €1.575 billion (referred to as the 'Full Notional Swap') which was then "*parcelled out*" to the Non-RBS Banks, this was not pursued in closing since the parties were ultimately agreed that all of the Banks entered directly into Swaps with Marme for their respective shares of the hedging. RBS entered into a swap in the market, which was then passed on to the Non-RBS Banks by way of back-to-back swaps.

48. The Swaps were documented by ISDA (Multicurrency – Cross Border) Master Agreements and Schedules entered into by each of the Defendants with Marme on 12 September 2008 in materially identical terms (the 'ISDA Master Agreements'), with Swap Confirmations following in the period 12 to 23 September 2008.

Purported termination of the Swaps and procedural history

49. In the midst of the financial crisis, Marme was unable to refinance the Senior Loan by bond issue or otherwise. Marme was unable to repay the Senior Loan when it fell due at the end of its term on 12 September 2013.

50. Following an application made for a protective administration order under Spanish insolvency law, Marme (along with Ramblas and Delma) was, on 4 March 2014, placed into voluntary insolvency in Spain (*concurso voluntario*) and an insolvency administrator, Sr Rafael Gimeno-Bayón, was appointed. On 7 May 2014, Sr Gimeno-Bayón issued a report determining that the sums which would fall due to the Defendants under the Swaps should be treated as pre-petition debts rather than debts to be paid as an expense of the *concurso*.

51. On 20 May 2014, the next instalments fell due under the Swaps; however, Marme made no payments. The Defendants sent notifications of non-payment to Marme in the period of 21-23 May 2014.

52. On 11 June 2014, the Defendants brought a claim in the Spanish liquidation, challenging the insolvency administrator's proposed method of dealing with the payments outstanding under the Swaps.

53. On 10 September 2014, Marme issued its claim in these proceedings for rescission of the Swaps.

54. On 31 October 2014, Marme applied in Spain for the Defendants' claim to be stayed pending determination of these proceedings; that application was rejected.

55. Marme also issued a counterclaim in the Spanish insolvency proceedings (without prejudice to its rescission claim in these proceedings) under Article 61.2 of the Spanish Insolvency Law for an order that the Swaps be terminated as of 31 October 2014, *"in the interests of the estate"*, with the amount (if any) payable to the Swap Counterparties as a result of that termination to be determined by the Spanish insolvency court. That claim is yet to be determined in Spain.

56. Between 11 and 25 November 2014, as explained in more detail later, the Defendants purported to terminate their respective Swaps by the service of termination notices pursuant to Clause 6(a) of the ISDA Master Agreements incorporated into the Swaps.

57. Marme wrote to RBS (copying in the Non-RBS Banks) stating that it rejected RBS's termination of the RBS Swap.

58. Between 17 November and 3 December 2014, the Defendants purported to notify Marme of the termination sums allegedly due in relation to their respective Swaps as a result of termination, also pursuant to the terms of the ISDA Master Agreements. The Defendants say that this termination triggered liabilities on the part of Marme for early termination payments totalling approximately €710 million plus default interest, broken down as follows: €223,721,576 due to RBS; €199,249,545.25 due to HSH; €129,049,794.94 due to Bayern; €91,375,814.79 due to Caixa; and €67,294,554.15 due to ING.

59. Marme has not paid these sums to the Defendants, Marme's position being that the termination notices were void and of no effect on the basis that Marme had already rescinded the Swaps for misrepresentation, alternatively on the basis that it had already accepted RBS's breach of contract as a repudiatory breach of the RBS Swap.

60. On 8 December 2014, RBS issued its claim in these proceedings 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 RBS Swap. RBS's position is that it had to issue a fresh claim rather than a counterclaim as, at that point, no Particulars of Claim had been served by Marme in its rescission claim.

61. On 9 December 2014, RBS filed a motion with the Spanish Court asking it to decline jurisdiction on Marme's counterclaim in the insolvency proceedings,

largely on the basis that its Swap had been terminated prior to the commencement of Marme's proceedings. The Spanish Court dismissed the challenge on the basis that the counterclaim came before the notices of termination. It also dismissed an application by Marme to stay the insolvency proceedings pending the trial of its rescission claim in England.

62. On 4 March 2015, Marme entered into liquidation (*liquidación*) in Spain.

63. On 8 April 2015, Marme applied for a stay of RBS's declaration claim. Subsequently, on 16 June 2015, Marme applied for a stay of the defences and counterclaims. Marme sought a stay under Article 28 of the Brussels Regulation (recast) on the basis that the claims should be settled in Spain initially as part of the insolvency proceedings since the cases were so similar that they should be considered 'related' under Article 28 and determined together in Spain so as to avoid irreconcilable judgments. Marme's application was rejected by Blair J in ***Marme v RBS & Ors*** [2016] EWHC 1570 (Comm).

64. On 2 June 2015, the Non-RBS Banks (followed by RBS on 3 June 2015) filed Defences and Counterclaims in these proceedings, the Non-RBS Banks seeking declarations as to the sums due following the alleged termination of their Swaps in November 2014.

65. Marme is currently subject to a liquidation plan approved by the Spanish Court on 15 September 2016. The liquidation plan was published on 25 July 2018. Under the first phase of this plan, bidders are entitled to submit offers for either the shares in Marme or Delma, or for all of Marme's assets on certain conditions, which include that the offers must provide for (i) the repayment in full of Marme's undisputed liabilities; and (ii) in respect of Marme's disputed liabilities, either their consensual settlement or the provision of full collateral with the Spanish court pending resolution of the relevant disputes. Under the Spanish Court's procedure, bidders had until 17 September 2018 to file their offers with the court, by which date three offers had been made.

An outline of Marme's case

66. Marme seeks rescission of the Swaps on the basis that RBS made untrue representations about the integrity of the process by which EURIBOR was set and its own conduct and knowledge in that regard. Marme's allegations of attempted manipulation of EURIBOR centre around Mr Moryoussef, the trader who joined RBS from Barclays in August 2007 and occupied the position there of Head of European Interest Rate Derivatives until September 2009.

67. The implied representations (the 'EURIBOR Representations') alleged by Marme have undergone a number of changes during the course of the proceedings, but Marme ultimately alleged that five representations were made, namely that:

(1) RBS had not at the time material to the Transaction sought to manipulate EURIBOR, was not seeking to do so at the date of the Swaps, and did not intend to do so in the future. ('EURIBOR Representation 1').

(2) RBS had no reason to believe that any other banks had at the time material to the Transaction sought to manipulate EURIBOR, were seeking to do so as at the date of the Swaps, or would seek to do so in the future. ('EURIBOR Representation 2').

(3) RBS had not at the time material to the Transaction conducted itself in such a way as to undermine the integrity of EURIBOR, was not conducting itself in such a way as at the date of the Swaps, and did not intend to do so in the future. ('EURIBOR Representation 3').

(4) RBS had no reason to believe that any other banks had at the time material to the Transaction conducted themselves in such a way as to undermine the integrity of EURIBOR, were not conducting themselves in such a way as at the date of the Swaps, and did not intend to do so in the future. ('EURIBOR Representation 4').

(5) RBS had at all times material to the Transaction acted honestly, was acting honestly at the date of the Swaps, and intended to act honestly in the future, in relation to the EURIBOR rate-setting process. ('EURIBOR Representation 5').

68. Marme contends that these representations were each false because RBS, through at least Mr Moryoussef, knew about and conducted the attempted manipulation of EURIBOR.

69. Marme does not allege that the Non-RBS Banks were involved in, or aware of, any actual or attempted manipulation of EURIBOR. The basis of its case against them is that RBS acted as agent with ostensible authority *to make the alleged representations* on behalf of the Non-RBS Banks. Marme does not allege, however, that RBS had authority (actual or apparent) *to contract* on behalf of the Non-RBS Banks, nor does Marme contend that RBS had actual authority to make representations on their behalf.

70. Alternatively, Marme seeks damages for deceit or under section 2(1) of the Misrepresentation Act 1967, on the basis that, if Marme had not been misled by RBS (and had, therefore, been unable to proceed on the basis that EURIBOR was properly set and that RBS was honest), Marme would have been able to negotiate more favourable terms. Marme contends that such negotiations would have resulted in one of two alternative structures for the Transaction. The first alternative (the 'PIK Loan Structure'), Mr Saini QC explained on behalf of Marme, entails Marme not entering into the Swaps at all and, instead, covering the initial shortfall in rental income necessary to cover loan repayments through a 'payment in kind' ('PIK') loan structure. Marme contends that it would have been better off under this structure by approximately €996 million. The second alternative (the 'Swap Discount Structure') entails Marme negotiating a discount of 50 bps over the whole Transaction, including a 10 bps discount on the Swaps. In this second

counterfactual, Marme contends that it would have been better off by €29,534,269.

An outline of the defences raised

71. RBS's position is that Marme's misrepresentation case fails for several reasons, including, most fundamentally, because the representations are too wide-ranging, intricate and ambiguous to be implied. In this respect, Mr Quest QC observed that the EURIBOR Representations are wider even than the representation which the Court of Appeal favoured in ***Property Alliance Group Ltd v Royal Bank of Scotland*** [2018] 1 WLR 3529. Even if the EURIBOR Representations were made, Mr Quest QC went on to submit, Marme was not induced by the EURIBOR Representations to enter into the RBS Swap. Furthermore, he continued, Marme cannot rescind the RBS Swap and any losses suffered by Marme were not caused by the EURIBOR Representations.

72. The Non-RBS Banks' defence largely mirrors RBS's defence. However, the Non-RBS Banks also dispute that RBS acted as their agent in making the alleged representations, relying upon this as a total answer to Marme's claims against them. Specifically and in the main, the Non-RBS Banks contend that Marme's allegations of apparent authority are untenable since there was no relevant holding out of RBS as their agent by the Non-RBS Banks.

The Defendants' claims for declaratory relief

73. The Defendants seek declarations that the Swaps were validly terminated in November 2014 and as regards the sums due to each Defendant bank upon termination of their respective Swaps.

74. Marme defends the declaration claims on the same basis as it seeks rescission of the Swaps, namely that it entered into the Swaps on the basis of fraudulent or negligent misrepresentations and, as a result, that the Swaps have been or should be rescinded. Marme also has a subsidiary defence in relation to RBS's declaratory claim.

75. As regards the RBS Swap, Marme additionally contends that a number of terms were implied into the RBS Swap (the 'EURIBOR Implied Terms') which were breached by RBS and which constituted repudiatory breaches. Marme's position is that it had accepted these repudiatory breaches by the time that RBS purported to terminate the RBS Swap, meaning that RBS no longer had any right to terminate. Mr Quest QC submitted, in response, first, that the EURIBOR Implied Terms do not fall to be implied, secondly and in any event, that there was no repudiatory breach and, thirdly, that Marme should be treated as having affirmed the RBS Swap, so precluding it from advancing the defence which it did.

EURIBOR

76. Having set out some of the background to the claims and making it clear that in this judgment I shall seek to deal with the main points which were made by

the parties rather than every point, albeit whilst confirming that I have considered every submission which has been made and have taken into account all the evidence which was deployed before me, I should now say something about EURIBOR, including the alleged manipulation or attempted manipulation of EURIBOR in 2007-2008.

Setting of EURIBOR

77. EURIBOR is a benchmark interest rate which is intended to reflect the cost of interbank lending in Euros. It is defined by the European Money Markets Institute as an index of "*the rate at which Euro interbank term deposits are offered by one prime bank to another prime bank within the euro zone*". It is widely used in international money markets. EURIBOR is published daily by the European Money Markets Institute ('EMMI') (and formerly by the European Banking Federation). A panel of banks submit daily quotes between 10.45 am and 11 am Brussels time to Thomson Reuters (the calculation agent of the EMMI) of the rate that each believes one prime bank is quoting to another prime bank for interbank term deposits within the Eurozone for each of 15 different maturities. EURIBOR is calculated as the mean of these quotes (to three decimal places) after discarding the top 15% and bottom 15%. In 2008, there were 43 panel banks. EURIBOR is determined daily at 11 am Brussels time (10 am London time)

78. At the time of the Transaction, Bayern and ING were panel banks. ING continues to be a panel bank; Bayern was a panel bank until 31 December 2012. RBS was not a panel bank at the time; however, ABN AMRO Bank NV (a bank of which the RBS group acquired a part in October 2007) was a panel bank. The ABN AMRO EURIBOR submissions team is based in the Netherlands.

79. A valuable summary of what EURIBOR is, how it is set and the Code with which submitting banks were required to comply over the course of the relevant period is contained in the judgment given by Davis LJ in ***R v B*** [2018] EWCA Crim 73. He explained at [8] that:

"Euribor was established with a view to creating a new benchmark interest rate for interbank lending in that currency. It was in effect designed as a counterpart to, indeed competitor of, Libor. Further (and just as with Libor) Euribor might be, and commonly is, designated as the reference rate for interest rate swaps or other derivative transactions."

He continued at [9]:

"For the purposes of setting the daily Euribor rate for each respective period (or 'tenor') submissions are received prior to 11 am CET on each day from banks who are on a designated panel. The number of such panel banks has fluctuated from time to time: but around 44 would be representative. At all relevant times Deutsche Bank was on the panel. Put shortly, the Euribor daily rate was fixed by averaging the submissions of each panel bank for the respective tenor, but with the highest and lowest 15% of the respective submissions being excluded. No panel bank was permitted to see any other

panel bank's submissions during the relevant window before 11 am. The daily rate would then be published via Thomson Reuters."

He, then, added at [10]:

"Because of the size and volume of many of the derivative transactions linked to Euribor even a very small percentage difference of 0.01% in the rate as set potentially could have a significant implication, in terms of profit and loss, for relevant underlying transactions."

80. Davis LJ also summarised the effect of the applicable EURIBOR Code of Conduct, explaining at [17] that:

"Euribor was devised, at the time of the creation of the euro in 1999, to provide participants in euro denominated transactions with a benchmark comparable to those found in many money markets. It was principally devised by the European Banking Federation ('EBF') representing national banks and the Financial Markets Association ('ACI') representing European Banks. Two entities (Euribor - ECF and Euribor - ACI) were established, under Belgian law, to supervise the operation of Euribor. The Code was prepared for the purposes of the Euribor setting process; this was replaced in 2008, but in essentially similar terms. The Code was then comprehensively revised in 2013, following a report known as 'the EBA/ESMA Report'. However, the latter Code post-dates the matters the subject of the indictment."

Davis LJ went on at [19] to explain that the Code, in its 1999 version, stated in the Preface as follows:

"The EURO Interbank Offered Rate – 'EURIBOR' – is the new money market reference rate for the euro. This Code lays down the rules applicable to EURIBOR and the banks which will quote for the establishment of EURIBOR.

EURIBOR is the rate at which euro interbank term deposits are being offered within the EMU zone by one prime bank to another at 11.00 am. Brussels time ('the best price between the best banks'). It is quoted for spot value (two Target days) and on actual/360 day basis."

He, then, referred at [20] to Article 1 setting out:

"... the various criteria for qualifying as, and remaining, a panel bank. It was specifically stated, among other things, that panel banks 'must be of first class credit standing, high ethical standards and enjoying an excellent reputation."

Davis LJ, then, set out Article 6 (*"ARTICLE 6: OBLIGATIONS OF PANEL BANKS")* at [21]:

"1. Panel banks must quote the required euro rates:

- to the best of their knowledge, these rates being defined as the rates at which euro interbank term deposits are being offered within the EMU zone by one prime bank to another at 11.00 am. Brussels time ('the best price between the best banks'):

- for the complete range of maturities as indicated by the steering committee;

- on time as indicated by the screen service provider;

- daily except on Saturdays, Sundays and Target holidays;

- accurately with two digits behind the comma.

2. *Panel banks must commit themselves to transmit to the European System of Central Banks all the necessary figures to establish an effective overnight euro rate, and in particular their aggregate loan volume and the weighted average interest rate applied.*

3. *Panel banks must make the necessary organisational arrangements to ensure that delivery of the rates is possible on a permanent basis without interruption due to human or technical failure.*

4. *Panel banks must take all other measures which may be reasonably required by the steering committee or the screen service provider in the future to establish EURIBOR.*

5. *Panel banks must subject themselves unconditionally to this Code and its enclosures, in their present or future form.*

6. *Panel banks must promote as much as possible EURIBOR (e.g. use EURIBOR as reference rate as much as possible) and refrain from any activity damageable to EURIBOR.*"

EURIBOR manipulation

81. From around 2011, investigations commenced into allegations of EURIBOR manipulation. These took a number of forms.

The EU Commission Proceedings

82. On 19 October 2011, the EU Commission issued a press release confirming that, starting on 18 October 2011, officials undertook inspections at premises active in the sector of financial derivative products linked to EURIBOR in certain Member States due to concerns that the companies concerned may have violated EU antitrust rules that prohibit cartels and restrictive business practices (namely Article 101 Treaty on the Functioning of the European Union (the 'TFEU') and Article 53 of the Agreement on the European Economic Area).

83. On 4 December 2013, the EU Commission issued a press release confirming that, following a settlement, RBS had been fined a total of €131,004,000 in relation to its involvement in a cartel "*aimed at distorting the normal course of pricing components for [certain] derivatives*," in which "*[t]raders of different banks discussed their bank's submissions for the calculation of EURIBOR as well as their trading and pricing strategies*". This related to activity between

September 2005 and May 2008, during part of which time RBS was a panel bank member of EURIBOR.

84. The EU Commission decision of 4 December 2013 (the 'EU Commission Decision') reflects a settlement reached with four banks, including RBS (along with Deutsche Bank, Société Générale and Barclays). It establishes that those banks infringed EU competition law (Article 101(1) of the TFEU) by participating in a cartel with the object of restricting or distorting competition in the sector of Euro interest rate derivatives linked to EURIBOR or EONIA.

85. The extent to which the press release and the EU Commission Decision evidence any involvement of RBS in actual or attempted manipulation of EURIBOR is a matter in dispute.

Other investigations concerning RBS

86. RBS has been subject to further investigations in relation to rate-setting, including by the Financial Services Authority, the US Department of Justice and the US Commodity Futures Trading Commission. These resulted in RBS being fined £87.5 million by the Financial Services Authority, $325 million by the US Commodities and Futures Trading Commission and $150 million by the US Department of Justice - such fines being in respect of the involvement of RBS and its subsidiaries in the manipulation of other rates, including Yen and Swiss Franc LIBOR.

The criminal proceedings

87. In 2018 Mr Moryoussef, together with Ms Sisse Bohart (Barclays), Mr Colin Bermingham (Barclays), Mr Carlo Palombo (Barclays), Mr Achim Kraemer (Deutsche Bank) and Mr Christian Bittar (Deutsche Bank), were charged with conspiracy to defraud by the procuring or making of false EURIBOR submissions.

88. Mr Bittar pleaded guilty, and in July 2018 Mr Moryoussef was convicted after a trial which took place in his absence. Mr Kraemer (a Deutsche Bank employee responsible for a team which it was alleged acted as a conduit between Mr Bittar and the Deutsche Bank EURIBOR submitters in Frankfurt) was acquitted and no verdict was reached on the others (Mr Birmingham and Ms Bohart, who were EURIBOR submitters at Barclays, and Mr Palombo, who had taken over Mr Moryoussef's position at Barclays).

89. Mr Bittar was sentenced to 5 years and 4 months' imprisonment. Mr Moryoussef was sentenced to 8 years' imprisonment.

The factual witnesses

90. I come on, next, to deal with the factual witnesses who gave evidence at trial. My overall impression of these was that they were each trying to assist the Court, although their attempts were often marred by the effect of the substantial passage of time on their memories of the Transaction.

91. Surprisingly for a case where fraud is alleged, none of the witnesses were themselves accused of fraud. However, Mr Maud (for Marme) and Mr Goodwin (for RBS) were both accused of not being entirely straightforward in their negotiations of the Transaction.

Marme's factual witness – Mr Glenn Maud

92. Marme called a single factual witness: Mr Glenn Maud. Mr Maud was, alongside Mr Quinlan, the ultimate 50% owner of Marme and was also the owner of a property management company, Propinvest, which managed the negotiations for financing the Transaction on his behalf. Since Marme, Delma and Ramblas entered insolvency proceedings in Spain, Mr Maud has played no part in the running of Marme, which is now in the hands of Sr Gimeno-Bayon as its liquidator (and prior to the opening of the liquidation phase as insolvency administrator). However, Mr Maud continues formally to co-operate as a director of Marme for procedural insolvency purposes.

93. Mr Maud addressed in his evidence a number of issues, including the representations which Marme alleged were made by RBS, RBS's role in the Transaction and the arrangements which Marme suggests it would have negotiated with RBS had it known that there was attempted EURIBOR manipulation.

94. Mr Quest QC and Mr Howe QC, on behalf of the Non-RBS Banks, made a number of criticisms of Mr Maud. I consider that there is some force in these various criticisms. Although Mr Maud emphasised during his evidence that he was no longer involved with Marme, it is clear that he was not wholly unpartisan. At the very least, he has a reputation to protect but, more than that, Mr Maud did seem to want to do his best to help Marme's case, sometimes even going beyond what Marme was contending, when, for example, claiming that Mr Goodwin agreed "*everything on behalf of the banks*". Mr Maud often seemed to be attempting to work out the impact of certain questions. At times he was evasive, sometimes failing to answer the question which was being put to him and at times giving what appeared to be prepared answers or even speeches in a manner which unfortunately witnesses sometimes now do. Mr Maud also often repeated certain words or phrases that he appeared to consider key to Marme's case: for example, that he believed that EURIBOR was a "*true and honest*" rate and that RBS "*did everything*" in relation to the Transaction. That said, my overall impression was not that Mr Maud gave misleading evidence, nor that he set out to do so. On the contrary, in my view, he generally tried to assist the Court in the evidence which he gave.

95. More specifically, Mr Howe QC submitted that Mr Maud's evidence had a tendency to shift and develop as the falsity or unreality of earlier accounts became apparent. He further submitted that Mr Maud on a number of occasions sought to explain these away in an unconvincing manner. I agree with Mr Howe QC about this. For example, in cross-examination, Mr Maud brought up an email which he had spotted in the trial bundle when preparing for the case and which he said triggered a "*vivid recollection*" that a stepped swap had been suggested by Mr Goodwin to Mr Littlewood in December 2007, despite the fact that the surrounding documents show quite clearly that

the email related to a possible inflation swap rather than a stepped swap. Mr Maud was here trying too hard to assist Marme's case. It would be wrong, however, to assume that Mr Maud did this consistently since that was not the case.

96. There is no escaping the fact, nonetheless, that Mr Maud's evidence evolved during the course of the proceedings in a way, in which, in my view, is unlikely to be entirely accidental. An example of this, highlighted by Mr Howe QC, concerns Mr Maud's evidence on Marme's opposition to interest rate swaps. In his first witness statement (dated October 2014 in support of an application for early disclosure), Mr Maud said that Marme:

"*was very much opposed to the idea of having an IRS as we believed at the time that the pressure on interest rates over the short to medium term was downwards."*

He went on:

"However, I accepted the idea as, potentially, a necessary evil … During BayernLB's period as lead arranger, I sought to persuade it (and by extension the other banks committed to the syndicate) that an IRS was not in fact necessary. I was making some headway: BayernLB reported to me that a number of banks were willing to proceed without an IRS and that BayernLB itself had an open mind."

There is, however, no evidence that Marme ever objected to having a swap. On the contrary, the swap concept was included in what was proposed from the beginning and there is no evidence that Marme ever sought to remove it. In fact and tellingly, as I shall explain later, in his second witness statement, Mr Maud stated that Marme "*expected*" that swaps would be required.

97. Mr Quest QC and Mr Howe QC highlighted also what they suggested was "*sharp conduct*" on the part of Mr Maud during the negotiations which led to the Transaction being concluded. First, they submitted that Mr Maud tried to negotiate a reduction in the credit spread on the Swaps by telling Mr Goodwin that Propinvest had been working on a figure of 13 bps (including both credit and execution) when Mr Maud knew (Mr Littlewood having told him a few hours prior to the negotiation) that the figure was 15 bps. In cross-examination, Mr Quest QC put to Mr Maud the various calls in which the credit spread was discussed between Propinvest and Mr Goodwin, suggesting that, although he told Mr Goodwin at the time that he believed that the credit spread was to be 13 bps 'all in', he understood very well that, in fact, everybody had been proceeding to date on the basis of a 15 bps spread. Ultimately, Mr Maud accepted that he had seen "*an opportunity of like: well let's see if we can get one bp off, right, just on the basis that I've made a mistake: I know it's 15, I'm going to go back and I'm going to agree 15, but let's see if we can just get one bp off on the option, you know"*. He explained that *"that's just commercial trading between, you know, two parties who were both trying to get the best advantage they can out of any transaction"*. In my view, this does not make Mr Maud dishonest. He is an opportunist, a deal-

maker and an entrepreneur. He is charismatic and self-confident. It does not follow, however, that he was an unreliable witness.

98. The same applies to another instance relied upon by Mr Quest QC concerning an email sent on 22 June 2008 to individuals at the LIA in which he referred to "*Bayern LB's credit approved amount of €500m*". Mr Maud accepted in cross-examination that, in fact, Bayern had not credit-approved an amount of €500 million but had approved a somewhat lesser amount - just €150 million. When asked why he said what he did to the LIA, he replied "*I don't know, actually … I don't know why I said that*." He stated that Propinvest believed at that time that Bayern was going to get to €500 million as Mr Worley (of Bayern) was saying that they would but he did not know why he used the words "*credit approved*" and he accepted that he "*must have known*" that Bayern had not credit approved an amount of €500 million. Mr Quest QC put to Mr Maud that, in the circumstances, he must have known that what he had written was not true and that the reason why he told the LIA what he did was because he wanted to get a letter from them to Santander saying that, subject to financing, they would participate in the equity and other financing. Mr Quest QC submitted in closing that this cannot be dismissed as "*inadvertence or careless drafting, particularly when Mr Maud admitted that it was hard to raise equity without having senior lending in place*". Mr Quest QC pointed out that, in an email on 11 June 2008 (ten days before the email to the LIA), Mr Maud had written to Mr Quinlan setting out the current position as to the banks' commitments. He put Bayern's figure at "*€150m (!)*" (and so the correct amount) and went on to state this: "*I must say, however, that the fact that Bayern only currently have approval for €150m is a bit of a shock*." Mr Quest QC suggested that this showed that Bayern's actual level of commitment must have been present to Mr Maud's mind and, therefore, it cannot have been a mistake when he told the LIA what he did. Again, although a further illustration of Mr Maud's willingness to exaggerate in order to achieve a deal, this does not lead me to conclude that Mr Maud was willing, when giving evidence before the Court, to give evidence which he knew to be misleading. Indeed, it should be noted in this respect that, when it was also pointed out in cross-examination that Mr Maud made certain representations in an email to Santander on 23 June 2008 about the LIA's position in terms of financing that the LIA did not wish him to make, Mr Maud accepted that this was a mistake and apologised to the LIA about this in a later email.

99. Overall, therefore, although there were inconsistencies in Mr Maud's evidence, in particular where he tried to put a better light on events or to put Marme's case at its strongest, it would be a mistake to conclude that he gave evidence to the Court which was knowingly misleading. The inconsistencies have caused me to be cautious not to accept everything which Mr Maud had to say in evidence at face value but that is a different matter.

RBS's factual witnesses

100. RBS called three factual witnesses: Mr Christopher Bates, Mr Christopher Andrews and Mr Sean Goodwin. As will appear, I found each of these witnesses to be reliable and honest.

Mr Christopher Bates

101. Mr Bates is currently employed as head of debt in the UK at Barings Real Estate. At the time of the Transaction, he was a Senior Director in RBS's UK Real Estate Finance team, within RBS's Global Banking & Markets division ('GBM'). He was employed by RBS from 17 June 2002 to 1 January 2012. He was one of the individuals responsible for overseeing RBS's involvement in advancing its portion of the Senior Loan to Marme as part of the Transaction and his evidence covered issues relating to this aspect of the Transaction.

102. Mr Bates was a straightforward witness who was doing his best to assist the Court. However, understandably in the circumstances, he had a poor memory of events at the time of the Transaction and needed to rely heavily on the documents. The weight I can place on his evidence is also affected by the fact that he was in RBS's real estate finance team and, therefore, was not directly responsible for the Swaps.

Mr Christopher Andrews

103. Mr Andrews is a current employee of RBS, employed in its investment banking division now known as 'NatWest Markets'. His role is to manage the Distressed and Defaulted derivative portfolio in the Trading & Flow Sales business within NatWest Markets. He gave evidence explaining the nature, purpose and contents of certain documents retrieved by RBS from its internal trading system relating to interest rate derivatives which appear to record and/or make up the booking of the RBS Swap. Mr Andrews was not involved in the Transaction or the entry into the Swap by RBS. However, he was involved in the close-out and termination of the RBS Swap in November 2014, and he explained that he is familiar with RBS's internal trading system. As Mr Andrews was not involved at the time, his evidence was based on his views of documentation now provided to him, including contemporaneous Transaction emails and contractual documentation and screenshots of Transaction details recorded on RBS's internal trading system. The controversial aspect of Mr Andrews' evidence related to Marme's case that RBS and Marme had entered into a swap for the full €1.575 billion before RBS "*parcelled out*" the swap to the Non-RBS Banks. Marme, however, no longer relies upon this case.

104. Mr Andrews was a straightforward witness with no incentive to do anything other than try to assist the Court.

Mr Sean Goodwin

105. Mr Goodwin is currently a principal in a hedge fund and pension fund, having left RBS at the start of 2015. He previously worked in RBS's GBM division on the interest rate derivatives desk. He was involved in the negotiation and execution of the RBS Swap and his evidence covered issues in relation to these aspects of the Transaction. Mr Goodwin was at the time a Senior Director in RBS's Structured Risk Solutions team and was the primary RBS contact responsible for RBS's involvement in the interest rate hedging aspect of the Transaction.

106. Mr Saini QC submitted that the Court should be cautious about accepting Mr Goodwin's evidence without independent documentary corroboration, although he did not invite the Court to make a finding that Mr Goodwin was dishonest. Mr Saini QC suggested that Mr Goodwin often appeared unwilling to accept as facts certain matters which were obvious on the basis of documents authored by him. He focused, when making this submission, in particular, on communications which he put to Mr Goodwin in cross-examination and which showed Mr Goodwin complaining to others at RBS about having to do all the work on behalf of the Non-RBS Banks or at least claiming credit for this work when that was not the position. Specifically, the relevant communications included Mr Goodwin saying on 5 September 2008 that:

"*… So far I've done all the running and taken the ISDA process to completion. Bayern and HSH not done anything so if it looks like they'll be coming in on the execution I'm going to suggest they start fielding the queries I've been taking from the other banks and produce terms sheets etc. I'll also be in a big huff"*.

Three days later, on 8 September 2008, Mr Goodwin, then, referred to "*... other banks swappers"* having done nothing and the next day he remarked that "*... the Bayern and HSH swap guys have brought absolutely nothibg [sic] to the table".* When Mr Saini QC put these exchanges to Mr Goodwin in cross-examination, Mr Goodwin said that he was simply suggesting that he had made more progress on the RBS Swap than the Non-RBS Banks had made on their swaps. I agree with Mr Saini QC, however, that this somewhat underplays his evident thinking at the time, suggesting a keenness on Mr Goodwin's part not to say anything in evidence which might undermine the Banks' agency case. However, I do not consider that this justifies a conclusion that Mr Goodwin was less than frank. He was defensive certainly but that is not the same thing.

107. Mr Saini QC's position in closing was that Mr Goodwin (like Mr Maud) was guilty of some "*forgivable untruths in the course of the cut and thrust of the intense commercial negotiations*" prior to execution of the Swaps. This was a fair comment.

Mr Edwin Rood

108. At the material time, Mr Rood was employed by ABN AMRO Bank NV in Amsterdam. He was head of the Amsterdam Money Markets business and, as such, had overall supervisory responsibility for ABN AMRO NV's EURIBOR submissions (including when it became part of the RBS group). Mr Rood was not required by Mr Saini QC to attend to be cross-examined.

The Non-RBS Banks' factual witnesses

Mr Mark Greenland

109. Mr Greenland is a Bayern employee, who gave evidence as to its role in the negotiation of the Swaps (including as MLA), the role of RBS, the

negotiations leading up to the Transaction, and Marme's alleged counterfactuals. Mr Saini QC accepted that he was a largely straightforward witness, albeit that he suggested with some justification that he had no relevant evidence to give on swaps issues since he worked in Bayern's real estate finance team.

Mr Alan Grey

110. Mr Grey was at the relevant time (and until December 2012) the Senior Relationship Manager in HSH's Real Estate team. He gave evidence as to HSH's role in the negotiations, the background to the Transaction, HSH's communications with RBS and Propinvest and Marme's alleged counterfactuals. Mr Howe QC invited the Court to take the view that he was an impressive and careful witness who gave balanced, precise and reliable evidence with the benefit of his extensive experience. Broadly, I agree. Mr Saini QC, indeed, himself accepted that he was a largely straightforward witness, albeit again pointing out with some justification that his ability to assist on swaps-related issues was limited given that he did not hold any direct responsibility for swaps.

Mr Samir Samhan

111. Mr Samhan is the Head of Corporate and Mid-Cap Derivatives Sales at Caixa. At the time of the Transaction he was a Director in Derivative Sales. Mr Samhan gave evidence as to Caixa's involvement in the Transaction, its communications with other parties and Marme's alleged counterfactuals. Mr Samhan gave evidence that he only had passing contact with the Transaction, as his colleague, Ms Isabel Abad, was the main person in the Caixa swaps team working on the contact but was due to go on holiday in September 2008, with the result that Mr Samhan was brought into the Transaction at the end of August 2008. Mr Saini QC suggested that Mr Samhan's oral evidence demonstrated that he had a poor understanding of what had happened surrounding the execution of the Transaction. Although Mr Samhan did his best to assist the Court, Mr Saini QC's criticism was not misplaced. Mr Samhan's evidence was not always easy to understand.

Mr Elmer Feenstra

112. At the time of the Transaction, Mr Feenstra was employed at ING as Head of Structured Products in the Real Estate Finance team. By the time that he left ING, in November 2016, he had held that position for 15 years. He gave evidence as to ING's involvement in the Transaction, its communications with RBS and other parties, the role of an MLA and Marme's counterfactuals. Mr Feenstra was a reliable witness who tried his best to assist the Court. Although Mr Feenstra was not a swaps trader, he was plainly very knowledgeable about all matters surrounding the Transaction.

The effect of the passage of time

113. The other matter which I should, albeit only briefly, address before coming on to deal with the substantive issues is a submission which was made by Mr

Saini QC to the effect that the Court cannot rely too much on oral evidence due to the passage of time but should instead rely primarily on the contemporaneous documentary evidence in making findings of fact on the matters in dispute. In this respect, Mr Saini QC referred to the observations which were made by Leggatt J in ***Gestmin SGPS SA v Credit Suisse (UK) Ltd*** [2013] EWHC 3560 (Comm) at [22] but which I do not need to set out here, as well as to ***Armagas v Mundogas (The 'Ocean Frost')*** [1985] 3 WLR 640, [1985] 1 Lloyd's Rep 1 at p. 57 (as endorsed by the House of Lords in ***Grace Shipping v Sharp*** [1987] 1 Lloyd's Rep 207 at pp. 215-6), in which Robert Goff LJ stated as follows:

"*Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth. I have been driven to the conclusion that the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case*."

These observations are apt in the present case. It would be wrong, however, to place no weight on the witnesses' recollections since the events in question are not so distant as to make that appropriate.

Marme's misrepresentation claim

114. Marme's case is that the EURIBOR Representations were made fraudulently, alternatively negligently, by RBS and that Marme relied upon them when entering into the Swaps. Marme does not contend that the EURIBOR Representations were made expressly, but that they should be implied from the circumstances and RBS's conduct.

Implication: applicable legal principles

115. There was no dispute as to the legal principles applicable to the implication of representations. They were summarised by Toulson J (as he then was) in ***IFE Fund SA v Goldman Sachs International*** [2006] 2 CLC 1043 at [50]:

"*In determining whether there has been an express representation, and to what effect, the court has to consider what a reasonable person would have understood from the words used in the context in which they were used. In determining what, if any, implied representation has been made, the court has to perform a similar task, except that it has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context*."

This passage has been applied variously by Christopher Clarke J (as he then was) in ***Raiffeisen Zentralbank Osterreich AG v RBS*** [2010] EWHC 1392 (Comm) at [82]; Popplewell J in ***Moto Mabanga v Ophir Energy PLC and anor*** [2012] EWHC 1589 (QB) at [26]; and in ***PAG*** by Asplin J (as she then was) at first instance, at [377] and by the Court of Appeal at [129].

116. Whether any, and if so what, representations were made must be "*judged objectively according to the impact that whatever is said may be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee*": ***MCI WorldCom International Inc v Primus Telecommunications plc*** [2004] EWCA Civ 957, per Mance LJ (as he then was), [30] (applied by Christopher Clarke J in ***Raiffeisen*** at [81] and by Popplewell J in ***Moto Mabanga*** at [25]).

117. A concise summary as to the appropriate approach was provided by Hamblen J (as he then was) in ***Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd*** [2011] 1 CLC 701 at [215]:

"*A representation is a statement of fact made by the representor to the representee on which the representee is intended and entitled to rely as a positive assertion that the fact is true. In order to determine whether any and if so what representation was made by a statement requires (1) construing the statement in the context in which it was made, and (2) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee: see Raiffeisen, supra, at [81]; Kyle Bay Ltd v Underwriters Subscribing under Policy No. 01957/08/01 [2007] 1 CLC 164, at [30]-[33], per Neuberger LJ*."

This statement applies equally where the facts relied upon for the implication of the representation consist of conduct rather than a statement. Hamblen J went on at [221] to say this:

"In a deceit case it is also necessary that the representor should understand that he is making the implied representation and that it had the misleading sense alleged. A person cannot make a fraudulent statement unless he is aware that he is making that statement. To establish liability in deceit it is necessary 'to show that the representor intended his statement to be understood by the representee in the sense in which it was false' – per Morritt LJ in Goose v Wilson Sandford & Co. [2001] Lloyd's Rep PN 189 at para. 41. In other cases of misrepresentation this is not a requirement, but one would generally expect it to be reasonably apparent to both representor and representee that the implied representation alleged was being made."

118. Also instructive is ***Geest v Fyffes*** [1991] 1 All ER (Comm) 672 at p. 683D-E. In that case Colman J set out a "*helpful test*" for evaluating the representor's conduct in cases of implied representations, as follows:

"*Where there is no express misrepresentation, the first question to ask is whether there has been any implied misrepresentation at all and, as with any other type of contract, the essential issue is whether in all the circumstances*

relating to the entering into of the contract of guarantee or indemnity, including in particular (a) the nature of the contract between the beneficiary and the principal debtor, (b) the conduct of the beneficiary and (c) express representations made by him to the surety, it has been impliedly represented to the surety that there exists some state of facts different from the truth. In evaluating the effect of the beneficiary's conduct a helpful test is whether, having regard to the beneficiary's conduct in such circumstances, a reasonable potential surety would naturally assume that the true state of facts did not exist and that, had it existed, he would in all the circumstances necessarily have been informed of it."

The Court of Appeal considered this test in ***PAG*** at [132], observing as follows:

"*The present case appears to be the first in which Colman J's test has been considered by the Court of Appeal. We do think it is a helpful test, in relation to the existence of an implied representation, to consider whether a reasonable representee would naturally assume that the true state of facts did not exist and that, if it did, he would necessarily have been informed of it. To that extent we would approve the dicta of Colman J in Geest plc v Fyffes plc [1999]1 All ER (Comm) 672 but that is not to water down the requirement that there must be clear words or clear conduct of the representor from which the relevant representation can be implied*."

119. There was some dispute between the parties over whether it is sufficient for the implication of a representation that the reasonable representee would "*naturally assume*" that the true state of facts did not exist. In closing, Mr Saini QC submitted that whether the EURIBOR Representations were made depended upon whether "*a reasonable Swap counterparty in 2008 would have assumed that the position was as set out in the EURIBOR Representations, and that they would be told if it were not so*". Mr Quest QC submitted, however, that this is to conflate the test for implied representations, which requires clear words or conduct, and the test for implied terms, for which an assumption may be sufficient. I consider that Mr Quest QC must be right about this. I bear in mind in this regard that the Court of Appeal in ***PAG*** emphasised that clear words or clear conduct are required for the implication of a representation, reflecting the principle that there is no general duty to disclose. Furthermore, as Christopher Clarke J put it in ***Raiffeisen*** at [84], "*Silence by itself cannot found a claim in misrepresentation*". Indeed, I did not understand Mr Saini QC, on analysis, to be contending that silence would suffice for the implication of the EURIBOR Representations since his submission was, rather, that a reasonable swap counterparty would have naturally assumed from RBS's *conduct* that the EURIBOR Representations were being made. In these circumstances, the difference between the parties is probably better seen as not being one of principle but as to the application of the applicable principle, Mr Saini QC having clearly (and correctly) accepted in opening that the Court of Appeal in ***PAG*** emphasised that clear words or conduct are required for the implication of a representation.

120. Mr Quest QC also submitted that the question of whether a representation is to be implied is inextricably linked to the question of what the representation

means. This differs from the case of an express representation, where the first question is whether the words were written or spoken as a question of fact and the second question is what they mean. Mr Quest QC submitted that the Court will not (or is very unlikely to) imply a representation from conduct in terms which are vague, uncertain, imprecise or elastic. Again, in my view, Mr Quest QC was right about this. Mr Quest QC relied, for these purposes, first, on ***Raiffeisen***, in which Christopher Clarke J rejected the implication of one of the alleged representations, namely "*that RBS's equity in RBSFT was 'at risk', in that there was no support for the returns thereon and the repayment of the capital other than as identified in the transactional materials*". RBS had alleged that the representation was necessarily implied in the statement in the Information Memorandum that RBS had equity. Christopher Clarke J said this at [111]:

"*The meaning of 'no support' is, in any event, unclear. If, as RZB contends, it means that there was no support of any kind it is extremely wide. The representation would be falsified if RBS had any arrangement with anyone which would or might provide it with any compensation if the value of the shares fell or was not realised or any particular rate of return was not achieved. If the scope of the implied representation is to be narrowed the ambit of the reduction is not clear. 'No support' could signify no contractual undertaking or something different. If it means the former, which would be consistent with the sense in which RBS used the expression 'support' in relation to the Sutton Bridge transaction …, there would have been no misrepresentation. This elasticity of possible meaning is a factor against regarding the representation that there was 'no support' as necessarily implied*."

121. Mr Quest QC also relied upon ***Brown v Innovatorone*** [2012] EWHC 1321 (Comm), in which Hamblen J rejected the implication of a number of representations on the basis, *inter alia*, that they were unclear and contained vague concepts. The relevant representations were a "*technology price representation*" that "*the acquisition cost for the Technology rights bore a reasonable relationship to its true market value*" and a "*technology rights valuation representation*" that "*the Technology rights acquired or to be acquired had been independently and properly valued*" (see [903]). At [911], Hamblen J stated this at (4):

"*The alleged 'technology price representation' appears nowhere on the face of an IM. One cannot infer a complex and contentious representation of this kind, still less one involving vague concepts such as 'reasonable relationship' and 'true value'. The basis of the acquisition cost is set out in the IM. No statement beyond that was made.*"

He went on at (5) to observe that:

"As to the alleged 'technology rights valuation representation' there is a statement in most of the IMs that the Technology had been independently valued. Where such statement was made it was true. No statement was made that it had been 'properly' valued. It is unclear what that means and any

representation to this effect, in so far as it is a matter of fact, would need to be clearly spelt out, which it is not."

An alleged representation that the Technology rights, the proposed business, its prospects, funding, proposed operators and advisers had been assessed with "*appropriate due diligence*" was also rejected on the ground, at [913], that:

"*There is no basis for inferring such a contentious and far reaching representation. Issues of this kind are properly the subject matter of negotiation and, if agreed, a promissory warranty. What is 'appropriate' or what is 'due diligence' is a matter of evaluation and judgment, not a statement of fact.*"

122. Mr Quest QC additionally prayed in aid ***Standard Chartered Bank v Ceylon Petroleum Corp*** [2011] EWHC 1785 (Comm) at [562], in which Hamblen J rejected a suggestion that there was an implied representation that a hedge was a "*true hedge*" or part of a "*proper hedging strategy*" for various reasons, including because:

"The Term Sheets do not refer to any of these matters and they are vague, imprecise and inherently implausible statements for a selling bank to make. The vague and uncertain nature of the statements mean that they are ill-suited to constitute actionable statements. What, for example, is meant by a 'true hedge', a 'proper hedging strategy' and how, precisely, is a bank meant to judge whether the benefits for its counterparty of any transaction outweigh the risks? A reasonable person would not have understood that SCB was making representations in such vague and ill-defined terms."

Mr Quest QC highlighted Hamblen J's focus here on the vague and uncertain nature of the representations, noting, further, that the Court of Appeal in ***PAG*** (at [122]) found that the expressly pleaded representations were too wide or complex to be implied and went on to reformulate the representation as a result.

123. Although each of these authorities is necessarily fact-specific, drawing the threads together, a number of principles can be distilled from these authorities:

(1) First, it is possible for a representation to be made expressly or impliedly through words or conduct. For a representation to be implied, silence or mere assumption is not usually enough as there is no general duty of disclosure. It is necessary to view the words or conduct objectively to determine whether an implied representation has been made, although the natural assumptions of the reasonable representee will be helpful in assessing whether an implied representation has been made through the conduct of the representor.

(2) Secondly, whether or not a representation is implied is ultimately a question of fact to be determined in the circumstances of the particular case: see also ***Deutsche Bank AG v Unitech Global Ltd*** [2013] EWCA Civ 1372 per Longmore LJ at [25].

(3) Thirdly, more may be required, in terms of words or conduct, for a representation which is wide in meaning or complex to be implied.

(4) Fourthly, it is less likely that a representation that is vague, uncertain or ambiguous would be objectively understood to have been made from words or conduct.

It is with these principles in mind that I now consider the EURIBOR Representations which have been alleged in these proceedings.

Implication: this case

124. Mr Saini QC submitted that both authority (in particular, the decision of the Court of Appeal in ***PAG***) and the factual evidence in this case provide strong support for the implication of the EURIBOR Representations. Put simply, Marme's case is that RBS made the representations by its conduct, specifically in proposing to Marme and, in any event, agreeing with Marme that its liabilities under the Swaps should be calculated by reference to EURIBOR.

125. As I shall explain, there are, however, a number of difficulties with this case. I should deal, first, however with a point made by Mr Quest QC which is that Marme has changed its case as to what implied representations it alleges on three occasions, yet without changing the conduct upon which it relies for the implication of the representations. There is a strong suspicion, in these circumstances, that the EURIBOR Representations are the result of a reverse-engineering exercise inspired by the Court of Appeal decision in ***PAG*** rather than the facts of the present case. In this respect, the position is similar to the position at first instance in ***PAG*** itself ([2016] EWHC 3342 (Ch)) in which Asplin J noted at [419] that "*It was accepted the form of the implied representations had been 'borrowed' from the* ***Graiseley*** *case and it seems to me that the pleading was not led by the evidence*" before going on to conclude that PAG had given no thought to the representations in the form pleaded and had not relied upon them. There is a similarity also with ***Foster v Action Aviation Ltd*** [2013] EWHC 2439 (Comm), in which Hamblen J observed as follows at [100]:

"*It is common in this court to find intricate cases of implied representations being advanced. Often these are more a reflection of the ingenuity of the pleader than reality or the evidence. There is an element of that in this case. The evidence should lead the pleading; not the other way round.*"

It is undeniably the case that the EURIBOR Representations have undergone several mutations. At the time of issue of the Claim Form in September 2014, Marme pleaded four implied representations. The Particulars of Claim (in May 2015) contained 11 implied representations. In August 2017 (after the first instance decision of Asplin J in ***PAG***), four further implied representations were pleaded. In March 2018 (after the Court of Appeal's decision in ***PAG*** and the close of disclosure), Marme replaced all of the pleaded representations with the current five EURIBOR Representations. Further, Marme's Particulars of Claim originally contained allegations that *RBS itself* had been making false submissions in respect of EURIBOR (Mr Quest QC suggested that this may

have been a misinterpretation of the EU Commission press release dated 4 December 2013 which announced that RBS had been fined for participation in a "*cartel aimed at distorting the normal course of pricing components for [euro interest rate] derivatives*") only for these allegations to be removed once RBS put in its Defence (and gave disclosure) and once the EU Commission Decision had become public so that it became known that, as Marme now accepts, there is no evidence that ABN AMRO had made any false EURIBOR submissions. That said, however, it is important to be alive to the fact that implied representations will almost invariably, to some extent, amount to a 'lawyer's construct'. This is because, by their very nature, implied representations are not expressed in words. As such, it will almost always, for practical purposes, be the lawyer's task to put the conduct relied upon into words. That will involve the lawyer analysing the evidence and taking into account decided cases. The key question in every case will be whether the evidence justifies the conclusion that the implied representation was made. If that is the position, then, the fact that a lawyer has helped construct the implied representation case is unobjectionable. It is only if the evidence does not support the implied representation case that there is a difficulty.

126. I prefer, therefore, not to base my decision concerning the implication of the EURIBOR Representations on this consideration, but, instead, to focus on the substantive merits of the case which was advanced by Mr Saini QC. As I have indicated, there are a number of difficulties with that case.

127. First, despite Mr Saini QC's submission in opening that, in the light of ***PAG***, EURIBOR Representations 1, 3 and 5, at least, should be treated as having "*plainly*" been made by RBS to Marme, the truth is that, on analysis, ***PAG*** provides no support at all for Marme's case.

128. This can be seen by looking at the EURIBOR Representations and seeing how they compare with the representations which were considered in ***PAG***. To this end, Mr Quest QC, Miss John and Mr Evans prepared a document entitled "*Marme representations unpacked*", in which they used the various definitions deployed on Marme's part to arrive at expanded versions of the EURIBOR Representations, as follows:

(1) EURIBOR Representation 1: "*No RBS employee had during the period of no less than around 2 years preceding the date of the Senior Loan Agreement and the Swaps, i.e. September 2006 to September 2008, engaged in conduct intended to lead to a higher or lower Euribor rate on any particular day as compared to the Euribor rate that would have pertained without the attempted manipulation, including the submission by any Euribor panel bank of a false rate even if that submission did not lead to a material increase or decrease in the Euribor rate on any particular day, no RBS employee was seeking to do so as at the date of the Swaps, and no RBS employee intended to do so in the future*."

(2) EURIBOR Representation 2: "*No RBS employee had reason to believe that any other banks had during the period of no less than around 2 years preceding the date of the Senior Loan Agreement and the Swaps, i.e. September 2006 to September 2008, engaged in conduct intended to lead*

to a higher or lower Euribor rate on any particular day as compared to the Euribor rate that would have pertained without the attempted manipulation, including the submission by any Euribor panel bank of a false rate even if that submission did not lead to a material increase or decrease in the Euribor rate on any particular day, were seeking to do so as at the date of the Swaps, or would seek to do so in the future."

(3) EURIBOR Representation 3: "*No RBS employee had during the period of no less than around 2 years preceding the date of the Senior Loan Agreement and the Swaps, i.e. September 2006 to September 2008, conducted himself or herself in such a way as was likely to lead submitting banks not to submit in accordance with the EURIBOR Code, no RBS employee was conducting himself or herself in such a way as at the date of the Swaps, and no RBS employee intended to do so in the future*."

(4) EURIBOR Representation 4: "*No RBS employee had reason to believe that any other banks had during the period of no less than around 2 years preceding the date of the Senior Loan Agreement and the Swaps, i.e. September 2006 to September 2008, conducted themselves in such a way as was likely to lead submitting bank not to submit in accordance with the EURIBOR Code, were conducting themselves in such a way as at the date of the Swaps, or intended to do so in the future*."

(5) EURIBOR Representation 5: "*All RBS employees had during the period of no less than around 2 years preceding the date of the Senior Loan Agreement and the Swaps, i.e. September 2006 to September 2008, acted honestly, were acting honestly as at the date of the Swaps, and intended to act honestly in the future, in relation to the EURIBOR rate-setting process*."

It is worth noting, in this context, that, in view of Marme's definition of what amounts to undermining integrity, it was common ground as between Mr Quest QC and Mr Saini QC by the time of closing that EURIBOR Representations 3 and 4 really add nothing to EURIBOR Representations 1 and 2 given that EURIBOR Representations 1 and 2 also relate to conduct intended to lead to a higher or lower EURIBOR rate. That this is obviously the case is borne out by the fact that Article 6 of the EURIBOR Code of Conduct includes an obligation on panel banks to submit rates which "*to the best of their knowledge*" are being offered. Not doing this would plainly amount to "*conduct intended to lead to a higher or lower Euribor rate on any particular day as compared to the Euribor rate that would have pertained without the attempted manipulation*" as described in EURIBOR Representations 1 and 2.

129. Turning, then, to ***PAG***, in that case, the claimant, PAG, entered into a number of loan facility agreements between 2004 and 2008 with the defendant, RBS. The agreements required the claimant to enter into four interest rate swap agreements with RBS which were referenced to three-month sterling LIBOR. Following the global financial crisis, LIBOR fell significantly with the result that the claimants were liable to pay rates of interest under the swaps that far exceeded what they received. The claimants subsequently terminated the swaps, incurring break costs of over £8 million and entered into a new facility

agreement. The Financial Services Authority (the 'FSA') subsequently found that RBS had manipulated Japanese yen and Swiss franc LIBOR between 2006 and 2012. PAG brought claims against the bank, seeking rescission of the swap agreements and/or damages, based *inter alia* on non-disclosures, false representations, fraudulently made implied representations and breaches of implied terms.

130. At first instance, PAG alleged five implied representations ([2016] EWHC 3342 (Ch), [375]). Asplin J decided that none of these had been made ([407]). Her reasoning was summarised by the Court of Appeal ([2018] EWCA Civ 355) at [119] as being that:

"*(1) There was no sufficient conduct on the part of RBS from which it could be implied that any representations were made …;*

(2) If there was such conduct, the only two representations which could be implied from that conduct were: (a) that the three-month LIBOR rate 'was set at the date of the transactions and would be set throughout its term in accordance with ... the BBA definition; and (b) that RBS had not in the past made false or misleading submissions or attempted to manipulate the three-month LIBOR rate …;

(3) PAG had not established that those representations were false, that is to say that the three-month LIBOR rate was not correctly set at the date of the transactions and RBS had in the past made false or misleading submissions in relation to that rate …;

(4) Therefore there was no question of any fraudulent or negligent representations …; and

(5) PAG did not rely on the alleged 'extremely complex and intricate' representations because they did not know about the BBA definition, how submissions were made or even that RBS was a panel bank, let alone that LIBOR was capable of manipulation; it was not enough that they assumed (although they did so assume) that LIBOR would be set in a straightforward and proper manner … ."

131. On appeal, PAG alleged the following four implied representations (set out at [118] of the Court of Appeal's judgment):

"*(a) On any given date up to and including the date of each of the swaps: LIBOR represented the interest rate as defined by the BBA, being the average rate at which an individual contributor panel bank could borrow funds by asking for and accepting interbank offers in reasonable market size just prior to 11 a m on that date ('LIBOR representation 1').*

(b) RBS had no reason to believe that on any given date LIBOR represented anything other than the interest rate defined by the BBA, being the average rate at which an individual contributory panel bank could borrow funds by asking for and accepting interbank offers in reasonable market size just prior to 11 a m on that date ('LIBOR representation 2').

(c) RBS had not made false or misleading LIBOR submissions to the BBA and/or had not engaged in the practice of attempting to manipulate LIBOR such that it represented a different rate from that defined by the BBA (viz a rate measured at least in part by reference to choices made by panel banks as to the rate that would best suit them in their dealings with third parties) ('LIBOR representation 3').

(d) RBS did not intend in the future and would not in the future: make false or misleading LIBOR submissions to the BBA; and/or engage in the practice of attempting to manipulate LIBOR such that it represented a different rate from that defined by the BBA (viz a rate measured at least in part by reference to choices made by panel banks as to the rate that would best suit them in their dealings with third parties) ('LIBOR representation 4')."

132. The Court of Appeal considered that the representations as pleaded could not be implied, as explained in the judgment at [122]:

"*As we have already mentioned the judge called the pleaded representations 'extremely complex and intricate' … . This is not an unmerited description. The first alleged representation is not only intricate but appears to amount to a representation that no bank had ever made inappropriate submissions to Reuters as to the rate at which LIBOR should be set and is an impossibly wide representation; much the same criticism can be rightly made of the second representation. The third and fourth representations are also unnecessarily complex and during the argument, the court endeavoured to reduce their complexity to something simpler. The most feasible formulation seems to us to be that RBS was representing that, at the date of the swaps, RBS was not itself seeking to manipulate LIBOR and did not intend to do so in the future. With some justification Mr Handyside complained that no such representation had been pleaded in terms. But it seems to us that our formulation captures the essence of what has been pleaded and we will proceed on that basis.*"

The Court of Appeal decided, however, at [133], that a different implied representation would be justified:

"*In the present case there were lengthy discussions between PAG and RBS before the swaps were concluded as set out by the judge in the earlier part of her judgment. … RBS was undoubtedly proposing the swap transactions with their reference to LIBOR as transactions which PAG could and should consider as fulfilment of the obligations contained in the loan contracts. In these circumstances we are satisfied that RBS did make some representations to the effect that RBS itself was not manipulating and did not intend to manipulate LIBOR. Such a comparatively elementary representation would probably be inferred from a mere proposal of the swap transaction but we need not go as far as that on the facts of this case in the light of the lengthy previous discussions*."

133. Mr Saini QC relied on the last sentence of this last passage in particular, submitting that, in the same way, the EURIBOR Representations should be inferred from a mere proposal of the Swaps in this case. He submitted, indeed,

that this means that EURIBOR Representations 1, 3 and 5 are to be regarded as having "*plainly*" been made by RBS. Although Mr Quest QC and Mr Howe QC were inclined to suggest that [133] sits uneasily with [132] and the need to ensure that there is no watering down of *"the requirement that there must be clear words or clear conduct of the representor from which the relevant representation can be implied"*, I am not persuaded that acceptance of Mr Saini QC's submission would entail any such dilution if only because the Court of Appeal were careful at [133] to use the word *"probably"* and so to signal that each case will depend on its own facts. It is precisely for this reason that it does not follow that EURIBOR Representations 1, 3 and 5 are, as Mr Saini QC submitted, *"plainly"* to be implied.

134. That, I repeat, will depend on the facts of the present case, which I will come on to consider. However, even leaving this point to one side, Mr Saini QC's submission overlooks the simple fact that the EURIBOR Representations are not the same as the implied representation which the Court of Appeal formulated in ***PAG***. Thus:

(1) First, there is the fact that EURIBOR Representations 2 and 4 concern whether RBS had "*reason to believe*" that *other banks* (in other words, not RBS itself) were involved in EURIBOR misconduct. Although Mr Saini QC sought to suggest that representations similar to EURIBOR Representations 2 and 4 were not considered in ***PAG***, that the sole issue in ***PAG*** was whether RBS itself had been undertaking manipulation of the relevant benchmarks, and so that the Court of Appeal in ***PAG*** should not be regarded as having decided that such representations were not capable of having been made, that is not right since, in fact, the Court of Appeal approached matters on the basis that the first two representations alleged in ***PAG*** (as set out at [118(a) and (b)]) similarly went beyond RBS's own conduct and extended to the conduct of other banks. Therefore, far from assisting Marme, ***PAG*** is actually an authority which points in the other direction.

(2) Secondly but in similar vein, it should also be borne in mind that, whereas the EURIBOR Representations extend to the past (specifically two years prior to the Transaction), the representation formulated by the Court of Appeal in ***PAG*** was not concerned with the past but only with the present and the future. This is because the Court of Appeal expressly rejected an argument that it would be appropriate to imply a representation that no bank had *ever* made inappropriate submissions – as demonstrated by the observations at [122] (as previously quoted) that the first and second representations amounted *"to a representation that no bank had ever made inappropriate submissions to Reuters as to the rate at which LIBOR should be set"* and that such a representation would be *"impossibly wide"*. Again, therefore, in this sense ***PAG*** is authority which not only does not support Marme's case but which is directly at odds with it.

(3) Thirdly, the EURIBOR Representations extend beyond *actual* manipulation to embrace also *attempted* manipulation which would not have had any effect on the obligations of the parties. Nowhere in ***PAG*** is there a suggestion that a mere attempt could be the subject of a

representation; on the contrary, the Court of Appeal did not accept LIBOR Representation 3 which included reference to *"the practice of attempting to manipulate"*.

(4) Fourthly and building upon the first and third points, in ***PAG*** "*manipulation*" referred to the making of false submissions by *RBS's* LIBOR submitters on the basis that the evidence considered in that case went only to the conduct of the RBS submitters whereas, in contrast, the EURIBOR Representations are concerned with all other conduct intended to influence the EURIBOR rates.

(5) Lastly, as for EURIBOR Representations 3 and 5 in particular, Mr Quest QC and Mr Howe QC observed, with justification, that these introduce concepts of undermining integrity and dishonesty in relation to the rate-setting process, neither of which was considered by the Court of Appeal in ***PAG***.

135. The second difficulty as far as Marme is concerned is that its case that the EURIBOR Representations should be implied is not supported by any other authority. Specifically, although Mr Saini QC also relied upon ***Graiseley Properties v Barclays Bank*** [2013] EWCA Civ 1372, submitting that that case involved representations very similar to those in this case, including representations concerning attempted manipulation and undermining integrity, this is not an authority which provides any real assistance to Marme.

136. In ***Graiseley***, two appeals were heard, from the decision of Flaux J (as he then was) in ***Graiseley*** and the decision of Cooke J in ***Deutsche Bank v Unitech***. The appeals related to whether permission should be granted to the claimant to amend its pleadings to allege that the banks in question (Deutsche Bank and Barclays) had made certain implied representations about LIBOR. Flaux J had granted permission to plead certain implied representations in ***Graiseley***, whereas Cooke J had refused permission in ***Unitech***. The implied representations which the claimants in ***Graiseley*** sought to plead were set out by Longmore LJ at [6], as follows, Mr Saini QC emphasising that two of these extended to attempted manipulation:

"*(3) Barclays had not on any given date, up to and including the date of the Swap and the Collar:*

(a) made false or misleading LIBOR submissions to the BBA and/or

(b) engaged in the practice of attempting to manipulate LIBOR, such that it represented a different rate from that defined by the BBA, (viz a rate measured at least in part by reference to choices made by panel banks as to the rate that would best suit them in their dealings with third parties); and

(4) Barclays did not intend in the future to

(a) make false or misleading LIBOR submissions to the BBA and/or

(b) engage in the practice of attempting to manipulate LIBOR, such that it represented a different rate from that defined by the BBA. (viz a rate measured at least in part by reference to choices made by panel banks as to the rate that would best suit them in their dealings with third parties)."

Mr Saini QC drew attention to the fact that two of the representations which the claimants in the ***Deutsche Bank*** appeal wished to plead included the concept of undermining integrity. These were set out by Longmore LJ at [18]:

"*(C) The first claimant had not itself acted, was not acting, and had no intention of acting, in a way which would, or would be likely to, undermine the integrity of LIBOR.*

(D) The first claimant was not aware of any conduct (either its own, or of other banks on the Panel) which would, or would be likely to, undermine the integrity of LIBOR."

The Court of Appeal concluded that permission to amend should be given, on the basis that the proposed pleas of implied representations in both cases were arguable (see [24]), Longmore LJ going on in the paragraphs which followed to explain his reasoning at [25]:

"Put very shortly, I consider that any case of implied representation is fact specific and it is dangerous to dismiss summarily an allegation of implied representation in a factual vacuum. If the LIBOR scandal had occurred before these cases were begun and what are now the proposed pleas had been incorporated in original pleadings, they would not, in my view, be amenable to a strike out application and it is not surprising that Barclays did not, at first, seek to appeal Flaux J's decision."

He continued at [27]:

"In the present case, however, the banks did propose the use of LIBOR and it must be arguable that, at the very least, they were representing that their own participation in the setting of the rate was an honest one. It is, to my mind, surprising that the banks do not appear to be prepared to accept that even that limited proposition is arguable."

He, then, said this at [28]:

"It was also submitted that doing nothing cannot amount to an implied representation. But it is (arguably) the case that the banks did not do nothing in that they proposed transactions which were to be governed by LIBOR. That is conduct just as much as a customer's conduct in sitting down in a restaurant amounts to a representation that he is able to pay for his meal, see DPP v Ray [1974] AC 370, 379D per Lord Reid."

He added at [30]:

"The banks' submissions boiled down to saying that they were prepared to accept that they would do nothing dishonest or manipulative during the term

of the contract and that should be enough for any counterparty. I can only say that, in my view, it is arguably not enough. If the day after the contracts had been made, the banks had told their counterparties that they had been manipulating LIBOR in the past and intended to do so in the future, but would be happy to pay any loss that their borrowers could prove, the borrower would (arguably) be sufficiently horrified so as to think he would be entitled to rescind the deal. The law should strive to uphold the reasonable expectations of honest men and women. If in the end it cannot do so, that should only be after a proper trial."

He, then, stated at [31]:

"The banks are, no doubt, on much stronger ground in relation to the first alleged representation in the Graiseley case and representations (A) and (B) in the Deutsche Bank case. They can say with considerable force that the proposed representations amount to statements about the conduct of banks other than themselves and no one could expect any statement to that effect to be made by one bank proposing LIBOR. But I do not consider it the function of this court at this stage of the proceedings to be too selective about the precise representations which the parties wish to advance. The trial judge should be able to discern and, if necessary, judge between the various alleged representations once he has a full picture of the disputes between the parties. For the same reasons I would not refuse the subsidiary amendments relating to negligent misrepresentation and breach of warranty."

Mr Saini QC emphasised that permission to amend was given in respect of all the representations, including those going to attempted manipulation and undermining integrity. He emphasised, in particular, that the Court of Appeal had no apparent difficulty with the concept of integrity as there was no express discussion of the concept in the judgment (although Mr Tomson, who appeared in the case, observed that there had, in fact, been an issue about the meaning of integrity). Mr Saini QC stressed, too, that the Court of Appeal gave permission to amend to plead representations as to historical conduct, highlighting the observations which Longmore LJ made as to the reasonable expectations of honest men and women (as referred to at [30]). I bear this in mind. It would, nonetheless, be wrong to regard what was decided in that case as having too great a significance since it is important to keep in mind that the only question which the Court of Appeal had to answer in that case was whether the points sought to be advanced were arguable. Longmore LJ himself emphasised that he did not "*consider it the function of this court at this stage of the proceedings to be too selective about the precise representations which the parties wish to advance*." Furthermore, the most that was stated by Longmore LJ at [31] was that there was "*considerable force*" in the submission that no one would expect a bank proposing a transaction linked to LIBOR to be making any statement about the conduct of banks other than itself. Indeed, as the Court of Appeal observed in ***PAG*** at [121], having cited the observations of the Court in ***Graiseley***:

"*These were, of course, only interlocutory observations and it now falls to this court to determine the extent to which, if at all, they represent the law*."

137. Thirdly, Marme's case on implication, were it to succeed, would inevitably involve a 'watering down' of the requirement that specific conduct be identified from which any alleged representation is said to arise. ***PAG*** makes it abundantly clear that this is not permissible, yet it is clear that, beyond reliance on the fact that RBS entered into the Swaps (allied with its case that the Swaps were proposed by RBS), Marme can in this case identify no other conduct (still less any specific conduct) which would justify the implication of any representation wider than the limited representation formulated by the Court of Appeal in ***PAG*** at [133]. Invocation of Colman J's *"helpful test"* in ***Geest*** is not enough by itself and nor, accordingly, is reliance merely on an internal assumption (and, even then, not a conscious assumption) on Mr Maud/Marme's part which RBS failed to correct. This is an intractable difficulty as far as Marme is concerned.

138. Mr Saini QC sought to suggest in this context that unstated assumptions may be sufficient since English commercial law is moving towards recognising duties of good faith and honesty. He relied for these purposes on Leggatt LJ's description of *'relational contracts'* in ***Al Nehayan v Kent*** [2018] EWHC 333 (Comm) at [167], as well as on ***ING Bank NV v Ros Roca SA*** [2011] EWCA Civ 353 in which Rix LJ used the concept of estoppel and implied representations interchangeably and had this to say at [92]:

"*What then does the law say about such a situation? Outside the insurance context, there is no obligation in general to bring difficulties and defects to the attention of a contract partner or prospective contract partner. Caveat emptor reflects a basic facet of English commercial law (the growth of consumer law has been moving in a different direction). Nor is there any general notion, as there is in the civil law, of a duty of good faith in commercial affairs, however much individual concepts of English common law, such as that of the reasonable man, and of waiver and estoppel itself, may be said to reflect such a notion. In such circumstances, silence is golden, for where there is no obligation to speak, silence gives no hostages to fortune. If, however, the contractor speaks, then he may have to live up to what he says; so also where what is unsaid is sufficiently closely connected with what he has said to render what has been left unsaid misleading. In general, however, there is no duty of disclosure. ... For the same reason it is not possible to set up an estoppel on the basis of an omission to disclose unless a duty to disclose can be established in the particular circumstances of the case. Tacit acquiescence in another's self-deception does not itself amount to misrepresentation, provided that it has not previously been caused by a positive misrepresentation."*

Rix LJ went on at [93] to add this:

"Nevertheless, particular circumstances can make a difference, and it is possible to formulate a general principle as to why that should be so. Thus in Moorgate Mercantile Co Ltd v Twitchings [1977] AC 890, 903 Lord Wilberforce, in a dissenting speech but which in this respect has borne fruit, spoke of the possibility that, in a particular situation which affected two parties, a reasonable man would expect the other party, 'acting honestly and responsibly' either to make something known or face the consequences of not doing so. In Republic of India v India Steamship Co Ltd (The Indian

Endurance and The Indian Grace) (No 2) [1998] AC 878, 914 Lord Steyn approved Lord Wilberforce's observation as "helpful as indicating the general principle underlying estoppel by acquiescence". As Bingham J had put it some years earlier in Tradax Export SA v Dorada Cia Naviera SA (The Lutetian) [1982] 2 Lloyd's Rep 140, 157, after citing Spencer Bower & Turner, Estoppel by Representation, 3rd ed (1977), p 49:

'More recently, Lord Wilberforce in Moorgate ... provided persuasive authority for the proposition that the duty necessary to found an estoppel by silence or acquiescence arises where a reasonable man would expect the person against whom the estoppel is raised, acting honestly and responsibly, to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations. (Lord Wilberforce dissented on the outcome, and expressed the principle in proprietary terms appropriate to that case, but neither of these things in my judgment diminishes the significance of what he said.)' *... ."*

Mr Saini QC submitted that the core principle identified by Rix LJ is that the reasonable man *"expect[s] the other party 'acting honestly and responsibly' either to make something known or face the consequences…"*. He suggested that this supports the proposition that the law should give effect to this type of expectation. I am not persuaded, however, that ***ING*** provides any assistance in the present context, given that Rix LJ was alone in referring to implied representation (as opposed to estoppel by convention) and in making the observations which he did. Indeed, it should be noted that in ***PAG***, at [407], despite recording her acceptance that a term would be implied into the swaps that the parties would conduct themselves honestly when performing the swap contracts, Asplin J, nonetheless, did not accept that this meant that the implied representations contended for in that case should be implied – and nor did the Court of Appeal apparently think differently. It needs to be remembered that the case which Marme advances is not a non-disclosure case but is an implied representation case. This is for good reason: the circumstances in which a 'duty to speak' arises under English law are limited, and this is not such a case.

139. Fourthly, there is a distinct lack of certainty (and associated lack of obviousness) as to what is entailed in the EURIBOR Representations. I have already touched on this subject, but there is in this case the same *"elasticity of possible meaning"* to which Christopher Clarke J referred in ***Raiffeisen*** and which operates against the implication urged upon the Court on Marme's behalf. Put simply, the more ambiguous or less certain the representation sought to be implied, the less likely that there will be the implication since the less likely it will be that either the representor or the representee understood that the representation had been made. Of the examples given by Mr Quest QC, there is, in particular, a lack of certainty in EURIBOR Representations 3 and 4, with their references to undermining integrity. Mr Quest QC relied in this context upon ***Unitech*** and Cooke J's rejection of a similar alleged representation. At [26]-[27], Cooke J stated as follows:

"*Again, there is a measure of uncertainty in the alleged representation… The question arises as to what is meant by 'Undermining the integrity' of LIBOR*

and reference is made to the number of LIBOR submissions per year being of the order of 444,250.

How many panel banks must be involved before integrity is undermined? How many submissions must be made, other than in good faith for that to occur? Does the conduct have actually to affect the published rate for it to undermine the integrity of LIBOR, and would manipulation on a single day be sufficient?

... If [this representation] were made, that would effectively impose upon DB AG and any other LIBOR panel bank which entered into a LIBOR linked derivative with the counterparty a positive duty to disclose to the counterparty any information which it had which might undermine the integrity of LIBOR, whatever that expression really means, and a failure to do so would amount to an implied misrepresentation. That does seem a very wide duty to impose."

The comparable yearly figure for EURIBOR submissions is 170,000, assuming that all the submitting banks made submissions on 257 submitting days for each of the 15 different EURIBOR 'tenors'. It follows that Cooke J's concerns apply similarly in the present case. The fact that the Court of Appeal in ***Unitech*** allowed an amendment to plead a representation involving concepts of integrity on the basis that "*integrity*" is an ordinary word does not seem to me to necessitate a different conclusion since, as Mr Quest QC submitted, it is important to have in mind that the viability of an implied representation needs to be considered not as some sort of sterile drafting exercise but in order to work out whether there has been a breach of the implied representation alleged.

140. As Mr Quest QC correctly observed, it is not clear, for example and by reference to the conduct relied upon by Marme as falsifying EURIBOR Representations 3, 4 and 5, whether this would cover the discussion of an arbitrage opportunity (as opposed to an arbitrage conspiracy – as to which see later) which the derivatives traders thought would benefit the cash desks as well as their own positions but which was never implemented, and whether this in and of itself undermined the integrity of EURIBOR or constituted a dishonest act in relation to the rate-setting process. In closing, Mr Saini QC confined matters of conduct undermining the integrity of EURIBOR to conduct likely to lead submitting banks not to submit in accordance with the EURIBOR Code. However, the very fact that such clarification was required on Mr Saini QC's part, if anything, supports Mr Quest QC's submission that there is the lack of certainty which he highlighted. It also demonstrates that the representation can hardly be regarded as having been obvious.

141. Specifically, as to the definition of "*attempted manipulation*" as "*conduct intended to lead to a higher or lower EURIBOR rate*", this is not limited to the making of false submissions in the setting process but seems apparently to encompass *any* conduct intended to lead to a higher or lower rate, indeed whether dishonest or not and not limited by materiality or frequency. If that is right, then, as was pointed out, EURIBOR Representation 1 could seemingly be falsified by a single instance of conduct intended to lead to a higher rate, which might mean that it would be sufficient merely that ideas had been floated or discussed but that those ideas never came to anything. It is not easy

to see how this could undermine the integrity of EURIBOR or constitute a dishonest act in relation to the rate-setting process, and so that a reasonable representee would not have considered the integrity of EURIBOR in such broad terms.

142. These, however, are merely illustrations of a broader point, namely that the EURIBOR Representations which Marme has alleged are simply not obvious. They are, on the contrary, contrived and cannot properly be described as capable of being implied from any "*clear words or clear conduct*" in this case. The most that can be said, as in ***PAG***, is that by going along (although this is more than proposing as in ***PAG***) with the Swaps RBS impliedly represented that it was not *itself* manipulating EURIBOR and that it did not *itself* intend to manipulate EURIBOR – although I would be prepared to extend the ***PAG*** representation so that it also included attempted manipulation but only on the basis that this covered conduct which resulted in a submission which was not in accordance with the EURIBOR Code since Mr Saini QC clarified in closing that this was the type of conduct which Marme had in mind and not some other (wider) conduct. That is not, however, an implied representation for which Marme contends.

143. Fifthly and turning to the evidence in the present case, a further reason why I am clear that the EURIBOR Representations ought not to be implied in this case is that Marme and, for practical purposes, Mr Maud, quite obviously, did not themselves consider that the EURIBOR Representations were being made *at the time*. Although, ultimately as far as implied representations are concerned, the question is to be answered objectively, it is, nonetheless, permissible, as Hamblen J indicated in ***Cassa di Risparmio*** at [221], to consider what was reasonably apparent to both the representor and the representee.

144. Even excusing Mr Maud from having to formulate the EURIBOR Representations (as they have become) with any degree of precision, it should not, therefore, be overlooked that Mr Maud's evidence as to what he understood to have been represented by conduct was so much more generalised than the EURIBOR Representations now sought to be relied upon by Marme in these proceedings. Thus, in his witness statements Mr Maud did not suggest that he consciously thought about any of the EURIBOR Representations at the time that the Transaction was entered into. Specifically, in his first witness statement, Mr Maud stated that he:

"*consider[ed] that at every step of that process, in which RBS was seeking agreements that it expected to be highly profitable for it and the other banks, it was impliedly or by conduct representing that it was not and had never been involved in the wrongful manipulation of EURIBOR and that it had no knowledge of such wrongful manipulation*."

In his second witness statement, Mr Maud stated that he "*believed that Euribor was an honest, objective benchmark rate*", something which he reiterated a number of times in cross-examination as illustrated by the following exchange, for example:

"*Q. Now, thinking back to 2008, presumably it wouldn't have occurred to you at that time that any bank might put in a false quote into the EURIBOR process?*

A. No.

Q. I mean, in fact in 2008 you wouldn't have spent any time really thinking about the process by which EURIBOR was set at all?

A. No, I thought EURIBOR represented a true and honest rate.

Q. Right. But you wouldn't have spent any time thinking about the process by which it was set?

A. Well, I knew the process it was set, but I can't say I laid awake at night contemplating it, no.

Q. No. I mean, you had a lot of other things to think about in 2008.

A. Yeah, but obviously I understood how both LIBOR and EURIBOR rates were arrived at. But I – I just believed it was a true and honest rate; I had no belief otherwise.

Q. I mean, you didn't start thinking about how EURIBOR might have been manipulated, presumably, until you started reading about the rate-setting scandal in the press some time later?

A. Yes.

Q. And you didn't really start thinking about the process by which EURIBOR might be manipulated until you read about it later?

A. Yes

Q. Yes that's right?

A. That's right.

Q. And until you read about these issues in the press, presumably the possibility of manipulation of EURIBOR hadn't really occurred to you?

A. Well, as I say, I – yes, I hadn't considered that EURIBOR was anything but a true rate. Although obviously I had become aware of other scandals involving particular RBS and GRG and so forth."

When pressed further by Mr Quest QC as to whether he was conscious of RBS impliedly making the alleged EURIBOR Representations by conduct as he was not thinking about manipulation at all, Mr Maud's response was merely that:

"*they told me that this is the EURIBOR rate and I accepted it as being true and honest. If that's not by conduct, I don't know what is*".

Self-evidently, Mr Maud gave no thought at the time to how EURIBOR was set. It did not occur to him that anything was being represented concerning the possibility that it might be manipulated.

145. Nor, sixthly, although in a sense this is a point which encapsulates a number of the previous difficulties, is it sufficient, as Mr Saini QC suggested, that reasonable people in the market at the time that the Transaction was entered into would have assumed that EURIBOR was an honest and objective rate. Mr Saini QC in this respect highlighted Mr Maud's evidence that underlying the use of the Swaps and the EURIBOR rate was the "*belief that it was a reliable, objective and independent rate which was established by means of fair reporting in the form of submissions of daily rates by certain banks, including RBS*", that he "*believed that EURIBOR was an honest, objective, benchmark rate*" and that he "*certainly would not have expected RBS to have proposed the use of EURIBOR if it had known that the rate had been subject to manipulation by an illegal bank cartel – or, indeed, had itself been participating in that cartel*." Mr Maud also maintained in cross-examination that he thought that the EURIBOR rate presented to him was "*true and honest*" and "*not manipulated*", which found something of an echo in the following exchanges when Mr Saini QC was cross-examining Mr Goodwin:

"*Q. Was it obvious to you in 2008 that RBS was not seeking to manipulate EURIBOR?*

A. Yes, it was obvious, yeah.

Q. So obvious that it goes without saying?

A. Yes.

Q. And so obvious that if that wasn't true, you would have expected RBS to tell someone?

A. Yes.

Q. Okay. Secondly, was it obvious to you, again to go without saying, that you had no reason to believe that other banks were manipulating EURIBOR?

A. Yes.

Q. Again, was it obvious to you at that time, again so it goes without saying, that RBS hadn't done anything itself to undermine the integrity of EURIBOR?

A. Yes

Q. Again, was it obvious to you at the time, so that it goes without saying, that RBS didn't have any knowledge that other banks were seeking to manipulate or undermine the integrity of EURIBOR?

A. Yes.

Q. Finally, was it obvious to you, so that it goes without saying, that as at the date of the swaps in particular, your bank was acting honestly?

A. Yes."

146. It was Mr Saini QC's submission that this evidence provides significant support for Marme's implication case. That cannot, however, be right since, although it may be helpful to consider what may have been naturally assumed at the time (on the basis of the "*helpful test*" set out by Colman J in ***Geest***), it is nonetheless important to heed the warning of the Court of Appeal in ***PAG*** that doing this must not be allowed to "*water down*" the requirement for specific conduct if the representations are to be implied. To ask whether something "*goes without saying*" or what a reasonable person in the market would "*naturally have assumed*", whilst relevant to whether particular terms are to be implied into a contract, does not really assist in determining whether a pre-contractual representation has been made since, whereas something which "*goes without saying*" can be a purely unconscious assumption, an implied representation requires that something is communicated by the representor to the representee through conduct.

147. Furthermore and seventhly, there is a related further difficulty. This is that the EURIBOR Representations are not (or are no longer) concerned with the truth and honesty of EURIBOR but are, instead, concerned with the conduct, intention and knowledge of RBS employees. This is no accident since Marme did previously plead representations about the truth of EURIBOR (for example that *"EURIBOR was a benchmark rate which had been, was, and would be, a reliable reflection on the cost of interbank lending denominated in Euros"*) only to abandon that case in May 2018.

148. The point goes further, however, and so beyond a matter of mere pleading. This is because, were Marme to try and make good a case that EURIBOR was not a reliable or truthful rate, Marme would have had to have proved that Mr Moryoussef had not merely attempted to influence EURIBOR but that he had succeeded in doing so and, furthermore, that those false submissions had actually affected the EURIBOR rate.

149. Mr Saini QC confirmed, indeed, in opening that it was not Marme's case *"that Mr Moryoussef was ever successful in trying to manipulate"* and that Marme had *"not tried to take on the burden of showing that when he made a particular request to, for example, a Barclays EURIBOR submitter, that request was acted on and then fed into the eventual rate"*. Mr Saini QC, Mr Tomson and Mr Rose made the same point in their written closing submissions. This, quite understandably given what would have been involved, is not something which Marme sought at trial to do. I agree with Mr Quest QC that, in such circumstances, it follows that, even if it were to be accepted that a reasonable person might have inferred from RBS's conduct that EURIBOR was a true and honest rate, that does not help Marme.

150. Lastly, focusing on the feature which in ***PAG*** led the Court of Appeal to decide that a limited representation fell to be implied, namely the proffering of a swap, it was Mr Saini QC's submission in this case that, prior to RBS's

involvement in July 2008, the other Syndicate banks had not unequivocally insisted that the Senior Loan contain interest rate swaps and that Marme understood that they were open to discussion about whether the Senior Loan should, in fact, be hedged, but that this changed when RBS became involved since it was RBS which insisted upon the inclusion of hedging arrangements as a condition of its participation in the Senior Loan syndicate.

151. There are several difficulties with this submission. First and most obviously, even if RBS did insist on the swaps as Mr Saini QC submitted, this would not justify a conclusion that the EURIBOR Representations were thereby implied in view of the fact that the Court of Appeal was prepared only to imply a limited representation in ***PAG*** itself.

152. In any event, I do not accept that Mr Saini QC was right when he submitted that it was RBS (as opposed to Marme) which proposed the use of interest rate hedging through swaps. On the contrary, I am quite clear that it was Marme's idea that the interest rate under the Swaps and the Senior Loan should be calculated by reference to EURIBOR and that what RBS, in effect, did was to accept a proposal by Marme to join the Syndicate on terms chosen by Marme and which had already been agreed in principle by the other Syndicate members. This is apparent from a number of matters.

153. Thus, in January 2008, Propinvest and Mr Owen Kelly (on behalf of Mr Quinlan) approached several banks with Marme's proposals for funding the Transaction via the 'vanilla' bank financing route and provided cashflow models which all expressly referred to the use of an interest rate swap. The first reference to a stepped swap appeared in Mr Maud's email to Lloyds TSB on 15 January 2008 in which he stated that Propinvest "*would seek to import a stepped swap during the early part of the term*". On 18 March 2008, following initial discussions, Marme circulated a proposal called Indicative Terms and Conditions to Bayern, HSH and RBS. Mr Maud accepted in cross-examination that these had probably been prepared by Propinvest. The covering email circulating the indicative terms and conditions described Marme as intending "*to hedge interest rates for a minimum term 15 years*" whilst the proposed terms themselves provided for interest on the Senior Loan to relate to EURIBOR. On its appointment as MLA on 15 April 2008, Bayern accepted, with some amendments, the terms proposed by Marme and the terms remained substantially unchanged until the date of the Transaction. RBS had originally declined to participate in the Senior Loan. Its involvement was necessary only because Bayern had been unable to raise all of the finance. Mr Maud accepted in cross-examination that, had Bayern been able to raise the finance, Marme would have been content to go ahead with the syndicate that Bayern had put together, and which did not involve RBS, but would have included a 15-year interest rate swap. Other than some relatively minor modifications introduced by RBS (including a reduction in length of the loan and the introduction of an LTV covenant), RBS accepted the terms of Marme's proposal, which included the Swap linked to EURIBOR, which terms were not changed or discussed. The only points on which there was any real negotiation after RBS joined the Syndicate were as to the credit and execution spreads payable under the Swap and the underwriting fee on the Senior Loan.

154. It is, furthermore, clear that Marme itself wanted a swap since otherwise it would have had difficulty in funding the interest rate payments under the Senior Loan purely from the rental income in the early years of the lease until the above-inflation rental increases took effect. This is a matter to which I shall return in the context of Marme's damages case but Mr Maud accepted, indeed, that the financing models provided for interest rate swaps from the very start, albeit that he suggested that this was because Bayern had made the point that the hedge would be a requirement for many banks, as the means by which Marme could guarantee to meet the ICR required under the Senior Loan, which might otherwise exceed the rental income under the lease. He observed that Marme was "*very much opposed*" to having an interest rate swap, as it believed at the time that the pressure on interest rates over the short to medium term was downwards, but that Marme accepted the idea as "*a necessary evil*". Mr Maud maintained that, during Bayern's period as sole MLA, he sought to persuade it (and, through it, the other banks in the Syndicate) that an interest rate swap was not necessary and, furthermore, that Bayern reported to him that a number of banks were willing to proceed without an interest rate swap and that Bayern itself had an open mind. By contrast, Mr Maud stated, "*with RBS there had been no room for any conversation. It required an IRS*." So it was, he insisted, that, in finalising the heads of terms for RBS's participation in the syndicate, in July 2008, Marme included in the suggested terms an interest rate swap because this was RBS's requirement. Mr Maud's evidence, indeed, was that Mr Bates told him that some of the other syndicate banks were also at that stage insistent on having an interest rate swap, with the result that he had "*little choice but to accept the position as stated by RBS*". The result was that RBS and the Non-RBS Banks required the Swaps whilst the other three syndicate banks proceeded without swaps, a fact which Mr Maud suggested "*demonstrates that Marme only agreed to an IRS where it was imposed on us as a requirement by a participating bank*."

155. In cross-examination, Mr Maud maintained that the RBS Swap was a non-negotiable condition of RBS's participation and that, even if a swap was contained in Marme's own proposal document, this was because negotiations had demonstrated that this would be the only acceptable term to the banks. Mr Maud also suggested, in cross-examination, that Mr Goodwin had suggested the use of a stepped swap to Mr Littlewood in an email on 19 December 2007 and that Propinvest had never previously undertaken a stepped swap. This was a reference to an email from Mr McDonald of RBS to Mr Frohnsdorff (of Propinvest). Mr Maud highlighted, in particular, how that email entailed Mr McDonald saying "*Although you have commenced discussions with my colleagues Mark and Sean regarding a potential structured swap solution …*". Mr Maud suggested that this referred to Mr Goodwin's suggestion of a stepped swap. It is clear, however, that this was a suggestion which was prompted not by any genuine recollection on Mr Maud's part. Mr Goodwin, for his part, gave evidence that the stepped swap was Mr Littlewood's idea, and it is the case that Mr Littlewood was experienced in derivatives and financial structuring. I cannot, in the circumstances, accept what Mr Maud had to say on this issue. Indeed, it is worth noting that, in cross-examining Mr Greenland, Mr Saini QC suggested that it was Mr Worley (and so Bayern)

who had come up with the idea of structuring the swaps, not that it was RBS's idea.

156. I am satisfied that, in truth, the position was that *both* Marme and RBS and the Non-RBS Banks wanted a swap. Again, this is a matter to which I shall return when dealing with damages, but essentially Marme wanted a swap to have interest rate protection and enable it to meet the Senior Loan repayments, and the Banks wanted a swap also for interest rate protection and to make money. Mr Saini QC submitted, in the circumstances and somewhat modifying his primary submission, that this is sufficient for Marme's purposes since it does not matter who proposed the Swaps since all that matters is that whoever put forward the idea of using swaps did so on the basis (which was not corrected by RBS) that EURIBOR is an honest rate. As Mr Saini QC put it, it cannot "*make any difference that the customer has knocked on RBS's door, it doesn't give RBS a free pass from the law of misrepresentation*". He gave the example of going into a bank and asking to have a mortgage at that bank's fixed variable rate. As far as the customer is concerned, he must take it that the fixed variable rate is an honest rate and it cannot make a difference as to who initiates the transaction: both parties must be proceeding on the understanding that the rate is honest.

157. Although, as to this, I accept that passive conduct may sometimes be sufficient for the implication of a representation, indeed Mr Quest QC accepted that it is conceptually possible for a representation to be implied from passive conduct such as RBS accepting Marme's proposals, it seems to me, nonetheless, that the broader and more complex the alleged representations, the more active and specific the conduct must be to give rise to the implication. Put differently, whilst it may be that some representations are legitimately to be implied, it is less obvious that intricate and broad representations such as the EURIBOR Representations should be implied from passive (and necessarily somewhat limited) conduct. In the present case, there is no basis on which it can sensibly be concluded that the EURIBOR Representations were implied. Passivity and assumption such as that contemplated in ***Geest*** are simply not, without more, sufficient.

158. It follows, for all these reasons, that I reject Marme's case that the EURIBOR Representations should be implied in this case. For this reason, Marme's action must fail. Although I do not consider that any of the EURIBOR Representations as pleaded can be implied in this case, nonetheless I do consider that RBS's conduct in going along with the Swaps was sufficient for the implication of a much narrower representation, namely that RBS was not itself manipulating, and did not intend to manipulate or attempt to manipulate, EURIBOR. That is not, however, an implied representation for which Marme contends – in all probability because Marme recognises that it is in no position to establish falsity.

Falsity

159. I come on now to consider whether, to the extent that the EURIBOR Representations were made, they were false. Although I have concluded that none of the EURIBOR Representations as pleaded was made and that the only

implied representation which was made was that none of the senior employees at RBS who were either submitters or connected with the Transaction were actually manipulating, or attempting to manipulate, EURIBOR in any material way, in case I am wrong about this, it is appropriate that I should address the issue of falsity in relation to all of the EURIBOR Representations.

160. Marme's case, in broad summary, is that the EURIBOR Representations were each false because RBS, through Mr Moryoussef, knew about and conspired in the attempted manipulation of EURIBOR. Marme does not allege that EURIBOR was actually manipulated or that the rates were not genuine. Nor did Mr Saini QC suggest that the ABN AMRO submitters made any false submissions. Nor does Marme allege that the Non-RBS Banks were involved in any actual or attempted misconduct.

161. To prove falsity, Marme relies upon certain direct evidence of communications between Mr Moryoussef and other traders together with certain other secondary material, including Mr Moryoussef's conviction for conspiracy to defraud and other documents such as the EU Commission Decision. The direct evidence comprised contemporaneous records of communications between Mr Moryoussef and traders at other banks - mostly in the form of Bloomberg instant 'chat' messages but also in the form of some emails and transcripts of telephone calls. Specifically, Marme relied upon two sets of communications between Mr Moryoussef and traders at other banks. It set these out in two schedules to its Re-Re-Re-Amended Particulars of Claim. Schedule 2 catalogues communications whilst Mr Moryoussef was employed at Barclays from 2005 until March 2007. Schedule 1 catalogues communications whilst Mr Moryoussef was employed at RBS from August 2007. Mr Saini QC submitted that these documents show that Mr Moryoussef was actively involved in the attempted manipulation of EURIBOR, first at Barclays and then at RBS.

162. Mr Quest QC submitted that, whilst the Barclays communications show that Mr Moryoussef was involved in the attempted manipulation of EURIBOR whilst at Barclays, none of the evidence establishes that such misconduct continued after he had joined RBS.

163. Before considering the material which was before the Court at trial, it is convenient to deal with certain other material which was not before the Court. This is because Mr Saini QC complained that the communications which were available to Marme at trial did not represent the totality of the communications which related to Mr Moryoussef's time at RBS and, specifically, as it was put in Marme's written opening, that RBS had been *"astute to manage its exposure – both financial and reputational – to the Euribor scandal as far as possible"*.

164. Mr Saini QC suggested that, in the circumstances, the Court should infer that more documentation exists, referring, by way of example, to conversations between Mr Moryoussef and Mr Bittar which were not recorded in the various 'chats' which had been disclosed but which were referred to in those 'chats' because of various references stating "*Call me*". Mr Saini QC also in this context highlighted how in his sentencing remarks HHJ Gledhill QC appears

to have considered that, in all likelihood, traders were communicating in other ways, the judge referring, in terms, to Mr Moryoussef in various communications speaking "*of his concern about the consequences of what he was doing if it was discovered"* and taking *"care to tell others to say nothing of what they were doing*." Mr Saini QC suggested that this made it all the more probable that there would be other communications which were not before the Court. However, I cannot agree given the very substantial amount of disclosure which has been provided by RBS. I was told, indeed, that the disclosure exercise in this case entailed over a million documents being collected on the part of RBS, nearly 625,000 being reviewed following the application of search terms and the production of nearly 225,000 documents amounting, in all, to approximately 1.4 million pages. In particular, RBS made available to Marme all relevant Bloomberg instant messages and emails to or from Mr Moryoussef. Furthermore, Mr Quest QC pointed out that various disclosure applications were made by Marme in the context of these proceedings, including an application which resulted in the making of a Consent Order on 4 October 2017, in which Blair J ordered that RBS should provide the following further disclosure:

"*1. … any relevant and non-privileged documents from the following categories:*

a. The 6,398 documents tagged as relevant by RBS in its internal review into Euribor misconduct but which were not provided to, or requested by, the European Commission as part of the EIRD Investigation.

b. 11 documents requested by the De Nederlandsche Bank following its review of the CFTC Productions.

c. 48 "noteworthy" documents identified as privileged as a matter of US law in the First and Second Euribor Productions to the CFTC.

2. Human Resources documents relating to Euribor misconduct, including any information relating to Phillipe Moryoussef's joining or leaving RBS, his bonus payments or his contractual arrangements with RBS where those documents relate to any Euribor misconduct.

3. Papers and minutes of the RBS board and relevant committees, and internal reports, reviews, and summaries that are relevant to the issues in these proceedings.

4. Relevant and substantive communications between RBS and relevant regulators as to their EURIBOR investigations, including any submissions RBS provided to the regulators in that disclosure."

That Order was complied with, and there was no subsequent suggestion until trial that RBS had somehow failed to provide documentation which ought to have been disclosed. In these circumstances, I cannot accept that, if criticism were intended of RBS as regards disclosure (and it was not clear, ultimately, whether Mr Saini QC meant to criticise), that criticism is justified and would add that I decline, in particular, to draw any adverse inference from RBS's

reliance on legal privilege in respect of certain categories of documents given that there is clear authority that no such inference should be drawn where legal privilege is asserted (see ***Edwards-Tubb v JD Wetherspoon*** [2011] 1 WLR 1373 at [9]).

165. Mr Saini QC suggested that, in any event, whether or not there is more documentation which has not been disclosed, it is likely that Mr Moryoussef, Mr Bittar and the other traders with whom they dealt would have been careful to ensure that the conversations which they had were not recorded, and so that what was before the Court did not represent the full picture. Mr Saini QC speculated in this connection that the reason why most communications ceased after June 2008 was because, by that time, LIBOR was under scrutiny and that this would have caused Mr Moryoussef to be more secretive from this point, stopping using 'chats', professional emails and bank telephone lines.

166. This is, however, as I say, merely speculation. There is nothing which establishes the position one way or the other. Mr Saini QC might be right but, equally, he might be wrong. It should be borne in mind, however, that, as Mr Quest QC pointed out, SJ Berwin LLP (acting on RBS's behalf in the context of the regulatory investigation) reviewed 452 of Mr Moryoussef's telephone calls. It follows that a very substantial number of telephone calls have been considered. In addition, on 24 April 2018 Males J approved a Consent Order requiring RBS to disclose a log identifying the date and duration of calls between Mr Moryoussef and either Mr Bittar or Mr Esper during the period of his employment at RBS. Mr Quest QC pointed out that further disclosure of telephone records was sought at the PTR, and it was agreed and ordered that RBS would conduct a further search for call records between Mr Moryoussef and Mr Bittar and Mr Moryoussef and Mr Esper - as recorded in an order which I made on 18 May 2018. The searches included searches in relation to documents for senior executive custodians other than Mr Moryoussef. Mr Quest QC explained that another 31 telephone transcripts were produced as a result of this yet none was regarded as significant (or relevant) enough to merit inclusion in the trial bundle which Marme put before the Court containing the direct evidence upon which it sought to rely. Mr Quest QC submitted, justifiably in my view, that, as a result, there is no reason to suppose that there is any relevant contemporaneous material either in the form of emails, 'chat' records or telephone records, relating to the period when Mr Moryoussef was employed by RBS, which has not been made available to Marme by way of disclosure.

Barclays communications

167. Turning, then, to the direct evidence relied upon by Marme, the first category of such evidence consists of certain Barclays communications relied upon by Marme as showing that Mr Moryoussef and traders at other banks were involved in the attempted manipulation of EURIBOR. Mr Saini QC submitted that these communications show that Mr Moryoussef's conduct at Barclays was committed at a "*time material*" to the Transaction for the purpose of the EURIBOR Representations (i.e. within two years of the date of the Transaction), and so that Mr Moryoussef was aware (including after he joined RBS) that attempts had been made to manipulate EURIBOR. He went on to

submit that, in the circumstances, the Court should infer that Mr Moryoussef continued the same type of conduct after he had joined RBS and that the RBS communications should be read in the light of the Barclays communications on the basis, as he put it, that "*a leopard does not change his spots*". Accordingly, Mr Saini QC relied upon the Barclays communications to establish the falsity not only of EURIBOR Representations 2 and 4 (with their references to no RBS employee having *"reason to believe that any other banks had during the period of no less than around 2 years preceding the date of the Senior Loan Agreement and the Swaps, i.e. September 2006 to September 2008, engaged in conduct intended to lead …"*), but also to establish the falsity of EURIBOR Representations 1, 3 and 5 (with their focus on what RBS employees had done in that same approximately 2-year period).

168. For his part, Mr Quest QC accepted that, if EURIBOR Representation 2 were to be regarded as having been impliedly made, then, the Barclays communications demonstrate that that implied representation was false. He accepted, in short, as he was obviously obliged to accept in the light of his conviction, that Mr Moryoussef participated in a dishonest conspiracy whilst he was employed at Barclays (and so prior to joining RBS) in the relevant approximate 2-year period, and that accordingly EURIBOR Representation 2 (if made) was false. He accepted, ultimately at least, that the same applied to EURIBOR Representation 4 given that this representation is, in effect, as Mr Quest QC recognised in closing, part and parcel of EURIBOR Representation 2. Mr Quest QC did not accept, however, that the Barclays communications established the falsity of EURIBOR Representations 1, 3 and 5 given that, with only three exceptions, Mr Quest QC suggested, the communications do not reveal Mr Moryoussef to have been doing or saying anything whilst at RBS which might be regarded as *"conduct intended to lead to a higher or lower Euribor rate"*.

169. I have read and considered in some detail all 49 documents which comprise the Barclays communications. It is perfectly obvious, in general terms, that they show substantial levels of attempted influence and attempted manipulation on the part of Mr Moryoussef. This is evidenced by conversations between Mr Moryoussef and others, including traders at a number of banks and Barclays rate setters (Ms Bohart and Mr Bermingham) in which they discuss influencing the rates to be submitted by Barclays. It is hardly surprising, in the circumstances, even leaving out of account the fact of Mr Moryoussef's conviction, that RBS has accepted that such communications establish that Mr Moryoussef was engaged in the conduct alleged and, in particular, the conduct which is the subject of EURIBOR Representations 2 and 4. It is convenient to refer to some examples of the relevant exchanges and to do so by referring to the examples which Mr Saini QC highlighted when opening Marme's case at trial since they are somewhat striking.

170. Thus, on 13 October 2006, Mr Moryoussef emailed Ms Bohart (of Barclays) saying that he had "*a huge fixing on Monday … something like 30bn 1m fixing … and I would like it to be very very very high … can you do something to help? I know a big clearer will be against us … and don't want to loose [sic] money on that one*". Mr Bittar was blind-copied into the email. On the same

day, Ms Bohart forwarded this email to Mr Ben Lloyd (of Barclays) who was temporarily covering for her adding that "*We always try and do our best to help out*." Shortly afterwards, Mr Moryoussef emailed Mr Lloyd saying "*hi Ben have u received the bloom from sisse? I really need help on that one. very high 1m on monday. tx a lot*".

171. On the same day, Mr Bermingham (of Barclays) emailed Mr Moryoussef saying "*By the way Sisse tells me that it would be good to see a high 1mth fix on Monday, we will pay for some cash that morning so hopefully that will help*".

172. Three days later, on 16 October 2006 (the Monday referred to in the earlier messages), Mr Moryoussef emailed Mr Pierre Thomir of Calyon (blind copying Mr Bittar) saying "*hi pierre how are you? tell me do you sometimes ask your treasury to contribute high or low according to your fixings? I have a very large amount of 1m..I would like it to be high…if this is possible can you put in a good word with them if this fits your book of course*". Mr Thomir replied "*It's possible but what's in it for me?*". Mr Moryoussef replied "*ahahah whatever you want. the right to ask me for fixings wherever you want whenever you need them*" to which Mr Thomir said "*whatever, find something else, you have another half an hour*".

173. These exchanges came some months after a Bloomberg 'chat' on 31 May 2006 during which Mr Moryoussef asked Mr Esper of Société Générale "*can you tell the treasury guys to set a low fixing for 12m?*". Mr Esper said "*ok, done*". Mr Moryoussef said "*thanks, if you need high or low fixings don't hesitate…I usually ask 4 or 5 banks*". There was, then, a further 'chat' on 8 June 2006, when Mr Moryoussef asked Mr Esper "*can you set a high 6m fixing*?".

174. The exchanges are not confined to 2006, however, since other communications in early 2007 show Mr Moryoussef conspiring with others to achieve a low EURIBOR rate on 20 March 2007, which was a quarterly IMM (international monetary market) date, commonly used as a maturity date for swaps. Thus, on 19 March 2007, in a Bloomberg 'chat' with Mr Sander (of HSBC), Mr Moryoussef said "*tell your cash to put the 3m fixing in the basement*" and "*it has to fix at 89*". A few minutes later, Mr Moryoussef asked "*well? what did they say*?". Mr Sanders replied "*they're going to set it low*". Mr Moryoussef also said "*don't talk about it too much*". The same day, Mr Moryoussef emailed Ms Bohart saying "*as discussed could u put the 3m as low as possible … and if possible a high 1m ... tx and have a nice day"*. Ms Bohart replied "*will do my best*".

175. Also on 19 March 2007, in a Bloomberg 'chat' with Mr Michael Zrihenm (of Calyon), Mr Moryoussef said "*You push the 3m miki. It's important*". Mr Zrihenm then said "*I made 156 000 euro thanks to that*". Later on in the conversation, Mr Moryoussef said "*Don't make any noise*". At the end he said "*Thanks for the help. Team work*". The next day, 20 March 2007, in a Bloomberg 'chat' with Mr Bittar, Mr Bittar asked "*how are you in 3m libor right now?*". Mr Moryoussef replied "*not too good but not too bad ... on march 30 I have 4bn from the 3y/3m 3y eonia that we did do you remember?*".

Mr Bittar responded "*it would be good if it could go up a bit*" to which Mr Moryoussef said "*ok chicken*". Mr Moryoussef then said "*we need it to up slowly right? to avoid drawing attention*". Mr Moryoussef later says "*I helped yesterday. I pushed 5 banks to set it low*".

176. The same day, in a Bloomberg 'chat' with Mr Dehais (of HSBC), Mr Moryoussef asked "*did you like the demonstration on the imm*". Mr Dehais replied "*well done, you must have stuffed yourself up with your 80 000 euribor*" to which Mr Moryoussef responded saying "*2plauqes*" (which is possibly translated as 2 million dollars). Mr Moryoussef said "*luckily there's 4 imm in one the year [sic]... we will take care of the next one*".

177. These communications are deeply incriminating. They show Mr Moryoussef participating in a conspiracy with other traders to influence the setting of EURIBOR whilst he was employed at Barclays. They show Mr Moryoussef boasting about the profits to be made, strongly suggesting that he was willing to attempt to manipulate the rates on future IMM dates. It is obvious, in the circumstances, that, if EURIBOR Representations 2 and 4 were made, then, Mr Moryoussef's conduct at Barclays means that those implied representations were each false since Mr Moryoussef (an RBS employee at the time that the Transaction was entered into) not merely *"had reason to believe"* that *"other banks"* had in the preceding 2-year period *"engaged in conduct intended to lead to a higher or lower Euribor rate"*. Mr Quest QC acknowledged this, albeit observing that this has the "*surprising consequence*", as he put it, that, when RBS employed Mr Moryoussef, RBS became "*infected*" by the knowledge which Mr Moryoussef had acquired whilst previously employed at Barclays. That, Mr Quest QC pointed out, would be the case even if Mr Moryoussef had behaved wholly properly, as *"an entirely reformed character"* after joining RBS. Although I recognise the force of this point, ultimately, however, it is a point which goes not to the question of falsity but, instead, to the prior question of whether the implied representations fall to be made at all (an issue which I have resolved in RBS's favour).

178. The question, in the circumstances, is whether Mr Saini QC was right when he submitted that the fact that Mr Moryoussef engaged in the conduct which he did at Barclays justifies a conclusion that he continued to behave in the same way after joining RBS. If that is the correct conclusion, then, the Barclays communications (whether viewed independently or alongside the other direct evidence, including the more limited RBS communications which I shall come on to consider) support not only Marme's case on falsity as regards EURIBOR Representations 2 and 4 but also its falsity case in relation to EURIBOR Representations 1, 3 and 5.

179. Although I was initially attracted to the logic which underpins this submission, ultimately I am not persuaded by it. Equally, however, I do not accept that Mr Quest QC can be right when he submitted, in effect, that the Barclays communications can be left out of account when deciding whether EURIBOR Representations 1, 3 and 5 are false or not. It seems to me, on analysis, that it is a matter of degree. The Barclays communications ought not to be treated as though they make it inevitable, or even particularly likely, that Mr Moryoussef

continued at RBS as he had at Barclays. It is appropriate, nonetheless, that they be taken into account when the RBS communications are looked at and an assessment is made as to the falsity of EURIBOR Representations 1, 3 and 5, the representations which are concerned with the conduct of RBS employees (specifically and, in fact if not in theory, exclusively, Mr Moryoussef).

180. There are two particular matters which I take into account in this respect. First, as I have explained, I am satisfied that there have in this case been no disclosure shortcomings as regards the disclosure which RBS has provided. On the contrary, it is clear that the disclosure has been very considerable and wide-ranging. As a result, it is right to conclude that, had Mr Moryoussef continued to behave as he had done at Barclays when he joined RBS, this would be apparent from the documents which have been disclosed. Instead, although there are a few RBS communications which hint at Mr Moryoussef's conduct continuing at RBS, the nature and scale of such continued conduct is of a wholly different order to that revealed from his time when working for Barclays.

181. Secondly, there is a material difference between Mr Moryoussef's situations at Barclays and RBS in that, whereas Barclays was a panel bank where Mr Moryoussef knew the setters (Ms Bohart and Mr Bermingham) well and would have been in frequent (if not constant) conversation with them, RBS was not a panel bank. From August 2007 to October 2007, no bank within the RBS group was a panel bank. Even after October 2007, when part of the RBS group acquired ABN AMRO, the submissions were made out of the Netherlands and there is no evidence that Mr Moryoussef was ever in contact with anybody involved there in the setting process.

182. I recognise, nonetheless, that the Barclays communications are relevant when determining whether EURIBOR Representations 1, 3 and 5 were false in the sense that they are part of the backdrop to the RBS communications.

RBS communications

183. I next consider those RBS communications. Although Mr Saini QC relied upon no fewer than 41 such communications, as mainly contained within Schedule 1 to the Re-Re-Re-Amended Particulars of Claim, the reality, implicitly recognised by Mr Saini QC, is that those communications paint a very much less compelling picture when compared with the Barclays communications.

184. That said, it should be noted straightaway that it was not suggested by Mr Quest QC on RBS's behalf that, when he moved to work for RBS, Mr Moryoussef underwent a sudden attack of honesty. He submitted, quite simply, that, Mr Moryoussef was no longer in a position to continue his earlier misconduct given that, as I have just mentioned, by the time that Mr Moryoussef changed employment RBS was (unlike Barclays) not a panel bank, and so the opportunity which previously existed no longer did.

185. The RBS communications relied upon by Mr Saini QC fall into various categories. First, they relate to the time from when Mr Moryoussef joined RBS in August 2007 until the first quarter of 2008, during which, Mr Saini QC submitted, Mr Moryoussef can be seen to have been continuing to conduct himself as he had done at Barclays. Secondly, there are communications which Mr Saini QC suggested evidence the improper sharing of information and data which might distort the EIRD market and impact on the EURIBOR rates. These are contained within Schedule 1B of Marme's Re-Re-Re-Amended Particulars of Claim. Thirdly, there are communications from April 2008 to June 2008 which Mr Saini QC submitted show Mr Moryoussef and traders at other banks attempting to manipulate EURIBOR by a different method, namely enlisting their treasuries to work in concert to take positions in the market that would move the EURIBOR rate. Marme refers to this as the "*arbitrage conspiracy*". Lastly, there are certain post-Transaction communications and, in particular, a document post-dating the Transaction which is also listed in Schedule 1A of the Re-Re-Re-Amended Particulars of Claim as a document evidencing the attempted manipulation of EURIBOR.

186. As to the first of these periods, Mr Saini QC relied upon eight documents to show that EURIBOR manipulation, through traders enlisting the assistance of rate setters (although not those at ABN AMRO), continued at least during the initial six months of Mr Moryoussef's employment at RBS.

187. Mr Quest QC accepted, indeed, that five of those documents contain statements by Mr Moryoussef which might be relevant to the alleged falsity of EURIBOR Representations 1 and 2.

188. Specifically, on 27 September 2007 in a Bloomberg 'chat' with Mr Palombo and Mr Modhvadia (both of Barclays), Mr Moryoussef said to Mr Modhvadia that he had "*a good info … 3m fix … up up up … target 82*" and that "*u know who is going to push it up … pls do not tell*". Mr Quest QC realistically accepted that Mr Moryoussef was probably here talking about the EURIBOR 3-month rate, with "*82*" referring to a rate of 4.82, whilst nonetheless suggesting that the 'chat' could be interpreted as just speculation as to what the rate will turn out to be and the discussion of a rumour in relation to another trader (likely Mr Bittar) and his potential influence on the 3-month EURIBOR rate. I doubt that Mr Quest QC can be right about this since the email seems to me to point to Mr Moryoussef knowing that somebody (presumably Mr Bittar) was planning to push up the 3-month EURIBOR rate.

189. Whether that is the case or not does not much matter, however, given that Mr Quest QC, again realistically, accepted that an email the next day, 28 September 2007, does provide support for Marme's case. In that email, sent on 28 September 2007, Mr Moryoussef said to Mr Modhvadia "*u should ask sisse [Ms Bohart] to put a high 3m … if ur short. 77 was too low yesterday*". It is pretty obvious that this was Mr Moryoussef telling his contact at Barclays that, as he had a short position, he should ask Ms Bohart to put the rate up. Both this email and, indeed, the conversation which took place the day before were before the setting of EURIBOR for the day, something which would have been done at 11 am, making it all the more likely that what Mr Moryoussef

was doing was suggesting that Mr Modhvadia seek a higher rate to benefit his (Mr Modhvadia's) position.

190. The next communication relied upon by Marme took place on 4 October 2007, when Mr Moryoussef asked Mr Modhvadia and Mr Palombo "*what do think of 3m fix? push them to put it high*", and Mr Palombo replied "*will do*". Mr Moryoussef went on to say "*I count on who u know to maintain it high*" albeit that, in my view, Mr Quest QC may well have been right when he submitted that Mr Moryoussef was in that context talking about EONIA or the dollar rate rather than EURIBOR since Mr Moryoussef's remark followed references to these. It does not matter, however, since Mr Quest QC accepted in relation to the earlier exchanges that Mr Moryoussef was self-evidently communicating with these traders regarding favourable settings for their trading positions, and that the Barclays traders agreed to Mr Moryoussef's request and also shared their intended submissions in other 'tenors'. The reference to a "*push*" seems, in particular, to be a suggestion by Mr Moryoussef that Mr Modhvadia and Mr Palombo should ask the Barclays rate setters to submit high, and so involves Mr Moryoussef seeking to manipulate EURIBOR. As I say, Mr Quest QC did not seek to suggest otherwise.

191. Nor did he do so as regards a 'chat' on 9 October 2007 in which Mr Moryoussef told Mr Bittar to "*make it happen so that 3m doesn't move any longer"* and went on to say *"I am sure that you are going to give me a lovely surprise … in the form of a fix at 78 … Base run*". Although Mr Bittar did not respond, Mr Quest QC acknowledged that this shows Mr Moryoussef expressing a preference for Deutsche Bank to make a particular EURIBOR submission. Clearly, as such, Mr Moryoussef should be taken in this email as seeking to manipulate EURIBOR.

192. It was Mr Quest QC's submission, however, that, other than that email and the earlier exchanges on 28 September 2007 and 4 October 2007, there is nothing otherwise in the RBS communications to support Marme's case on falsity as regards EURIBOR Representations 1, 3 and 5. He went on to submit as regards those exchanges (and the 'chat' on 27 September 2007 in view of my rejection of his submission in relation to that) that any falsity ought not to be regarded as material and, as such, should be disregarded. That is a submission to which I shall return later after, first, dealing with Mr Saini QC's reliance on certain further exchanges in relation to the first of categories of the documents which he identified and, then, his reliance on the other three such categories.

193. There are four further documents in the first category covering the period between August 2007 and the first quarter of 2008 which should be mentioned. The first is an email on 24 August 2007 from Mr Moryoussef to Mr Esper of Société Générale, stating: "*Chicken, a small favour. Can you ask Francois from ICAP, Alice HPC DEDE to call me on 00 44 207 085 56 07*". (Francois and Alice are two brokers from ICAP and HPC respectively). Mr Esper responded by saying "*I will do it in 10 minutes. call me around 12:30 p.m. your time*". It was Mr Saini QC's position that, although innocuous when viewed in isolation, this email needs to be understood in the light of Mr Moryoussef's conduct whilst at Barclays and the communications to which I have referred in September and October 2007 after Mr Moryoussef had moved

to RBS. Mr Saini QC noted, indeed, that brokers were used to facilitate the manipulation of LIBOR and noted that ICAP was fined $87 million by UK and US authorities in relation to its role in LIBOR manipulation. He went on to highlight how Mr Moryoussef apparently had a relationship with ICAP, as demonstrated by a Bloomberg 'chat' with Mr Bittar on 17 November 2006 during which Mr Moryoussef stated that he had had dinner with ICAP the previous evening and by a further 'chat' on 22 December 2006 during which Mr Moryoussef told Mr Bittar to "*tell icap to raise the 6m*".

194. There is, however, nothing in this point since there is not the slightest suggestion in these 'chats' that there was anything improper as between Mr Moryoussef and ICAP, still less that it was anything relating to EURIBOR. Indeed, as Mr Quest QC observed, the email appears to show nothing more than Mr Moryoussef providing his new number, after his move to RBS, and asking Mr Esper to get the brokers to call him.

195. The next document is a Bloomberg 'chat' on 11 October 2007 between Mr Moryoussef and Mr Esper, during which Mr Esper said "*My neighbors are going to be contributing 3 month low next time … for your information*". Mr Saini QC submitted that this is a reference to 3-month EURIBOR and pointed out that Mr Esper also provided three rates to Mr Moryoussef, namely "*48.2, 32, 25.8*", which Mr Saini QC suggested are the rates at which the Société Générale rate setters would submit. Again, however, I cannot accept that this exchange assists Marme. As Mr Quest QC acknowledged, Mr Esper should almost certainly not have been sharing this information with Mr Moryoussef, but it does not follow from this that the 'chat' entailed Mr Moryoussef and Mr Esper seeking to manipulate EURIBOR. It is even unclear whether the rate being discussed is EURIBOR since the word "*EURIBOR*" is not mentioned in the original transcript and, furthermore, none of the rates provided by Mr Esper corresponds to the range of 3-month EURIBOR submissions made in October 2007, so reinforcing the impression that the email is not at all on point.

196. Mr Saini QC also sought to rely upon a Bloomberg 'chat' on 12 December 2007, during which Mr Moryoussef asked Mr Bittar "*the 6m fix are you expecting it or it's important [sic]*". Mr Bittar did not respond and so Mr Moryoussef asked again "*Where are you expecting the 6m fix?*". Mr Bittar replied: "*823 bid*". Mr Saini QC submitted that this is evidence of Mr Moryoussef's attempts to manipulate EURIBOR to the advantage of his trading positions at RBS. I cannot accept this, however, since, as Mr Quest QC submitted, all that Mr Moryoussef appears actually to have been doing is asking where Mr Bittar thought that 6-month EURIBOR might fix. There is no suggestion on the part of Mr Moryoussef that he was trying to influence the submissions. Mr Moryoussef ought not to have tried to obtain such information from Mr Bittar, but this does not mean that either trader was seeking to manipulate EURIBOR. Furthermore, Mr Bittar appears to have been talking in the 'chat' at cross-purposes about a trade given earlier references in the conversation to "*82.1 bid*" by Mr Moryoussef and "*822*" by Mr Bittar, with Mr Bittar saying "*823 do we deal?*" a little later on.

197. The last of the exchanges in the first category took place on 28 February 2008, when Mr Modhvadia asked Mr Moryoussef "*wats ur guess for 1m fix?*" and Mr Moryoussef replied saying "*22?*" to which Mr Modhvadia responded saying "*it traded 24 yest ... [E1] try to push this low*" and Mr Moryoussef's response to that was "*yep*". E1 is a trader at JP Morgan whose identity is not known, and Mr Quest QC submitted that, in the circumstances, the comment ought to be disregarded. Whilst I cannot agree about that since the exchange should surely be regarded, at a minimum, as demonstrating that Mr Moryoussef knew about misconduct on the part of other banks during his employment at RBS, nonetheless, this cannot really amount to evidence of Mr Moryoussef trying to manipulate EURIBOR *himself*. In any event, in the light of the view which I have formed in relation to the other exchanges (indeed, Mr Quest QC's acceptance that those exchanges entailed Mr Moryoussef engaged in conduct *"intended to lead to a higher or lower Euribor rate"*), it does not, perhaps, matter whether the exchanges on 28 February 2008 also evidence such conduct on Mr Moryoussef's part.

198. I should add that Mr Quest QC was at pains to point out that the various exchanges are unlikely to have resulted in EURIBOR rates being affected. Specifically, Mr Quest QC took the Court to certain records showing the EURIBOR submissions which were made on the dates of the various communications relied upon by Marme which had been compiled by RBS's expert, Mr Kasapis. These showed that Barclays made a submission of 4.77 on 27 September 2007, that Barclays, Deutsche Bank and Société Générale were towards the bottom of the panel banks on 28 September 2007 (at 4.78, 4.80 and 4.72 respectively), well below the alleged "*target*" of 4.82 and that, despite the communication on 4 October 2007, the Barclays submission on that day was 4.79 and, as such, in the middle of the range. Mr Quest QC submitted, furthermore, that it would be very hard for any individual bank, or even for three or four banks, to change the rate significantly in circumstances where it was common ground as between the parties that the highest six and lowest six submissions are discounted when setting the EURIBOR rate.

199. Mr Quest QC was probably right in what he had to say about this since, although Mr Saini QC sought to demonstrate in closing, based on what Marme's expert, Mr Zjalic, had to say in his report (neither expert having been required to give evidence at trial), that a false submission even by a single bank is, in principle, capable of making a 1 bp difference to the EURIBOR rate, it is not easy to see how, in practice, that can be right. However, even assuming in RBS's favour on that point, this does not detract from the fact that, as shown by the communications to which I have referred, Mr Moryoussef and the other traders with whom he was in contact were seeking to manipulate EURIBOR by affecting their own (or each other's) EURIBOR submissions. Assuming that EURIBOR Representations 1, 3 and 5 were made, it must follow that there was, in these circumstances, the falsity which Marme has alleged. It cannot matter whether there was success in the sense that EURIBOR rates were actually affected since that is not what the EURIBOR Representations (specifically EURIBOR Representations 1 and 2) have as their focus, as demonstrated by the *"even if that submission did not lead to a*

material increase or decrease in the Euribor rate" wording in their 'unwrapped' form.

200. As for the second category of documents, those to be found in Schedule 1B, these are documents which Mr Saini QC suggested constitute "*evidence of improper sharing of information and data which might distort EIRD market and impact Euribor rate*". There are 18 documents listed in Schedule 1B, albeit that one of them (the Bloomberg 'chat' on 27 September 2007) has already been considered and another (a 'chat' on 22 April 2008) will be considered when dealing with the third category of documents (the "*arbitrage conspiracy*" documents).

201. It is somewhat telling that Schedule 1B was not mentioned at all in Mr Saini QC's oral submissions (whether in opening or in closing); indeed, the only reference is in a single footnote to Mr Saini QC, Mr Tomson and Mr Rose's written closing submissions where there is a reference to Schedule 1B containing further examples of documents showing improper exchanges of information for the purpose of commercial gain in which Mr Moryoussef was involved. As for Schedule 1B itself, no attempt is made within this to analyse the documents other than the observation being made that they evidence the sharing of proprietary or market-sensitive information.

202. I have nonetheless considered the Schedule 1B documents. Having done so, I acknowledge that they do, indeed, show traders sharing information on base rates for various different months – specifically, in all but one case, in the period between 26 September 2007 and 4 June 2008 with the exception being a final communication on 19 November 2009. These are communications which evidence anti-competitive practices of sharing of price-sensitive information. Mr Quest QC accepted as much. They are, therefore, incriminatory in that sense. However, they do not amount to evidence that the EURIBOR Representations are false, and Mr Saini QC did not seek to demonstrate that they did since, unsurprisingly given that he did not refer to them, he did not explain the connection between the sharing of information and any attempted manipulation of EURIBOR.

203. This, therefore, brings me to the third category of documents – those dealing with the suggested *"arbitrage conspiracy"*, the relevant period being between April and June 2008. It was Mr Saini QC's submission that the seventeen documents in this category (although not all of the documents were addressed in Marme's submissions) evidence a plan by Mr Bittar, Mr Esper, Mr Moryoussef and Mr Modhvadia to benefit their trading positions by simultaneously asking their treasuries to take positions in the market that would allow the traders to make greater profits by moving EURIBOR rates so as to reverse a "*market dislocation*" between 3-month and 6-month EURIBOR. Mr Saini QC submitted that, as such, the documents show that, well into his time working at RBS, Mr Moryoussef was still actively engaged in plans with the same individuals with whom he had conspired whilst at Barclays to try to manipulate EURIBOR rates. Mr Saini QC submitted that, accordingly, the *"arbitrage conspiracy"* documents demonstrate that *"the leopard"* (Mr Moryoussef) had not changed his spots and that the Court should conclude that he *"had (at most) changed his fraudulent strategy*

opportunistically to take advantage of an evolving financial environment with another method of manipulation".

204. There is no dispute between the parties that there was a disparity between the 6-month and 3-month EURIBOR rates during this period. This was created by a high demand for 3-month financing and a low demand for 6-month financing. It is agreed that this created an arbitrage opportunity. Mr Saini QC submitted, indeed, that there was an acknowledgment in the marketplace at the time that the 6-month EURIBOR rates were "*dodgy*", as it was put in a note sent by Merrill Lynch to Mr Bittar on 23 April 2008 and forwarded by him to Mr Moryoussef. The same note, furthermore, suggested that there was "*an opportunity*" given by the difference between 3-month and 6-month EURIBOR rates on the basis that:

"*EURIBOR settings cannot possibly avoid the glaring spotlight recently turned on Libor settings, and we believe therefore that this state of affairs is unlikely to continue much longer. Under increased regulatory scrutiny, banks will be forced to submit settings in both Euribor and Libor which more closely reflect their true price of funds. 6m setting will increase relative to the 3m strip, and basis swaps will inevitably trade higher*."

The note continued:

"*The integrity of LIBOR & euribor settings is critical to the financial health of the planet. It is in everybody's best interest that they reflect what they are supposed to: unsecured interbank lending rates. An important new feature of today's market is widespread demands for increased transparency, regulation, and accountability. Dodgy 6m Euribor settings will not survive this clamour*."

Mr Saini QC highlighted how, having been sent this note, Mr Moryoussef forwarded it to three other RBS employees (Mr Steve Ashley, Mr Andrew Bruce and Mr Jonathan Linton), clearly demonstrating, as Mr Quest QC accepted, that, at a minimum, Mr Moryoussef and others were, in all probability, aware of the arbitrage opportunity which had arisen.

205. More specifically, the documents relied upon by Mr Saini QC in support of Marme's case that there was the "*arbitrage conspiracy*" include a Bloomberg 'chat' on 23 April 2008 during which Mr Modhvadia said to Mr Moryoussef that "*i told our cash desk to start borrowing term cash 6m–12m etc*". Mr Moryoussef responded "*yes pls*". Mr Saini QC submitted that this exchange shows Mr Moryoussef's knowledge, whilst at RBS, that 6- to 12-month EURIBOR was subject to actual or attempted manipulation. Mr Quest QC submitted that the exchange does no such thing and that all that it constitutes is Mr Modhvadia and Mr Moryoussef complaining about Barclays' cash desk not borrowing 6-month cash. If viewed separately, Mr Quest QC might be right about that but the fact is that this 'chat' is not an isolated conversation. On the contrary, a month later there was a telephone conversation on 28 May 2008 between Mr Bittar and Mr Moryoussef, in which Mr Bittar said "*Every day I speak to my cash desk, to cash brokers … to increase the level of the 6 month …*". Again, if viewed freestandingly, there might be nothing in this exchange but, taken together with the other matters relied upon by Marme, I

consider that there is substance in Mr Saini QC's suggestion that this is a reference to the 6-month EURIBOR rate and that, as such, it is at least capable of supporting the *"arbitrage conspiracy"* in which Mr Saini QC suggested that Mr Moryoussef was engaged at the time - although whether there was a *conspiracy* as such and so whether it supports Marme's case as to falsity are different matters to which I shall return.

206. The position is the same in relation to a telephone conversation the next day, 29 May 2008, in which Mr Moryoussef and Mr Esper discussed the "*justifications for the six-month story*" and Mr Moryoussef suggested that "*the reasoning here is, more or less, that as they are short of cash, they don't want it to go up so, at the end, if it is not expensive enough, they are not bothered ...*". There is force in Mr Saini QC's submission that the "*they*" referred to here are the cash desks and that Mr Moryoussef was here suggesting that those cash desks (those responsible for making EURIBOR submissions) are biased towards lower submissions because it reduces their borrowing costs. Mr Moryoussef later referred, indeed, in terms, to 6-month EURIBOR saying "*I basically want it to go up*" to which Mr Esper's response was "*Yes, yes, yes. Ok – right, I'll mention it*". Mr Moryoussef replied that it "*mightn't be a bad idea, to make a bit of noise to the Central European Bank ... to criticise the fact that it is too low relative to 2 times the 3 month ... so the credit spread is peculiar*". Then at the end of the call, Mr Esper agreed that "*we need to take care of the 6 months*".

207. This is evidence which, again, lends some credence to the notion that there was an *"arbitrage conspiracy"*, as does a Bloomberg 'chat' the next day, 30 May 2008, during which Mr Moryoussef asked Mr Palombo, "*why is 6m so low?*" and Mr Palombo asked "*is noone try to push 6m fixings higher? here as you know they dont [sic] really help on that side*". Mr Moryoussef's reply to that was "*we shoud [sic]! Ask ur isde [sic] why its solow [sic]*" and then to ask what Barclays was contributing. Mr Palombo replied "*I tried ... no luck, no they dont care*", and Mr Moryoussef said in response to this that "*u hAVE A LOT?*". Mr Palombo, then, replied by saying "*well yes*" to which Mr Moryoussef responded "*SAME HERE*." Mr Palombo, then, continued by saying "*I am going to try again and see if i can convince them, but they say their job is not to push the market anywhere*". Mr Moryoussef asked why Barclays' cash desk did not "*take 6m cash instead of 3m cash*" and Mr Palombo later asked "*does cb have the 6m fixing problem as well?*" to which Mr Moryoussef replied "*yes*". The 'chat', then, ended with Mr Moryoussef saying "*if you find a way to convince treasyry [sic] let me know how*". Mr Saini QC submitted that this 'chat' demonstrates Mr Moryoussef's involvement in actual or attempted EURIBOR manipulation, although I consider that Mr Quest QC was probably right when he submitted that the 'chat' actually shows that the strategy (whatever it was) discussed went nowhere.

208. The same also applies to another Bloomberg 'chat' the same day during which Mr Esper told Mr Moryoussef that "*the treso can pay 6m cash at a too low price*" and also stated that "*I have found a way to sell this thing to treasury*",

and a telephone conversation also on 30 May 2008 between Mr Moryoussef and Mr Esper during the course of which Mr Esper stated as follows:

"*I told them – look, you have an arbitrage opportunity. You need to be brutal with them … pay the 6 month cash in the market at this rate if you can … Because, if they do this, they pay 6 month cash with the risk of 1 basis point below 2 times the 3 month … it is extraordinary for them … to pay the 6 month 'for free', so they have to 'lift it', they pay it, and if it is paying in the market it will go up … And then this time they started to think about it*". Mr Esper continued by saying "*In fact this is what should be sold, in this way, I think, the Treasuries have to be told ok, look, you can pay 6 month cash and trade at the level of Euribor, you trade the 3 month in 3 months 'for free' and against that to hedge the curve risk, you don't want to bet on rate hikes, you buy the September EURIBOR futures contract … At a stroke this will make September go up as well as the 6 month cash*…".

Mr Moryoussef, then, stated "*I'm going to tell them*", Mr Saini QC submitting that this shows that the trading positions of both Mr Moryoussef and Mr Esper would benefit from higher, 6-month EURIBOR rates and so Mr Moryoussef's involvement in actual or attempted manipulation. So, too, he submitted, does another telephone conversation that day during which Mr Moryoussef and Mr Bittar discussed "*l'arbitrage*" and Mr Bittar told Mr Moryoussef that "*you should put pressure on the people you know*", with Mr Moryoussef replying by saying that "*I have already told everybody. I called. I called*".

209. The same applies also to a Bloomberg 'chat' on 4 June 2008 between Mr Moryoussef and Mr Esper, during which Mr Esper stated that "*There is only 6m cash that I would like to see increase and the lobbying is not working very well for the time being*".

210. These exchanges are quite clear in demonstrating that there were discussions concerning the exploitation of what was regarded, putting the matter neutrally, as an arbitrage opportunity. Mr Quest QC himself acknowledged that this must be the case. He recognised that the possibility was being discussed of enabling or incentivising cash desks to borrow 6-month money at a below-market rate which it was thought could then lead to higher 6-month rates and higher 6-month EURIBOR fixings. The strategy was that the cash desks would borrow more 6-month money in the market and use internal swaps to reduce the cash desks' costs of such borrowing. Plainly, again as acknowledged by Mr Quest QC, the intention was to benefit the cash desks and, for that matter, the EURIBOR traders. The question, however, is whether there was anything wrong about this – whether it was, as Mr Saini QC characterised it, an *"arbitrage conspiracy"* or whether, as Mr Quest QC put it, the communications amount to no more than legitimate discussions as to what might be done. This is not a question which was properly addressed at trial. As Mr Quest QC rightly observed in closing, if Marme's case is that the discussions represented some sort of unlawful conspiracy, it was incumbent upon Marme to make good that case. It is not sufficient for Mr Saini QC merely to assert that that is the position and, in doing so, to refer to the fact that Mr Kasapis, RBS's expert, used the term *"cartel banks"* in his report. Neither Mr Kasapis nor Mr Zjalic, Marme's expert, were called to give

evidence. Moreover, the evidence which these experts in the field of derivatives and money market trading gave in their reports was in relation to the issue of the technical meaning of certain derivatives trading jargon. They did not give evidence as to the legitimacy of the arbitrage discussions (nor as to the viability of what was discussed) and, in those circumstances, it is not appropriate to base any falsity finding on the so-called *"arbitrage conspiracy"* since to do so would entail an acceptance of Marme's case without adequate evidence being before the Court.

211. I acknowledge that there is some force in Mr Saini QC's submission that there is a risk in adopting too charitable an approach to the exchanges relied upon by Marme. I acknowledge, similarly, that there is some force in the submission, also made by Mr Saini QC, that the exchanges entail Mr Moryoussef and *"his cronies"* being *"not altruistically concerned with ensuring that the relationship between 3 month and 6 month EURIBOR reflected economic theory"*. I am satisfied that altruism is unlikely to have played any role. It does not follow, however, that there was anything necessarily wrong with what was under discussion. In such circumstances, despite the breadth of the EURIBOR Representations, it would be wrong to conclude that they were also falsified on the basis of this further documentation since Mr Saini QC's submissions were, after all, premised on the discussions amounting to a conspiracy.

212. The final communication relied upon by Marme is a Bloomberg 'chat' on 16 October 2008 between Mr Moryoussef and Mr Bittar starting at 11.03 am, a few minutes after the EURIBOR fixing was published that day, during which Mr Moryoussef asked "*how is it that you are the lowest on the panel? Properly screwed*" and Mr Bittar replied by saying "*very long in the stub*". Mr Moryoussef responded: "*I'm going to break. That makes me want to puke. Why did you put it low, seriously*? *The biggest [?] of my life is there nobody who will clean my stub? I would prefer to get out*". Mr Bittar replied by saying "*nobody will do anything mate*". Mr Saini QC submitted that this is evidence of Mr Moryoussef and Mr Bittar sharing knowledge of rates being artificially low, with Mr Bittar explaining, in effect, that Deutsche Bank had put the lowest EURIBOR panel submission in *because* Mr Bittar was "*very long in the stub*". He also submitted that the mere fact that Mr Moryoussef asked Mr Bittar suggested that he was aware that Mr Bittar would know of the reasons for the Deutsche Bank submission and that he had special contact with the submitters. In truth, however, what the exchange was about is unclear. Mr Saini QC may be right to suggest that it shows Mr Moryoussef continuing to be involved in attempted manipulation by others. However, given that it post-dates the Transaction, the communication does not fall within the period of time material to the EURIBOR Representations and is, instead, relevant only to Marme's breach of contract case. For that reason, it has no bearing on the falsity issue. In the circumstances, I say no more about it not least because of the conclusions which I have reached as to falsity based on other material.

213. For the same reason, I say nothing also about certain ABN AMRO documents dating from March to June 2011 to which Mr Saini QC made no reference during the course of submissions, whether written or oral argument, but which

were before the Court at trial. There is nothing in these documents to suggest misconduct and, in any event, concerning ABN AMRO as they did, an entity against which Marme has made no allegations, it would be inappropriate to say anything further.

Conclusions on direct evidence

214. By way of summary, therefore, before I come on to address the secondary evidence and, then, the issue of fraud (and, after that, the question of reliance), my conclusions as to falsity are that, had the EURIBOR Representations been made, they would each have been falsified through a combination of the Barclays communications (specifically as regards EURIBOR Representations 2 and 4, but also when viewing those communications as the backdrop to the early RBS communications which Mr Quest QC accepted showed Mr Moryoussef engaged in manipulation or attempted manipulation and so also EURIBOR Representations 1, 3 and 5) and the early RBS communications (as regards EURIBOR Representations 1, 3 and 5) but not the later RBS communications, including the so-called *"arbitrage conspiracy"* documents and the post-Transaction documentation.

215. I would add in this regard that I reject the submission made by Mr Quest QC (and mentioned earlier) as regards EURIBOR Representations 1, 3 and 5 that, even if there were evidence of falsity, it cannot be said that those representations were materially false. Mr Quest QC cited in support of this submission ***Avon Insurance v Swire Fraser Ltd*** [2000] Lloyd's Rep IR 535, in which Rix J (as he then was), when considering the application of section 2(1) of the Misrepresentation Act 1967 in the insurance context (together with section 20 of the Marine Insurance Act 1906), observed at [17] that "*a representation may be true without being entirely correct, provided it is substantially correct and the difference between what is represented and what is actually correct would not have been likely to induce a reasonable person in the position of the claimants to enter into the contracts*." Mr Quest QC submitted that the early RBS communications represented no more than a *"few improper comments … nearly a year before the Marme transaction completed"* and that, in the circumstances, *"no reasonable person in Marme's position would have regarded that as material"*. The difficulty with this, however, is twofold. First, since falsity is being considered on the assumption that the EURIBOR Representations were made, it follows that the "*time material to the Transaction*" as defined by Marme, which encompassed the two years prior to the execution of the Transaction, is a period which needs to be taken into account in assessing if there are communications evidencing falsity. Secondly, I fail to see how the fact that there were only a limited number of communications evidencing what Mr Moryoussef was doing can justify a conclusion that the EURIBOR Representations were "*substantially*" correct and so that any falsity is immaterial. Either Mr Moryoussef was doing what he was by way of manipulation or attempted manipulation, in which case there is falsity, or he was not and there is not such falsity.

216. This leaves the representation which I have explained that I would have been willing to find implied had it been a representation which Marme had alleged. There can be no question that there is no falsity as regards that representation.

This is because there is no evidence that RBS *itself* was manipulating or attempting to manipulate EURIBOR rates after Mr Moryoussef joined RBS. The fact that Mr Moryoussef was engaged in the activities which he was as regards other banks, as demonstrated by the RBS communications to which I have referred and which I have concluded support at least aspects of Marme's case, does not mean that RBS *itself* was manipulating or attempting to manipulate EURIBOR. After he joined RBS, Mr Moryoussef was not in a position similar to the RBS trader in ***PAG***, Mr Thomasson. RBS itself was no longer a panel bank and, accordingly, Mr Moryoussef was in no position to manipulate EURIBOR rates. It was, no doubt, in recognition of these factors that Marme did not put forward this alternative representation in these proceedings.

Criminal proceedings

217. In view of the conclusions which I have reached concerning the direct evidence which was before the Court at trial, it is strictly unnecessary to go on and consider the secondary evidence. It is appropriate, however, that I do so since substantial proportions of the submissions advanced by Mr Saini QC and Mr Quest QC were directed towards that evidence and, furthermore, the relevant material falls to be considered in the context of the fraud issue which I shall come on to address and so the evidence needs, in any event, to be looked at. I start with Mr Moryoussef's criminal conviction, before going on to address the EU Commission Decision and, then, touching on other material.

218. Mr Moryoussef was charged with conspiracy to defraud contrary to the common law on 13 November 2015. He was charged alongside five others: Mr Bittar (a Deutsche Bank trader), Mr Bermingham and Ms Bohart (Barclays EURIBOR submitters), Mr Kraemer (a Deutsche Bank employee) and Mr Palombo (a Barclays trader). Mr Moryoussef was subsequently convicted *in absentia* and sentenced on 19 July 2018 to 8 years' imprisonment. Marme relies upon section 11 of the Civil Evidence Act 1968 to establish that Mr Moryoussef and Mr Bittar participated in a conspiracy to manipulate EURIBOR. It is, perhaps, worth setting out section 11:

"(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or [of a service offence (anywhere)] shall (subject to subsection (3) below) be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section.

(2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or [of a service offence] —

(a) he shall be taken to have committed that offence unless the contrary is proved; and

(b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose."

219. There is no issue that Marme is entitled to rely upon the fact of Mr Moryoussef's conviction in these proceedings. Mr Quest QC, nonetheless, submitted that that does not prove that he conspired whilst employed by RBS (as opposed to Barclays) since the conviction is non-specific as regards timescale, not least because the indictment alleged a conspiracy between 2005 and 2009, and so including the time after Mr Moryoussef had left Barclays and joined RBS notwithstanding that the indictment itself identified Mr Moryoussef as having been at Barclays and made no mention of RBS, the offence particulars stating as follows:

"Philippe MORYOUSSEF, Carlo PALOMBO, Colin BERMINGHAM and Sisse BOHART (employees of Barclays Bank) and Achim KRAEMER (employee of Deutsche Bank), between 1st January 2005 and 31st December 2009, conspired together and with Christian BITTAR (employee of Deutsche Bank), and with other employees of Deutsche Bank, Barclays Bank, Societe Generale and other banks, to defraud in that:

(1) Knowing or believing that the abovementioned Banks were party to trading referenced to the Euro Interbank Offered Rate (Euribor),

(2) They dishonestly agreed to procure or make submissions of rates into the Euribor setting process by one or more Euribor Panel Banks which were false or misleading in that they:

a. were intended to create an advantage to the trading positions of employees of one or more of the abovementioned banks and

b. deliberately disregarded the proper basis for the submission of those rates

Thereby intending that the economic interests of others may be prejudiced."

220. Mr Saini QC's position was that the point made by Mr Quest QC does not matter since, under section 11(2)(b), the indictment is admissible "*for the purpose of identifying the facts on which the conviction was based*", and it is sufficient that Mr Moryoussef was alleged in the indictment to have been engaged in the conspiracy in the period identified, including the time after he had joined RBS and covering the entirety of his period of employment with RBS from August 2007 until September 2009. I consider that Mr Saini QC was wrong about this, however, for the reason which I have previously given, namely that, whatever the indictment might say concerning the time period which it covered, the indictment was explicit in its identification of Mr Moryoussef as an "*employee of Barclays Bank*". Put shortly, insofar as the indictment related to Mr Moryoussef (and it should obviously be borne in mind that the indictment did not deal exclusively with him), in my view, it was

concerned only with the period when he was at Barclays since, were the position otherwise, then, the reference to Mr Moryoussef being a Barclays employee would make little sense since, if the position were otherwise, it would be expected that Mr Moryoussef would have been identified not only as an employee of Barclays but also an employee of RBS. The explanation for the time period described in the indictment extending beyond Mr Moryoussef's time at Barclays is the fact that the indictment was concerned not only with him but also with others.

221. For this reason, I do not consider that there is anything ambiguous about the indictment, and so it is not necessary to look at the other materials which were before the Court in order to ascertain what conduct was covered by the indictment. I am clear, in any event, that those other materials are consistent with the view which I have formed about the breadth of the indictment and do not demand a different conclusion.

222. Before addressing this point, however, it is worth mentioning a different submission which was made by Mr Quest QC. This was that, although the indictment charged a conspiracy covering the period from 2005 to 2009, in order to convict, the jury did not need to be satisfied that Mr Moryoussef had participated throughout that period. As HHJ Gledhill QC himself told the jury in his summing-up:

"*Provided you are sure in the case of the defendant you are considering that he or she agreed at some stage that the conspiracy should be carried out, and that he or she would play his or her part, it does not matter precisely where his or her involvement appears on the scale of seriousness or precisely when he or she became involved, he or she is guilty is charged*."

It follows that, in convicting Mr Moryoussef, the jury should not be taken as having convicted him in respect of the time when he was no longer at Barclays but had moved to RBS. Mr Saini QC characterised this as a *"desperate argument"* but I cannot agree with that characterisation since, on the contrary, in my view, HHJ Gledhill QC was, obviously, right to direct the jury as he did, and Mr Quest QC was, equally obviously, right to make the submission which he did.

223. As to material besides the indictment, Mr Saini QC relied upon various material, including parts of HHJ Gledhill QC's summing-up and his sentencing remarks, as showing that the conviction should be treated as covering Mr Moryoussef's time at RBS as well as his time at Barclays. He cited ***Brinks Ltd v Abu-Saleh and Others (No.2)*** [1995] 1 WLR 1487 in this connection. In that case, the plaintiff, which had been the victim of a robbery during which gold bars and other valuables were stolen, brought civil proceedings in conversion against 57 defendants alleged to have played some part in the theft or in dealing with the stolen property or its proceeds. The plaintiff wished to rely upon the conviction of one of the defendants, C, to establish that another defendant, who had not been convicted, was involved in disposing of the proceeds of the crime. The certificate of conviction relating to C simply recorded that he had been convicted of "*one count of conspiracy to handle stolen goods*". It did not record that this had any connection to the

Brinks Mat robbery. Accepting that the certificate of conviction alone could not establish that it was the plaintiff's money that had been in issue under section 11(2)(b), the plaintiff sought to rely upon parts of the judge's summing-up at the criminal trials in order to identify the facts on which C's conviction was based. Rimer J (as he then was) took into account that the summing up is not a judgment and also took into account the defendant's submission that "*the judge's usually somewhat selective reference to the evidence in his summing up can at most amount to a materially abbreviated, second-hand, summary of the evidence and that it can be of no relevance to consider such summary in the context of an inquiry at a subsequent civil trial as the facts on which a conviction was based*". Rimer J's view on this at p. 1491D-G was as follows:

"*I have, however, come to the conclusion that I should not rule out the admission of the transcripts at this stage on the ground that they are bound to be irrelevant. The purpose of a summing up is not to repeat the evidence, which the jury has already heard direct from the witnesses. It is to sum up the respective cases of the prosecution and the defence so that the jury will understand as best they can the factual issues they have to decide in order to arrive at their verdict. The summing up will include directions to the jury as to the relevant law. It will ordinarily include references to, or summaries of, parts of the evidence which has been given. It will or may include statements of what the parties have agreed or admitted in the course of the trial. It will or may identify with a clarity which might not otherwise appear from a mere consideration of transcripts of the evidence what the defences are: for example, they may depend on matters to be inferred from the evidence, or on whether the defendant had the knowledge required for a conviction. It will or may include specific directions to the jury as to the particular facts on which they have to be certain before they can arrive at a verdict of guilty. These factors suggest to me that a consideration of the transcript of a judge's summing up at the end of a criminal trial is likely to be of relevance in identifying the factual basis on which a defendant was convicted of the offence with which he was charged.*"

224. For his part, Mr Quest QC did not suggest that the material relied upon by Mr Saini QC should be left out of consideration in the event that the indictment were to be regarded as unclear. Rightly, however, he made the point as regards HHJ Gledhill QC's sentencing remarks that care should be taken insofar as these contained the judge's own findings of fact or opinions about the degree of Mr Moryoussef's guilt since those would be inadmissible under the rule in ***Hollington v Hewthorn*** [1943] KB 587.

225. Dealing, first, with the summing-up, Mr Saini QC drew attention to something which HHJ Gledhill QC told the jury on the forty-eighth day of the trial, namely that a particular Bloomberg 'chat' between Mr Bittar and Mr Moryoussef was "*an example of what was going on between Mr Bittar and Moryoussef and the prosecution case against him is that he was involved in all aspects of this conspiracy in the way that you have seen and heard over the period of the indictment*". Mr Saini QC also referred (perhaps, less permissibly) to something which the prosecution had to say when opening the

case on the sixth day of the trial, namely that a communication in September 2007:

"*tells you that even though Mr Moryoussef has gone over to RBS, he is still in contact with his old colleagues in discussions about the interest rates. And indeed, as we'll see from time to time, making suggestions as to what Carlo Palombo, for instance, should ask of Sisse Bohart about submitting particular rates*."

As Mr Saini QC also pointed out, the prosecution, in addition, referred to a "*further conversation … about the rates, even though, as I've said, Mr Moryoussef has moved on to a different institution. He still can't resist intervening in the business of Barclays interest rate setting*". Mr Saini QC, furthermore, (again, perhaps, not altogether permissibly) highlighted an extract from the cross-examination of Mr Bermingham in relation to one of his communications with Mr Moryoussef on 29 May 2008, and so after Mr Moryoussef had moved to RBS. Mr Saini QC submitted that this demonstrates that the criminal trial was not restricted to Mr Moryoussef's activities whilst he was at Barclays. In truth, however, these were isolated references which, as such, provide only scant support for the proposition that the criminal case against Mr Moryoussef included his time when employed by RBS.

226. As for the sentencing remarks, Mr Saini QC cited these remarks when HHJ Gledhill QC was dealing with the question of Mr Bittar's sentence:

"*You committed the offence in 3 ways: intrabank collusion, that is by asking the submitters of your bank – Deutsche Bank – to make high or low Euribor submissions, intending to advantage your trading positions. Two: interbank collusion, by asking others employed by other banks, including Moryoussef at Barclays, and later at the Royal Bank of Scotland, and Stephane Esper at Societe Generale, to do the same. And thirdly: by cash pushing, that is by offering cash to the market with the intention of altering the Euribor rate in the lead up to a fixing or reset date*."

Mr Saini QC suggested that the reference to Mr Moryoussef being at Barclays and later at RBS demonstrates that the trial judge, who was best placed to know the evidence he has heard, had in mind that the conspiracy concerned Mr Bittar dealing with Mr Moryoussef not only when he was at Barclays but also when he had moved to RBS. Mr Quest QC made the legitimate point, however, that what HHJ Gledhill QC had to say here could not be quite right since there is no evidence that Mr Bittar made a request as described to Mr Moryoussef once he had moved to RBS; indeed, it would have been surprising had he done so since RBS was not a panel bank. The likely explanation for this is that the judge was using somewhat loose language, which is, of course, quite understandable in the circumstances. It is clear, when analysing what HHJ Gledhill QC had to say in his sentencing remarks more generally, that his real focus, at least as far as Mr Moryoussef was concerned, was on his time at Barclays. Thus, his sentencing remarks began by referring to the fact that:

"*The derivatives world is small and tight [knit]. Bittar moved to Deutsche, Moryoussef to Barclays, whilst Esper remained at Societe Generale. There is*

no doubt that by 2005, Moryoussef had joined the conspiracy. Exactly when he joined and why he became involved is difficult to determine."

It is notable, indeed, that, although the judge referred a number of times to Mr Moryoussef's communications with Barclays' cash desk and Barclays' submitters, and also his communications with traders at other banks, there is no reference made to Mr Moryoussef being at RBS or to any communications after mid-March 2007. The only reference made by the judge to RBS when sentencing Mr Moryoussef was when he explained that when Barclays refused to pay him a percentage of the profits he made for the bank, "*he resigned and went to work for the Royal Bank of Scotland*". Moreover, as Mr Quest QC pointed out, the sentencing remarks followed submissions from the prosecution which described Mr Moryoussef's activity as covering "*principally – well, it relates to his time at Barclays, which is May 2005-August 2007*", Mr Waddington also submitting in relation to Mr Bittar that "*The relevant period is March 2005 to the beginning of 2009, in Mr Bittar's case, however the bulk of the activity on which the Crown rely, took place between March 2005-August 2007*".

227. In the circumstances, even if there were some doubt (which I do not consider there is) as to the period to which Mr Moryoussef's conviction relates, in my view, there is nothing in this further material which makes it clear that that conviction covered not only his time at Barclays but also his time at RBS.

EU Commission Decision

228. Mr Saini QC relied also upon the EU Commission Decision dated 4 December 2013. This reflects a settlement agreement between the Commission, RBS and a number of other banks regarding an infringement by the banks of Article 101(1) of the TFEU and Article 53(1) of the EEA Agreement. Mr Saini QC did not suggest that the Court is bound by the findings of the Commission but relied upon the EU Commission Decision as evidencing certain admissions made by RBS in relation to EURIBOR.

229. The EU Commission announced the settlement in a press release on 4 December 2013 (amended on 6 April 2016 in relation to the fine of Société Générale). This describes the cartel found as follows:

"*The EIRD cartel operated between September 2005 and May 2008. The settling parties are Barclays, Deutsche Bank, RBS and Société Générale. The cartel aimed at distorting the normal course of pricing components for these derivatives. Traders of different banks discussed their bank's submissions for the calculation of the EURIBOR as well as their trading and pricing strategies.*"

The EU Commission Decision itself summarises the infringement found in this way:

"The addressees of this Decision participated in an infringement of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement. The infringement consisted of agreements and/or concerted practices covering at

least the whole EEA that had the object of restricting and/or distorting competition in the sector of the Euro Interest Rate Derivatives linked to the Euro Interbank Offered Rate ('EURIBOR') and/or the Euro Over-Night Index Average ('EONIA') (hereinafter 'EIRD' or 'EIRDs')."

230. The EU Commission Decision was "*based on matters of fact as accepted only by Barclays, Deutsche Bank, Société Générale and RBS in the settlement procedure*" and was reached pursuant to formal requests to settle submitted in September and October 2013 by Barclays, Deutsche Bank, Société Générale and RBS pursuant to Regulation (EC) No 773/2004. The settlement submissions of each bank, as recorded at Recital (28)(a), contain, *inter alia*:

"an acknowledgment in clear and unequivocal terms of its liability for the infringement summarily described as regards its object, the main facts, their legal qualification, including the individual [settlement party]'s role and the duration of its participation in the infringement in accordance with the results of the settlement discussions".

231. The conduct for which the banks accepted liability is described in Recitals (32) onwards, following this statement in Recital (31):

"*Having regard to the facts of the case established on the basis of the body of evidence on the file and the settling parties' clear and unequivocal acknowledgement of these facts, the Commission holds the addressees of this Decision liable for the conduct described below."*

Recital (32) (under the heading *"Description of the conduct"*) states:

"The [settlement parties] through the conduct of certain of their employees, have participated in arrangements in the EIRD sector which consisted of the following practices between different [settlement parties]:

(a) On occasion, certain traders employed by different [settlement parties] communicated and/or received preferences for an unchanged, low or high fixing of certain EURIBOR tenors. Those preferences depended on their trading positions/exposures.

(b) On occasion, certain traders of different [settlement parties] communicated and/or received from each other detailed not publicly known/available information on the trading positions or on the intentions for future EURIBOR submissions for certain tenors of at least one of their respective banks.

(c) On occasion, certain traders also explored possibilities to align their EIRD trading positions on the basis of such information as described above in (a) or (b).

(d) On occasion, certain traders also explored possibilities of aligning at least one of their banks' future EURIBOR submissions on the basis of such information as described above in (a) or (b).

(e) On occasion, at least one of the traders involved in such discussions approached the respective bank's EURIBOR submitters, or stated that such an approach would be made, to request a submission to the EBF's calculation agent towards a certain direction or at a specific level.

(f) On occasion, at least one of the traders involved in such discussions stated that he would report back, or reported back on the submitter's reply before the point in time when the daily EURIBOR submissions had to be submitted to the calculation agent or, in those instances where that trader had already discussed this with the submitter, passed on such information received from the submitter to the trader of a different [settlement party].

(g) On occasion, at least one trader disclosed to a trader of another [settlement party] other detailed and sensitive information about his bank's trading or pricing strategy regarding EIRDs."

Recital (33), then, continues:

"In addition, on occasion certain traders employed by different [settlement parties] discussed the outcome of the EURIBOR rate setting, including specific banks' submissions, after the EURIBOR rates of a day had been set and published."

This is followed by Recital (34):

"Each [settlement party] participated in at least some of these forms of conduct. This occurred throughout the period of the settling parties' respective involvement in the infringement, although not every settling party participated in all instances of the collusion and the intensity of the collusive contacts varied over the period of the infringement."

Recital (35), then, states:

"The collusive activity occurred through bilateral contacts, mainly through on-line chats, e-mails and on-line messages or over the telephone."

Lastly, Recital (39) is in these terms:

"Between 26 September 2007 and 30 May 2008, RBS engaged in bilateral practices falling under at least some of the practices enumerated in recital (32) with parties."

232. The proceedings were brought under Article 101(1) of the TFEU and Article 53(1) of the EEA Agreement, with the legal basis of the EU Commission Decision being set out in Recitals (43) and (44) as follows. Thus, Recital (43) states:

"Article 101(1) of the Treaty prohibits as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those

which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply."

Recital (44), then, is in these terms:

"Article 53(1) of the EEA Agreement is modelled on Article 101(1) of the Treaty. However, the reference in Article 101(1) to trade 'between Member States' is replaced by a reference to trade 'between contracting parties' and the reference to competition 'within the internal market' is replaced by a reference to competition 'within the territory covered by the ... [EEA] Agreement'."

233. Recital (55) subsequently records that:

"*For the period of their respective involvement in the infringement, Barclays, Deutsche Bank, Société Générale and RBS accepted that they were aware of the general scope and the essential characteristics of the infringement or were able reasonably to foresee this conduct and prepared to take the risk*."

234. The EU Commission's conclusion is then set out at Recital (67):

"*The facts described in Section 4 show that Barclays, Deutsche Bank, Société Générale and RBS participated in a single and continuous infringement of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement. The overall conduct consisted of agreements and/or concerted practices that had as their object the distortion of the normal course of pricing components in the EIRD sector*."

235. Also relevant is the fact that in Section 6 the EU Commission records the *"Duration of the addressees' participation in the infringement*" as being in respect of RBS between 26 September 2007 and 30 May 2008. It seems likely that that same end date is recorded in respect of all of the addressee banks, suggesting that this was the point in time where the Commission's investigations ceased.

236. As part of the settlement, RBS and RBS Group plc were fined €131,004,000, although Mr Quest QC submitted that the size of the fine was based primarily on the value of RBS's EIRD sales at the relevant time, rather than the gravity of any misconduct.

237. Mr Saini QC submitted that the EU Commission Decision shows that RBS has previously admitted to misconduct of the relevant type and during the *"time material"* to the Transaction as defined for the purposes of the EURIBOR Representations, and that these admissions show that the EURIBOR Representations are false.

238. As far as RBS is concerned, Mr Quest QC made the point that the EU Commission Decision was concerned with RBS's admitted infringements in the period from 26 September 2007 to 30 May 2008 when, in conjunction with other banks including Barclays, Deutsche Bank and Société Générale, RBS

participated in activities aimed at distorting the normal course of pricing components for financial derivatives in the EEA. As such, it was Mr Quest QC's submission (and RBS's case) that the EU Commission Decision establishes only that RBS engaged in anti-competitive conduct in the relevant period, and not that RBS was involved in EURIBOR manipulation in the sense alleged by Marme. Mr Quest QC highlighted, in particular, how the EU Commission Decision at no point refers to "*the manipulation and/or attempted manipulation of Euribor*" despite the fact that Marme relied upon the EU Commission Decision as evidence of that conduct. He submitted that nothing in the EU Commission Decision relates to this, and that this is demonstrated by looking at the legal basis of the EU Commission Decision which shows that the subject-matter of the proceedings was not EURIBOR manipulation in the sense of subversion of the rate-setting process but, instead, anti-competitive practices. That this is the case is shown by the fact that the proceedings were brought under Article 101 TFEU (and Article 53(1) of the EEA Agreement which is modelled on Article 101(1) TFEU), which prohibits practices which may affect trade and which have as their object or effect the prevention, restriction or distortion of competition within the internal market (and, in particular, those which directly or indirectly fix purchase or selling prices). Mr Quest QC relied also upon the press release which was issued on 4 December 2013, specifically the fact that it was headed "*Commission fines banks €1.49 billion for participating in cartels in the interest rate derivatives industry*" and the fact that it recorded the EU Commission's Vice President as saying this:

"*What is shocking about the LIBOR and EURIBOR scandals is not only the manipulation of benchmarks, which is being tackled by financial regulators worldwide, but also the collusion between banks who are supposed to be competing with each other. Today's decision sends a clear message that the Commission is determined to fight and sanction these cartels in the financial sector*."

Mr Quest QC submitted that this shows that the EU Commission's focus was not on manipulation but only on anti-competitive behaviour. Mr Quest QC accepted that there could be some overlap between conduct which constitutes anti-competitive practices and conduct which constitutes manipulation, but that, as the EU Commission proceedings were directed at a different kind of wrongdoing, the Court should be cautious in placing any significant reliance on the EU Commission's findings.

239. I agree with Mr Quest QC about this, specifically that the fact that RBS accepted before the EU Commission that between 26 September 2007 and 30 May 2008 (but not after that date) Mr Moryoussef, on occasion, engaged in the anti-competitive practices described in sub-paragraphs (a), (b) and (g) of Recital (32), and so that it was responsible for Mr Moryoussef's conduct (as his employer) and in that way it infringed article 101(1) TFEU, does not mean that RBS should be regarded as having accepted that Mr Moryoussef engaged in EURIBOR rate manipulation even though it is right to acknowledge that the conduct described in (a), (d) and (e) of Recital (32) corresponded to some degree with rate manipulation. Although Mr Saini QC submitted that the type

of conduct which the EU Commission considered (known as 'object infringement') is the same conduct in issue in the present case since an object infringement involves a cartel doing something which is unlawful and there is no requirement that the cartel was successful, this does not change the fact that the EU Commission was concerned with a breach of Article 101 TFEU, as to which dishonesty is not an ingredient (as made clear, indeed, in Recital (43) which lists the elements of a breach of Article 101). I accept that the conduct described in Recital (32)(a) comes close to Marme's case of attempted manipulation, but the fact is that it does not go that far since its focus is merely on the sharing of information. In short, it is not possible (as shown by Recital (34)) to read the EU Commission Decision as showing RBS accepting that it engaged in attempted manipulation, as opposed to improper sharing of information. Nor is it appropriate to approach the EU Commission Decision as necessarily showing that RBS accepted that it behaved dishonestly in what it did.

240. It follows that, in my view, the EU Commission Decision ought not to be regarded as establishing the falsity of the EURIBOR Representations. In any event, given my earlier conclusions as regards the direct evidence, the significance of the EU Commission Decision is in the context of this case more limited than it might otherwise have been. I shall have to return to the EU Commission Decision, however, when considering the issue of fraud.

Other secondary material

241. Mr Saini QC sought to rely upon certain other secondary material in support of Marme's falsity case. I do not, however, regard that other material as having any significant relevance; indeed, in several respects Mr Saini QC himself did not appear to do so either since he did not explain why the documents were said to be relevant.

242. An example of documents in that category are certain internal RBS reports. Thus, on 1 November 2011, the RBS Group Audit Committee – Group Regulatory Affairs Update on Regulatory Reviews and Investigations record a number of ongoing investigation, including "*LIBOR related investigations by the CFTC, European Commission, the US DOJ (Criminal Fraud Section and Antitrust Division) [redacted] are ongoing. The currencies under investigation are [Redacted] and EUR (EURIBOR)*". Furthermore, the RBS Risk Management Monthly Report for October 2011 also records that:

"*[redacted] the European Commission undertook an unannounced visit ('Dawn Raid') at 135 Bishopsgate on 18 October; similar visits were also made to a number of other banks. The visit lasted four days and papers concerning EURIBOR were taken away. A meeting is scheduled for mid-November in Brussels with the European Commission to discuss progress*".

Although these reports obviously demonstrate that RBS had knowledge of the investigations from Autumn 2011, Mr Saini QC did not suggest what conclusion as to the falsity issue should be drawn from this.

243. Other examples are certain documents concerned with a Deferred Prosecution Agreement entered into between Barclays and the US Department of Justice entered into on 26 June 2012 in relation to Barclays' submissions (as a panel bank) of benchmark interest rates, including LIBOR and EURIBOR. That agreement records Barclays' acceptance of certain conduct as set out in Appendix A (a Statement of Facts) which states, in part, as follows at paragraph 23:

"*From at least approximately August 2005 through at least approximately May 2008, certain Barclays swaps traders communicated with swaps traders at other Contributor Panel banks and other financial institutions about requesting LIBOR and EURIBOR contributions that would be favorable to the trading positions of the Barclays swaps traders and/or their counterparts at other financial institutions."*

The Statement of Facts, then, goes on to say this in the next paragraph:

"Certain Barclays swaps traders made requests of traders at other Contributor Panel banks for favorable LIBOR or EURIBOR submissions from those banks. In addition, certain Barclays swaps traders received requests from traders at other banks for favorable LIBOR or EURIBOR submissions from Barclays rate submitters. When Barclays swaps traders did not have trading positions conflicting with their counterparts' requests, those Barclays swaps traders sometimes would agree to request a LIBOR or EURIBOR submission from the Barclays LIBOR or EURIBOR submitters that would benefit their counterparts' positions. Those interbank communications included ones in which certain Barclays swaps traders communicated with former Barclays swaps traders who had left Barclays and joined other financial institutions. The likelihood that the LIBOR or EURIBOR fix would be affected increased when other Contributor Panel banks also manipulated their submissions as part of a coordinated effort."

Mr Saini QC submitted that the "*former Barclays swaps traders*" referred to in the second of these passages included Mr Moryoussef. He was clearly right about this. Indeed, it is clear that Mr Moryoussef was "*Trader-5*" as described in paragraph 28 of the same Statement of Facts:

"*From at least approximately August 2005 to at least approximately May 2008, Barclays Euro swaps traders communicated with swaps traders at other financial institutions that were members of the EURIBOR Contributor Panel about requesting favorable EURIBOR submissions from the EURIBOR submitters at their respective banks. At Barclays, this conduct was primarily undertaken by a Barclays Euro swaps trader, Trader-5, who left Barclays and joined another financial institution in approximately May 2007. While Trader-5 worked at Barclays, Trader-5 communicated with traders at several other Contributor Panel banks about obtaining favorable EURIBOR submissions, and requested favorable EURIBOR submissions from the Barclays EURIBOR submitter. After Trader-5 joined another financial institution, Trader-5 continued communicating with traders at Barclays about requesting favorable EURIBOR settings.*"

Mr Saini QC relied, in particular, on the last sentence of this last passage to show that the conduct continued after Mr Moryoussef joined RBS, given the reference to Trader 5 joining another financial institution which, in the circumstances, was obviously RBS. Nonetheless, this evidence does not really assist in proving the falsity of the EURIBOR Representations in circumstances where the facts recorded in these passages were contained in an appendix to an agreement to which RBS was not a party. Nor, obviously, is the Court bound by any findings in the Barclays Deferred Prosecution Agreement. In my view, therefore, this is not a document which really adds anything to the direct evidence which was before the Court at trial.

244. Similarly, the Court is not assisted by the Final Notice which was issued by the FSA to Barclays as a result of the FSA's investigations into Barclays' involvement with EURIBOR, another document relied upon by Marme at trial. Under that Final Notice a financial penalty of £59.5 million was imposed on Barclays as part of an agreed settlement. It was Mr Saini QC's submission that the type of conduct described in the Final Notice was principally the conduct of Mr Moryoussef whilst he was at Barclays. He relied, in particular, upon paragraphs 8 to 10, which recorded findings that derivatives traders had, between January 2005 and July 2008, made LIBOR and EURIBOR submissions inappropriately motivated by profit and to benefit Barclays' trading positions. Specifically, paragraph 10 states as follows:

"*Barclays also breached Principle 5 on numerous occasions between February 2006 and October 2007 by seeking to influence the EURIBOR (and to a much lesser extent the US dollar LIBOR) submissions of other banks contributing to the rate setting process*".

Mr Saini QC submitted that this is especially relevant because, certainly by September 2007, Mr Moryoussef had left Barclays and had gone to RBS.

245. Mr Saini QC also relied upon paragraph 53 of the Final Notice which relates to "*Internal requests for submissions from Barclays' Derivatives Traders*" and which records that:

"*On numerous occasions between January 2005 and June 2009, Barclays' Derivatives Traders made requests to its Submitters for submissions based on their trading positions. These included requests made on behalf of derivatives traders at other banks. The Derivatives Traders were motivated by profit and sought to benefit Barclays' trading positions. The aim of these requests was to influence the final benchmark LIBOR and EURIBOR rates published by the BBA and EBF*."

Mr Saini QC emphasised the second sentence, submitting that this evidences Mr Moryoussef's "*modus operandi*" after he had moved to RBS (and after his direct channel of influence to the submitters had been closed off). Mr Saini QC asked the Court to infer from this that Mr Moryoussef continued to do what he had been doing with some success whilst at Barclays when he moved to RBS.

246. I should explain that, although Mr Moryoussef is not named in the Final Notice, it is tolerably clear (and agreed between Mr Saini QC and Mr Quest QC) that he is the person identified as "*Trader E*" who is mentioned in various places in the Final Notice, including in paragraphs 79, 85, 90, 94-97 which deal with certain communications in September 2006 and February/March 2007 (the same communications as set out in Schedule 2 of the Re-Re-Re-Amended Particulars of Claim and recorded as being with Mr Moryoussef).

247. Although I acknowledge that the Final Notice is not unhelpful in seeing what Mr Moryoussef was doing when he was at Barclays, it is not particularly useful in reaching conclusions as to Mr Moryoussef's conduct whilst at RBS. The Final Notice is a document which was prepared as between the FSA and Barclays; RBS was not involved in its preparation and is not bound by anything stated in it. As Mr Quest QC pointed out, the FSA has jurisdiction over EURIBOR and has issued no equivalent final notice against RBS. The underlying documentation upon which it was (at least in part) based is documentation which was before the Court at trial and is documentation in relation to which it is for the Court to form its assessment.

248. Mr Saini QC was, however, able also to point to documents which involved RBS directly, and I should address these. The first was a report commissioned by RBS NV for De Nederlandsche Bank NV ('DNB'), which is the Dutch Central Bank. The focus of this report was on the controls of the EURIBOR setting process at RBS NV; it covered the period from 2005 to 2011 and was prepared by Clifford Chance LLP with the assistance of SJ Berwin LLP. The report recorded the acquisition of ABN AMRO by a consortium including RBS in October 2007. As Mr Saini QC accepted, the report was not concerned with the issues in the present case since its focus was on the RBS submitting desks in the Netherlands and there has never been any suggestion on the part of Marme that those desks were involved in any attempted or actual EURIBOR manipulation. Mr Saini QC nonetheless highlighted what is stated in paragraph 40 of the report, namely:

> *"In addition to reviewing the communications of the EURIBOR setters, DNB should be aware that the communications of Euro derivatives traders were reviewed and in particular, those of Philippe Moryoussef. [redacted]*."

He also referred to paragraph 41, as follows:

> *"By way of background, Philippe Moryoussef joined RBSG from [Barclays] in 2007 and then left RBSG to join Morgan Stanley in 2009. During his time at RBSG, he was responsible for running the Euro derivatives trading desk in London and it was for the whole of this period that his written communications were reviewed. In addition, external counsel has also undertaken a review of certain telephone conversations in light of references to such calls in the written communications. In this regard, approximately 450 telephone conversations between Philippe Moryoussef and traders from other banks have been reviewed by external counsel.*"

This is followed by paragraph 42:

"During this review of written and audio communications, no evidence was found of Philippe Moryoussef being directly involved in manipulation of the EURIBOR setting or that he was in contact with the EURIBOR setters based in Amsterdam. However, external counsel did identify deep and frequent exchanges of information about trades and prices between Philippe Moryoussef and traders at competing banks, including [Entity A] [Entity B], Morgan Stanley, [Entity C] and [Entity D]. Following the review of approximately 280,000 documents, around 1,200 relevant documents were submitted to the Commission [Redacted] [Redacted] [Redacted]. As noted above, none of these documents evidences discussions between Philippe Moryoussef and RBS EURIBOR rate setters."

Mr Saini QC cited also feedback which DNB gave to RBS NV after the report had been prepared in the form of a letter dated 24 April 2013 which states at paragraph 4 that, in respect of the investigation regarding EURIBOR, the DNB had:

"*encountered certain difficulties during its review by means of partial observation and document review, because a significant part of the relevant information was not disclosed to the regulator. In particular, DNB could not review interview reports and the investigation documents, because the external parties who conducted the investigation invoked their legal professional privilege. DNB has, nonetheless, gained a fair view of the methods that were used to conduct the investigation*".

Although Mr Saini QC was probably right when he suggested that these were references to concerns about Mr Moryoussef, nonetheless these documents do not assist in reaching any meaningful conclusions as to the falsity of the EURIBOR Representations since, ultimately, what the report compilers would have looked at are the documents which were before the Court at trial and it is for the Court to reach its own assessment as to those documents (as has been done).

249. This leaves two further categories of documentation. The first is the Deferred Prosecution Agreement which RBS itself entered into with the US Department of Justice on 5 February 2013, RBS agreeing to pay US$150 million to resolve the investigation. The agreement records, indeed, at paragraph 2 that RBS:

"*admits, accepts and acknowledges that it is responsible under United States law for the acts of its officers, directors, employees and agents as charged in the Information, and as set forth in the Statement of Facts attached hereto as Attachment A and incorporated by reference into this Agreement, and that the allegations described in the Information and the facts described in Attachment A are true and accurate*".

It is clear from the Statement of Facts that the conduct predominately related to Yen LIBOR and Swiss Franc LIBOR, in relation to which RBS had been a panel member from at least 2006 to 2010. The agreement was not concerned with allegations of manipulation of EURIBOR at RBS, although Mr Saini QC

was able to identify an isolated reference to EURIBOR in a footnote within the Statement of Facts (footnote 23). Significantly, the paragraph to which the footnote relates (paragraph 65) is concerned not with EURIBOR but with Yen LIBOR, albeit that the footnote itself refers to EURIBOR (and Mr Moryoussef by implication) in these terms:

"*In addition to the conduct described above, an RBS derivatives trader, on a few occasions from September 2007 to mid-2008, attempted to coordinate with derivatives traders at other banks about submissions related to the Euro Interbank Offered Rate ('EURIBOR'), a reference rate overseen by the European Banking Federation. RBS became a Contributor Panel Bank for EURIBOR in October 2007 by virtue of its acquisition of ABN AMRO Bank. For example, in a series of instant messages on October 4, 2007, the RBS derivatives trader who traded products tied to EURIBOR, communicated with two derivatives traders employed by Barclays Bank, plc regarding favorable EURIBOR settings for their trading positions. The Barclays Bank traders agreed to the RBS trader's request and shared their intended submissions in other tenors, to which the RBS trader signaled approval*."

It seems to me that, despite only being in a footnote, this is more significant than the other material cited by Mr Saini QC since it entails RBS admitting that there was misconduct in the period whilst Mr Moryoussef was at RBS. That said, I do not consider that it has any additional probative value given that the direct evidence is before the Court.

250. The last document which I should mention is something described as an Order Instituting Proceedings against RBS issued by the Commodity Futures Trading Commission. This relates to the settlement of anticipated proceedings in relation to alleged violations by RBS of various provisions of the Commodity Exchange Act, 7 U.S.C., sections 9, 13b and 13(a)(2) (2006). It also relates to allegations of manipulation of Yen and Swiss Franc LIBOR. Mr Saini QC relied upon a footnote 4 to a paragraph setting out various facts relating to LIBOR, the footnote 4 stating as follows:

"*RBS, through a Euro derivatives trader, also colluded with traders at other banks on at least a handful of occasions relating to another benchmark interest rate, Euribor, by asking for beneficial Euribor submissions to be made by the other banks. This conduct occurred from September 2007 through at least mid-2008.*"

I agree with Mr Quest QC, however, when he submitted that, the Commodity Futures Trading Commission CFTC having seemingly been provided with the same material as the US Department of Justice and the proceedings having been settled without any admission by RBS, this document really adds nothing over and above the direct evidence which was before the Court at trial.

Fraud

251. Given my earlier conclusion that the EURIBOR Representations were not made, it is not necessary to go on to consider the issue of fraud. Nor, indeed, does any issue of non-fraudulent misrepresentation (and so section 2(1) of the

1967 Act) arise. However, as with other issues which do not strictly arise in view of what I have previously decided, it is appropriate that I should address the issue of fraud, in any event. What follows, therefore, proceeds on the assumption that the EURIBOR Representations were made and that, as I have decided, they were false. In contrast, as for the alternative representation which I have decided would have been permissible had it been put forward by Marme, since this is not a representation which was put forward by Marme and since, in any event, I have concluded that it would not have been false had it been made, I do not propose to say anything more about it whether in relation to the fraud issue or any subsequent issue.

252. It was Marme's case that RBS made the EURIBOR Representations fraudulently, knowing them to be false and intending Marme to rely upon them. As Mr Saini QC, Mr Tomson and Mr Rose put it in their written opening submissions, in order to prove that RBS was fraudulent in this case, it needs to be shown that an RBS *"agent or employee by his act or omission intended Marme (individually or as a member of a class) to rely on the EURIBOR Representations, without an honest belief in their truth"*.

253. This is consistent with authority. Thus, for example, in ***Standard Chartered Bank v Pakistan National Shipping Corp (No. 2)*** [1998] 1 Lloyd's Rep. 684, Cresswell J described the relevant principle at p. 704 in this way:

"*The tort of deceit involves a false representation made by the defendant, who knows it to be untrue, or who has no belief in its truth, or who is reckless as to its truth. If the defendant intended that the plaintiff should act in reliance on such representation and the plaintiff in fact does so, the defendant will be liable in deceit for the damage caused…* ".

There are, accordingly, two elements: first, that the representor intends the representee to rely on the representation and, secondly, that the representor knows the representation to be untrue or has no belief in its truth or is reckless as to its truth.

254. As to whether there is a requirement that there be an "*intention to deceive*" (the phrase used by Mr Quest QC, Miss John and Mr Evans in their written opening submissions citing ***Derry v Peek*** (1889) 14 App Cas 337), it is tolerably clear that there is no additional requirement that there be such an intention. In this respect, ***ECO3 Capital Limited and Ors v Ludsin Overseas Ltd*** [2013] EWCA Civ 413 is instructive since in that case Jackson LJ described the tort of deceit as containing the following four elements at [77]:

"*… What the cases show is that the tort of deceit contains four ingredients, namely:*

i) The defendant makes a false representation to the claimant.

ii) The defendant knows that the representation is false, alternatively he is reckless as to whether it is true or false.

iii) The defendant intends that the claimant should act in reliance on it.

iv) The claimant does act in reliance on the representation and in consequence suffers loss."

As he put it, *"Ingredient (i) describes what the defendant does. Ingredients (ii) and (iii) describe the defendant's state of mind. Ingredient (iv) describes what the claimant does"*. He then went on at [78] to say this:

"I do not accept that 'intention to deceive' is a separate or free standing element of the tort of deceit. The phrase 'intention to deceive' is merely another way of describing the mental element of the tort. It is a compendious description of ingredients (ii) and (iii) as set out in the preceding paragraph."

It follows that there is no need for Marme in this case to establish that RBS had an intention to deceive. The obligation is, instead, to make good its case as to the four elements identified by Jackson LJ and, in this particular context since the issue of fraud is under consideration, to establish requirements (ii) and (iii).

255. There was, in truth, no controversy about this. Nor was there a dispute, at least as I understood it, that the necessary intention may be proved by inference. In that regard, Mr Saini QC cited *Spencer Bower & Handley: Actionable Misrepresentation, (5th Ed., 2014)* where this is stated at 6.03:

"*Proof of the necessary intent is facilitated by the ordinary inference that the representor intends the natural and probable result of his acts*."

Similarly, in ***Shinhan Bank Ltd v Sea Containers Ltd*** [2000] 2 Lloyd's Rep. 406, it was considered sufficient for intention to rely purposes that the buyer who was signing receipts for undelivered goods knew that the seller would then use them to obtain bank finance and that, absent some unforeseen intervention, the bank would pay against the false receipts. Longmore J (as he then was) explained this at [26]:

"... Mr. Ward accepted in his statement (para 38) that one of the reasons Win wanted the clean receipts was to provide comfort to the bank that Win did have on-going business with SCL. So notwithstanding protestation to the contrary, he did intend that the false clean receipts should be shown to the bank just as much as, in the past, true clean receipts had been shown to the bank. He knew in the past that the bank had paid against clean receipts; in my judgment he intended (in the legal sense of the word) that the bank would pay against clean receipts in the future. I say in the legal sense of the word because my finding is that Mr. Ward appreciated that (barring some unforeseen intervention) the bank would pay against the false clean receipts. This is the formulation now used in the criminal law when a jury is to be directed on the question of intention for the purpose of a murder or other criminal charge, see R -v-Woollin [1999] 1 A.C. 82 approving R -v- Nedrick [1986] 1 W.L.R. 82. In my judgment it is equally applicable when one has to assess intention for the purposes of the law of deceit."

256. There was, however, a dispute as between Mr Saini QC and Mr Quest QC as to whether it is necessary that the maker of the representation should have

both the requisite knowledge that the representation is false or be reckless as to whether it is true or false (requirement (ii)) *and* the requisite intention that the representee should act on the representation (requirement (iii)). Mr Saini QC referred, in this context, to the principle that a company is liable where one employee or agent with the necessary dishonest state of mind directs or allows another employee to make a false representation. He suggested, therefore, that it is not necessary that dishonesty or guilty knowledge which makes a company liable for fraud need be found in the maker of the statement. Mr Saini QC referred, in particular, to the following passage in the judgment of Moore-Bick LJ (at first instance) in ***Man Nutzfahrzeuge AG and others v Freightliner Ltd*** [2005] EWHC 2347 (Comm) at [156]:

"*It is obvious that, because it is a fictitious person, a company can only act through one or more natural persons and therefore, as the decisions in El Ajou v Dollar Land Holdings Plc and the Meridian case show, in order to determine whether the company is liable in respect of any particular act or omission it is necessary to identify the natural person who represented the company for that particular purpose and who can therefore can be regarded as embodying for that purpose what is sometimes called its controlling mind and will. When seeking to identify the person who is to count as the company for the purposes of a substantive rule of law it is necessary to consider the nature and policy of that rule. The essence of fraudulent misrepresentation, so far as is relevant for this case, is making a statement that is known to be untrue intending that the person to whom it is made will rely on it. Liability therefore depends on the conjunction of a false statement and a dishonest state of mind. In a case where it is said that a company has made a fraudulent misrepresentation the first step must be to see whether a false statement has been made by someone who is authorised to speak on the company's behalf. Once that has been established the starting point in deciding whether the company acted dishonestly must be to enquire into the state of mind of the person who made the statement. However, if that person was unaware that the statement was false, it may be necessary to enquire into the state of mind of other persons who directed him to make it or who allowed it to be made.*"

257. Mr Quest QC submitted, however, that Marme must identify *an* employee with both the requisite intention and the requisite knowledge and that it cannot establish fraud by aggregating, in effect, the intention and knowledge of different employees. In this respect, Mr Quest QC relied upon the statement of principle in *Bowstead & Reynolds on Agency* at paragraph 8-815, where ***Armstrong v Strain*** [1952] 1 KB 232 is cited, as follows:

"***Deceit: division of ingredients:*** *The tort of deceit, where because of its connection with contract situations agency terminology is frequently used, raises special problems where agents are involved, in so far as it requires a false statement made, with the intention that it should be acted on, 'knowingly, or without belief in its truth, or recklessly, careless whether it be true or false'. Is the principal to be liable to a third party where (for instance) the agent made a representation innocently, believing it to be true, and the principal knew of the untruth of the statement but did not know that it was being made? In such case no individual is guilty of personal fraud: there is an 'innocent*

division of ingredients'. But are the acts and minds of principal and agent to be regarded as so far one that, by taking the agent's statement and the principal's knowledge together, the principal can be held liable to the third party in deceit? There was some authority that they were: but the law was later clarified by the decision of the Court of Appeal in Armstrong v Strain and is best stated in a series of propositions.

(a) The principal is liable if he authorised the agent to make the false representation which he (the principal) knew to be untrue (or did not believe to be true), whether or not the agent knew the truth.

(b) The principal is liable if, while not expressly authorising the agent to make the false representation, he knew it to be untrue and was guilty of some positive wrongful conduct, as by consciously permitting the agent to remain ignorant of the true facts, so as to prevent the disclosure of the truth to the third party, if the third party should ask the agent for information, or in the hope that the agent would make some false representation. The agent's representation when made would of course require to be within the scope of his actual or apparent authority.

(c) The principal is liable if the agent made the false representation fraudulently, it being within the scope of his actual or apparent authority and within the course of his employment, to make such a representation, sometimes even where the representation reached the third party by way of another innocent agent, or by way of the innocent principal himself, because in such a case the innocent second agent or principal may be no more than a conduit pipe for the fraud of the guilty agent.

(d) The principal is not liable if the agent made the false representation innocently, the principal knowing the true facts but not having authorised the agent to make the representation, nor knowing that it would be made, nor being guilty of fraudulent conduct as in (b) above.

(e) Conversely, the principal is not liable if he himself made the false representation innocently, notwithstanding that an agent knew the true facts."

258. Mr Quest QC went on to submit that the need for the individual to appreciate that the representation was being made presents a particular difficulty in the case of implied representations which, by their nature, are not articulated and so may not be present even to the mind of the representor. He referred in this context to ***Cassa di Risparmio*** at [221], as previously cited, highlighting specifically Hamblen J's reference to somebody not being able to *"make a fraudulent statement unless he is aware that he is making that statement"*, as well as the general expectation being that it is *"reasonably apparent to both representor and representee that the implied representation alleged was being made*". Mr Quest QC suggested, furthermore, that the difficulty which he identified appears to have been in the Court of Appeal's mind in ***PAG*** in view of this at [158]:

"*There is therefore no need to consider whether the judge's conclusion that fraud had not been proved is correct. If we had concluded that the implied representation was false it would be necessary to decide how the normal rule, that, for a finding of fraud, the representor must have intended to make a representation that he knew to be false (see Akerhielm v De Mare [1959] AC 789, 804, per Lord Jenkins, Gross v Lewis Hillman Ltd [1970] Ch 445, per Cross LJ and the Raiffeisen v RBS case [2011] 1 Lloyd's Rep 123, paras 338—340, per Christopher Clarke J) can apply to an implied representation when the implication is not present to the representor's mind. It may be the case that an implied representation of this kind can never (or quite rarely) be fraudulent; on the other hand recent decisions about dishonesty, such as Barlow Clowes International Ltd v Eurotrust International Ltd [2006] 1 WLR 1476 and Ivey v Genting Casinos UK Ltd (trading as Crockfords Club) [2017] 3 WLR 1212, may be relevant. It is unnecessary for us to resolve that question in this case.*"

It was Mr Quest QC's submission that this is the position in the present case given that the EURIBOR Representations, assuming that they were made, were impliedly made not by Mr Moryoussef but by the RBS personnel who were responsible for RBS entering into the Transaction and whose honesty has not been called into question by Marme.

259. Mr Saini QC disagreed, submitting that ***Man*** makes it clear that it is not necessary that knowledge and intention should be vested in a single individual. He made the point that it cannot be right to permit a situation to arise where, just because a person who makes a representation does not know it to be false, there should be no liability in fraud on the part of the company which employs that person as well as another employee who should be taken as knowing, at least in broad terms, that certain representations were being made and would know that those representation were untrue.

260. I agree with Mr Saini QC about this. Whilst I acknowledge that, as a general proposition, it is necessary for there to be both knowledge and intention in one person, and that it certainly ought never to be possible to aggregate as between two innocent agents to arrive at a finding that there has been fraud, it nonetheless does seem to me to be appropriate that, if one agent (or employee) knows that a representation is being made, or should be treated as knowing that a representation is being made even if the agent does not actually know this to be the case, and knows that that representation is false but does nothing to make that known, then the principal (or employer) is liable in fraud. I am strengthened in this view by the fact that it is in line with the position described by Males J (as he then was) in ***UBS AG v Kommunale Wasserwerke Leipzig GmbH*** [2014] EWHC 3615 (Comm). In that case, which was the subject of an appeal but not on this issue (see later in the context of agency) Males J recorded the submission which he was considering at [755]:

"*So far as Mr Bracy is concerned, a question arises whether his knowledge and intention are for this purpose to be attributed to UBS. UBS submits that (as I have accepted) nobody in UBS apart from Mr Bracy and Mr Maron knew about the 'letter for K' episode; that their knowledge is not to be regarded as*

the knowledge of UBS; that by the time of the Depfa transaction, Mr Bracy was effectively no longer involved, and played no part in the decision to approach Depfa, in any provision of information to Depfa, or in any discussion or negotiation with Depfa; and that he was therefore not responsible for the making of any representation to Depfa. It is simply a case, according to UBS, of one agent or representative of UBS making a statement believing it to be true, even though another agent or representative not responsible for the representation and not being aware of its being made knows facts making it untrue."

Males J accepted at [756] that *"if this were such a case, there would be no fraudulent state of mind on the part of UBS"*, referring to a passage in the then edition of *Clerk & Lindsell* at paragraph 18-28, as follows:

"However, to render the principal liable in an action of deceit in such a case, it must it seems be proved that there was a fraudulent state of mind on his part: that is, that he intended the claimant to be misled or at the very least was indifferent as to whether he might be. Where a false representation has been made innocently by an agent acting within his authority, the mere fact that the principal knows the facts which render the representation false will not make the latter liable if he has not expressly authorised the representation or deliberately concealed facts from the agent with a view to the claimant being misled. So in Armstrong v Strain [1952] 1 KB 232 estate agents with general authority to make representations about a house on their books innocently told a purchaser that it was sound when, as the owner knew, it was not. The Court of Appeal upheld a finding that the owner was not liable to the purchaser in deceit."

As Males J went on to explain at [757], however, that is not always the position:

"The position is different, however, if the relevant knowledge and intention rest with the same individual within the organisation making the representation. The knowledge and intention need not be with the particular individual who makes the representation."

Males J, then, quoted from *Bowstead & Reynolds*, specifically the then version of the passage to which I have myself referred. Males J observed at [758] that:

"A footnote explains that the position is the same if the wrongful conduct was that of another agent of the principal acting in the course of his employment, the principal being innocent."

He, then, stated as follows at [759]:

"Chitty on Contracts (31st Edn, 2012) at para 6-052 is to the same effect, citing among other cases The Siboen and The Sibotre [1976] 1 Lloyd's Rep 293 at 320–321:

'if one agent makes a statement honestly believing it to be true, but another agent or the principal himself knows that it is not true, knows that the

statement will be or has been made, and deliberately abstains from intervening, the principal will be liable. In these circumstances the party with the guilty knowledge can himself be treated as being guilty of fraud.'"

As Males J put it, when dealing with the facts of the case which was before him, at [760]:

"Accordingly there are four matters to be considered. The first is whether Mr Bracy's knowledge of the dishonesty of Value Partners and Mr Heininger is to be regarded as the knowledge of UBS. The second, on the hypothesis that only Mr Bracy had the relevant knowledge, is whether Mr Bracy intended that the representation should be made to Depfa (or a bank in the position of Depfa). The third, on the same hypothesis, is whether his intention is likewise to be regarded as the intention of UBS. The fourth is whether the hypothesis that only Mr Bracy had the relevant knowledge is correct."

261. As to the point which appeared to trouble the Court of Appeal in ***PAG*** at [158], Mr Saini QC submitted that, since a defendant facing a fraud claim is taken to intend the representee to rely on any representation which is made if such reliance is the natural and probable result of the representation having been made, so a defendant should be treated as having intended a claimant to rely on an implied representation which he himself may never have thought about. In this respect, Mr Saini QC relied upon what Christopher Clarke J had to say in ***Raiffeisen*** at [222]:

"*The rule is less easy to apply in respect of implied rather than express statements because the representor may not appreciate what a court later holds to be the implications of what he said. Nevertheless, if he intended what he said to be relied on by the representee in deciding whether to contract he must be taken to have intended that the representee should rely on the objective meaning of what he said*."

In that case the position was not on all fours with the present case, however, since the focus was on what the *representor* should be regarded as intending the representee to do. In the present case, by way of contrast, Mr Moryoussef was not himself making any representation, whether express or implied. As a matter of principle, nonetheless, I consider that Christopher Clarke J's approach is as applicable to implied representations made by other employees or agents as it is to a case where a single person (the representor) is involved.

262. Mr Quest QC submitted that, the more complex or obscure the implied representation, the less appropriate it would be to conclude that the agent/employee who has not made the implied representation but knows of its untruth should be regarded as having intended that the representee should rely on that implied representation. In this case, Mr Quest QC submitted, the EURIBOR Representations fall into this category, and so it would not be right to attribute to Mr Moryoussef the requisite intention. The difficulty with this submission, however, is that, as Christopher Clarke J made clear, what the representor is taken as having intended is the *"objective meaning"* of whatever representation has been made. If, therefore, objectively, certain implied representations are to be treated as having been made, then, there is no

legitimate scope to argue that the agent/employee who has not made the representation is to be regarded as not having intended those implied representations to have been made. Of course, at this stage of the analysis, I am assuming (contrary to what I have decided) that the EURIBOR Representations were made and that they had the meaning which has been alleged by Marme. Given this, it seems to me that I must assume in Marme's favour that Mr Moryoussef intended that Marme should rely upon the EURIBOR Representations with that meaning attributed to them. Put differently, although I accept that it may be harder to show that a complex or unusual representation should be implied, since the fraud question is being considered on the assumption that EURIBOR Representations were implied and so on the assumption that a reasonable person in Marme's position would have understood them to have been made, as long as Mr Moryoussef was aware of the conduct underlying them, the complexity or unusual nature of the representation are irrelevant. It follows that, making the assumptions which I do, Mr Quest QC's objection falls away.

263. The real question, in the circumstances, is not as to this but as to whether Mr Moryoussef knew that any representations (as it happens, the EURIBOR Representations) were being made by others at RBS or should be treated as knowing that such representations were being made even if he did not actually know this to be the case. If he did or if he is to be treated as doing so, then, the requirements identified by Jackson LJ in ***Ludsin*** at [77(ii)] and [77(iii)] are satisfied; if not, then, the fraud case (inasmuch as it depends on Mr Moryoussef being fraudulent) must fail. As Mr Quest QC put it, if the EURIBOR Representations were false, then, necessarily, Mr Moryoussef knew the facts which made them false, but Marme must still prove that Mr Moryoussef intended Marme to rely on the representations and it is not enough merely to do as was suggested by Mr Saini QC, Mr Tomson and Mr Rose in their written opening submissions which was to infer that this was Mr Moryoussef's intention because *"the natural and probable result of Mr Moryoussef and others failing to share their knowledge with the world—and hence what they are taken to have intended—was that parties, such as Marme, would continue to rely on the EURIBOR Representations"*. As Mr Quest QC explained, to make such an inference skips a stage in the reasoning in a case such as the present where the person said to have the requisite intention is not the person who made the representation. It is for this reason that the prior question necessarily arises. That is whether Mr Moryoussef was aware that RBS had engaged in conduct towards Marme which was capable of giving rise to any implied representations at all. Mr Quest QC submitted that there is no evidence to support such a conclusion and no reason to presume it since Mr Moryoussef had no contact with Marme and no involvement in the Transaction. Indeed, it is clear that, at the time, Mr Bates and Mr Goodwin did not even know who Mr Moryoussef was, Mr Moryoussef being part of an RBS group trading in Euro interest rate derivatives which traded short-term rates whereas the market hedging of the Swaps would have been carried out by traders in long-term rates (such as Simon Wilson, Liam Baker and Andy Bruce).

264. Mr Saini QC, implicitly recognising that the prior question identified by Mr Quest QC does, indeed, need to be addressed, submitted that it is sufficient for these purposes that Mr Moryoussef knew that RBS was entering into swaps transactions and that he should be taken as having been aware of the importance of EURIBOR to such transactions. I tend to agree with Mr Saini QC about this. I consider that, whether or not Mr Moryoussef was sitting next to Mr Goodwin or other members of the deal team which undertook the Transaction, he should be taken to have known, at a minimum, that there were people within RBS like Mr Goodwin who were entering into swap transactions referenced to EURIBOR. To the extent, therefore, that any representations can be implied from the fact of RBS entering into swaps referenced to EURIBOR, I consider that Mr Moryoussef should be regarded, without more, as having had sufficient awareness and knowledge.

265. I should mention that Mr Saini QC went further, however, submitting that, if necessary, the Court should conclude that, in all likelihood, Mr Moryoussef was aware of the Transaction itself. Mr Saini QC referred in this regard to Mr Goodwin having agreed in cross-examination that it was *"very likely"* that the Euro swaps trading team positioned directly next to Mr Moryoussef's team in the RBS structure chart which was produced at trial was the team with which he had liaised before the Transaction was completed. He confirmed, indeed, that a member of that team, most probably Simon Wilson, had been the trader on the execution call with Marme as regards the Transaction. It was Mr Saini QC's submission that there is no reason to believe that there was any 'Chinese wall' between these teams and that, given his other involvement in EURIBOR trading, there is every prospect that Mr Moryoussef would have known about the Transaction itself – the more so, given that it was at that stage the largest real estate transaction in Europe. Although I have taken these further submissions into account, I do not feel able to accept them since they require inferences to be made which, in my view, go somewhat too far. That is the case even though I acknowledge Mr Saini QC's associated submission that it would have been open to RBS to adduce evidence from Mr Moryoussef's superiors, Mr Liddy and Mr Nygaard, as to what Mr Moryoussef did or did not know about the Transaction. It is, in any event, unnecessary that I should base my decision on this further point in view of my earlier conclusion as to what Mr Moryoussef should be taken to have known.

266. It follows that, in my view, Marme has satisfied the requirements identified by Jackson LJ in ***Ludsin*** at [77(ii) and (iii)] by establishing what Mr Moryoussef both knew and intended. In consequence, it is not strictly necessary to go on and consider Marme's further case that the Court should conclude that there were others at RBS (besides Mr Moryoussef) who were fraudulent. Mr Saini QC's position was that, whilst it was right to point out, as Mr Quest QC did, that Mr Moryoussef is the only identified person alleged by Marme to have been fraudulent, this was only because Marme was not in a position to name any other individual but that did not mean that it is not open to Marme to put forward a fraud case which extended beyond Mr Moryoussef. Although I am not altogether convinced that it is open to Marme to adopt so unspecific an approach since there is a clear and longstanding requirement to allege fraud in clear and specific terms (a requirement which would typically entail

identifying any alleged fraudster), nonetheless, in the particular circumstances of the present case and since, as will appear, my ultimate conclusion is that Marme has not established fraud on the part of any other individual, I propose to address the substance of Marme's case at trial rather than to treat Marme as somehow precluded from advancing the wider fraud claim.

267. Mr Saini QC submitted that there are two reasons why in this case the Court should conclude that others (besides Mr Moryoussef) had the relevant knowledge and intention. First, he suggested, an adverse inference to this effect should be drawn from the fact that RBS destroyed Mr Moryoussef's personnel file as well as, secondly, from RBS's failure to call witnesses who could have spoken to RBS's knowledge. I see no merit, however, in either of these points.

268. As to the first, it will be recalled that I have previously addressed a submission made by Mr Saini QC concerning the suggested non-disclosure of documentation. I need not repeat what I had to say about this here, not least because the criticisms which in the present context are made are specific: that RBS destroyed Mr Moryoussef's personnel file on 13 October 2016, and so after the commencement of these proceedings. In this respect, Mr Saini QC relied upon ***The Ophelia*** [1916] 2 AC 206. That was a case in which the Privy Council condemned a German hospital ship as a prize, the crew having thrown overboard the evidence which might have disproved the allegation that the ship was used for military signalling and having destroyed the accounts relating to the stock and consumption of signal lights. Sir Arthur Channell said this at pp. 229-230:

"*In the cases as to spoliation of documents, the point has frequently arisen on the preliminary hearing on documents, and the question has been debated whether or not further proof should be allowed. This point cannot arise under the present procedure, and it may be that in some respects the old doctrine was rather technical. The substance of it, however, remains and is as forcible now as ever, and it is applicable not merely in prize cases, but to almost all kinds of disputes. If anyone by a deliberate act destroys a document which, according to what its contents may have been, would have told strongly either for him or against him, the strongest possible presumption arises that if it had been produced it would have told against him; and even if the document is destroyed by his own act, but under circumstances in which the intention to destroy evidence may fairly be considered rebutted, still he has to suffer. He is in the position that he is without the corroboration which might have been expected in his case.*

In the present case there are two separate destructions of documents—one the throwing overboard of documents when the vessel was about to be searched, the other the destruction of the accounts relating to the stock and the consumption of signal lights. As to the first, the Attorney-General admits that the destruction of the code book to prevent it getting into enemy hands is at least excusable. It is, indeed, so obvious that that must at any rate be done that complaint could not be made of it. But Captain Pfeiffer naively admitted that, when throwing overboard documents to avoid their getting into enemy hands, he acted on the principle of throwing overboard too many rather than too few,

and adds that the Morse signal book contained absolutely innocent messages, which could be read by any one. That probably was so, but it may also have contained some which were not so innocent; and it is pretty obvious that when he threw it overboard he either knew it did or was not sure that it did not.

The Morse signal book could not have disclosed or given any key to the wireless signal code, so there could be no reason for destroying it, except the consciousness that as something wrong had in fact taken place it might be disclosed by the book. As pointed out, a wireless signal log might have been kept in such a way as not to disclose the code or give any key to it. The destruction of the stock book of signal lights cannot be excused by any fear of disclosing a secret code. It is suggested that it was innocent because the guard on the ship was told it was being done, and that British officers had already examined it. British officers would not in the first instance examine minutely documents of that kind, but would assume that if wanted they could be looked over afterwards. Pfeiffer and the paymaster doubtless knew what the signal lights really were for, and hoped that the British, who up to that time had made no point about it, would not find it out, so they destroyed the book. Nothing that can be called a reason was given for doing so. Even if the books had become waste paper, why destroy them?

Their Lordships are of opinion that Captain Pfeiffer and the other witnesses have by their acts put themselves in such a position that their evidence cannot be relied on; that the evidence discloses facts of which no satisfactory explanations are or can be given; and that although on the Crown affidavit evidence some ambiguities have been pointed out which have not been cleared up by cross-examination or re-examination, yet there are incriminatory matters in those affidavits to which no answer has been given."

269. Also of interest is *Hollander, Documentary Evidence* at paragraphs [11-23]-[11-27]:

"*… where a person who is not yet party to litigation destroys documents which are relevant to the prospective litigation, it is not straightforward to hold that he has done something which enables the court to draw inferences against him unless what he has done was with deliberate intent. Where there is no legal duty to retain documents because the litigation has not commenced and no deliberate intent, the court will need to examine the basis for the drawing of inferences. But there should be circumstances, where the court considers the duty to retain documents, even prior to litigation, was sufficiently obvious that it considers it entitled to draw adverse inferences. Litigation must surely be in reasonable prospect before the principle can apply. An example might be where in pre-action correspondence the lawyers for one party asked the other to retain particular classes of documents, and the documents are subsequently destroyed albeit not deliberately. There seems no reason why the court should not draw adverse inferences where a party has destroyed documents in breach of Practice Direction 31B, treating that as the relevant duty. Once proceedings have started, even if the time for disclosure has not yet arisen, there should be no difficulty in an appropriate case in drawing adverse inferences*."

270. It was Mr Saini QC's submission that this is a case where an adverse inference should be drawn since there is no good reason for the destruction of the documents and, indeed, litigation having been commenced by RBS itself (Marme brought its claim subsequently) at the time that the file was destroyed, it is all the more appropriate that an inference should be drawn. I cannot agree with Mr Saini QC about this, however, since the fact of the matter is that the evidence before the Court is that the destruction was inadvertent. That is not challenged by Marme, and nor realistically could it be. As such, whilst there may not be a good reason why the file was destroyed, nor is there a bad reason in the sense that a positive decision was made to destroy when plainly the file should not have been destroyed. In addition, Marme did not challenge the evidence given by Mr Craig Berry (RBS's Head of Litigation and Investigations) that no disciplinary investigation was carried out into Mr Moryoussef's activities before he left RBS in September 2009. It is distinctly unlikely, in the circumstances, that the personnel file would have contained material showing that RBS staff had any material awareness as to any misconduct on Mr Moryoussef's part. It would, for these two reasons, therefore, be inappropriate to draw the adverse inference which Mr Saini QC suggested.

271. Similarly, I am wholly unpersuaded that such an inference should be drawn from RBS's failure (if that is the right word) to adduce evidence from individuals at RBS to say that nobody at RBS knew about Mr Moryoussef's misconduct. Mr Saini QC submitted that, given RBS's engagement with the various regulatory authorities to which I have previously referred, it is highly likely that there would be RBS witnesses at a senior or even Board level who would have been able to give evidence as to what was known. Mr Saini QC contrasted the position in the present case with what RBS did in ***PAG***, which was to adduce evidence from a number of senior RBS individuals who knew something about submissions and derivatives trading. In ***PAG*** also, it should be noted, Asplin J was asked to draw adverse inferences - from the fact that other RBS employees were not asked to give evidence. She dealt with this point at [485], explaining that, although she regarded RBS's failure to call certain witnesses as "*surprising*", she did not consider it appropriate to draw any adverse inference having regard to the approach described by Brooke LJ in ***Wiszniewski v Central Manchester Health Authority*** [1998] PIQR 324 at p. 340, namely:

> "*(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
>
> *(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*
>
> *(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words there must be a case to answer on that issue.*

> *(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified*."

I agree with Mr Quest QC that, applying the formula described by Brooke LJ to the present case, it would not be right to draw an adverse inference since it is unclear to me that any of the witnesses whom Mr Saini QC suggested ought to have given evidence were witnesses *"who might be expected to have material evidence to give on an issue"* in this action (principle (1)). It is unclear also how this can really be said to be a case in which there is "*evidence, however weak, adduced"* by Marme *"on the matter in question before the court is entitled to draw the desired inference"* and so *"in other words … a case to answer on that issue"* (principle (3)). On the contrary, the case that other RBS personnel (besides Mr Moryoussef) were aware of Mr Moryoussef's misconduct is not supported by any of the evidence before the Court, as illustrated by the material to which I have already referred and my further consideration of the EU Commission Decision in what follows. In the circumstances, I do not consider that any adverse inference should be drawn from RBS's failure to call witnesses concerning the settlement.

272. It is worth also, in this respect, having in mind the following passage in ***PAG*** at [154] where the Court of Appeal considered the issue of the absence of senior management witnesses:

> "*No litigant is obliged to call witnesses to satisfy the curiosity or enthusiasm of his opponent. It was always open to PAG to subpoena any witness it thought would be helpful to the court. The fact that a party who might be expected to produce witnesses does not do so may sometimes speak volumes but it is a matter for the judge to decide whether it does so in a particular case. The critical question in the present case was whether manipulation of GBP LIBOR had taken place. The critical witness for that purpose was Mr Thomasson. If he was believed, there was nothing relevant for senior management to know; if he was not, RBS's case collapsed anyway. The judge did say (para 461) that RBS's decision not to call Mr Cummins (and a Mr Nielsen) in connection with the allegations of lowballing did not reflect well on RBS and repeated this in her decision on whether RBS had been fraudulent (para 485). She was well aware of Mr Lord's case (para 479) but in the end was not prepared to draw an adverse inference. We do not think the judge can be criticised*."

In the present case, I recognise that it may have been useful for RBS to have called witnesses to speak to the question of what was known concerning Mr Moryoussef's activities. However, besides the points which I have already made, it is also significant that it was only at trial that Marme made it clear that it was its case that individuals at RBS other than Mr Moryoussef knew of EURIBOR manipulation. As Mr Quest QC pointed out, although Marme had pleaded reliance on Recital (55) of the EU Commission Decision, it never sought to identify particular individuals at RBS. This case is, accordingly, a

more striking case even than ***PAG*** since in that case specific allegations were made about the knowledge of particular RBS individuals.

273. I come, then, to Mr Saini QC's submission that RBS admitted to the EU Commission that it had the relevant knowledge, as demonstrated (exclusively since Marme relies upon nothing else) by the EU Commission Decision, specifically Recital (55) which has previously been quoted but which it is convenient to repeat:

"*For the periods of their respective involvement in the infringement, Barclays, Deutsche Bank, Société Générale and RBS accepted that they were aware of the general scope and the essential characteristics of the infringement or were able reasonably to foresee this conduct and prepared to take the risk.*"

Although Mr Saini QC made a number of submissions concerning Recital (55), his core submission was simple: that Recital (55) shows that RBS admitted that, at a corporate level, it was aware of Mr Moryoussef's attempts to manipulate EURIBOR, and so that RBS should be taken as having admitted knowledge internal to RBS which went beyond Mr Moryoussef's own knowledge.

274. I cannot accept that Mr Saini QC is right about this for several reasons. First, Recital (55) says nothing about the awareness of particular individuals within RBS but is, perfectly obviously, concerned only with corporate knowledge. It is that corporate knowledge which is all that mattered to the EU Commission. Moreover, for corporate knowledge purposes, Mr Moryoussef's own knowledge would be sufficient. This is clear, as Mr Quest QC submitted, from the fact that the EU Commission is concerned with anti-competitive behaviour under Article 101(1) TFEU, as is apparent from Recital (49) which is in these terms:

"*According to settled case-law, the agreements and concerted practices referred to in Article 101(1) of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. It follows, that an infringement of Article 101(1) of the Treaty may result not only from an isolated act but also from a series of acts or from a continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute, in themselves and taken in isolation, an infringement of Article 101(1) of the Treaty. When the different actions form part of an overall plan, because their identical object distorts competition within the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole."*

This is reinforced by Recitals (50) to (52), Recital (52) in particular stating as follows:

"In order to establish that an undertaking participated in such a … infringement the Commission must show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of those same objectives, or that it could reasonably have foreseen it, and that it was prepared to take the risk."

The position is, then, made all the more clear by Recital (53) which deals with the particular case and states:

"The factual circumstances on the file such as the content of the contacts, the methods used and the objective of the various agreements and/or concerted practices in question, show that the bilateral collusive contacts between the [settlement parties] were linked and complementary in nature, since each of these actions was intended to deal with one or more consequences of the pattern of competition and, by interacting, contributed to a scheme having a single objective. Indeed, the [settlement parties] shared a common purpose which was to distort the normal course of pricing components for EIRDs through the forms of conduct described in Section 4. This object of the infringement remained the same throughout the whole infringement period. Each [settlement party] was involved in at least some of these forms of conduct and with varying degrees of intensity. The [settlement parties]' various collusive contacts followed comparable patterns and covered overlapping topics. A stable group of individuals from the [settlement parties] was involved in the anticompetitive activities during the respective period of each [settlement party]'s involvement. The different contacts between different pairs of [settlement parties] often took place in parallel or in close temporal proximity to each other."

Recital (54), then, concludes with this:

"The infringement described in Section 4 therefore qualifies as one single and continuous infringement as regards the respective periods of involvement of Barclays, Deutsche Bank, Société Générale and RBS."

275. I should mention in this respect that Mr Quest QC submitted that, once it is appreciated, as Recital (52), in particular, makes clear, that it was necessary, in order to prove that RBS participated in an infringement of Article 101(1) TFEU, that RBS was aware of the conduct of the *other banks* within the cartel, it can, then, be appreciated that what Recital (55) has as its focus is not RBS's knowledge of its own conduct but RBS's knowledge of other banks' conduct. In support of this, Mr Quest QC cited *Bellamy & Child: European Union Law of Competition* (7th edn, 2013) at paragraph [2-076], as follows:

"*The mere fact that there is an overall plan linking an infringement in which an undertaking participated and a wider cartel does not suffice to render that undertaking responsible for the whole cartel. It must be shown that the undertaking knew or ought to have known, when it took part in the*

infringement, of the offending conduct planned or put into effect by other undertakings in pursuit of the same overall plan."

I am, however, unpersuaded by this submission because it overlooks the fact that Recital (55) refers to an *"infringement"* in which Barclays, Deutsche Bank, Société Générale and RBS were involved and so an acceptance that each of those entities (including RBS) had the awareness described in Recital (55) must entail the acceptance not only of the role played in the *"infringement"* by the other banks but also by RBS itself.

276. Secondly, I agree with Mr Quest QC when he submitted that, as regards the EU Commission proceedings, it was irrelevant to determine whether anybody else at RBS knew of the misconduct because, for the purposes of a finding of an *"infringement"*, any anti-competitive conduct on the part of an employee is attributable to the undertaking by which he is employed. That was made clear by the CJEU in ***VM Remonts v Konkurences Padome*** [2016] Bus LR 1176 at [24], in which one of the issues raised was whether the anti-competitive conduct of a contractor was attributable to an undertaking. The question referred to the CJEU was whether Article 101(1) of the TFEU must be interpreted as meaning that an undertaking may be held liable for a concerted practice on account of the acts of an independent service provider which was supplying it with services. Before determining this question, the CJEU considered the principles applicable to employees, observing at [23] that:

"*An employee performs his duties for and under the direction of the undertaking for which he works and, thus, is considered to be incorporated into the economic unit comprised by that undertaking…"*.

As a result, the CJEU explained at [24]:

"*For the purposes of a finding of infringement of EU competition law any anti-competitive conduct on the part of an employee is thus attributable to the undertaking to which he belongs and that undertaking is, as a matter of principle, held liable for that conduct*."

Although this was a case which was concerned with attribution of conduct rather than awareness, nonetheless, as Mr Quest QC pointed out, awareness is a necessary element of liability for an *"infringement"*. It follows that, for competition law purposes, Mr Moryoussef's awareness of his own wrongdoing would be sufficient since he is an employee of RBS and so his knowledge can be attributed to RBS.

277. Accordingly, I reject Marme's case that others at RBS should be regarded as having awareness of relevant EURIBOR-related misconduct. As I have explained, however, Mr Moryoussef's awareness is sufficient for Marme's purposes as regards the falsity issue. It follows that, had it been necessary, I would have concluded that fraud had been made out by Marme in that Mr Moryoussef's knowledge would, for these purposes, have been sufficient and it is not necessary that other people within RBS also had the relevant knowledge.

Reliance

278. The next issue to be considered is that of reliance since it was common ground that, in order to succeed with a misrepresentation claim, a claimant must show that it relied upon the alleged misrepresentation. That applies whether the misrepresentation claim is founded on the existence of an express representation or, as in the present case, implied representations. Either way, there needs to be reliance on the part of the representee.

279. There are two aspects to this issue since, in the first place, a claimant must establish that it was aware of the representation at the time that it was made and, secondly, the claimant must show a causal connection between the making of the representation and its decision to enter into the contract which ensued from the making of the representation.

280. This, again, is uncontroversial and is the position irrespective of whether the representation is express or implied. It was not, however, agreed as between Mr Saini QC, on the one hand, and Mr Quest QC and Mr Howe QC (who made detailed submissions on the reliance issue), on the other, as to what precisely a claimant in Marme's position must establish in order to make good its causation case, specifically whether it is enough that the claimant shows that it *might* have acted differently if the representation had not been made or whether it must show that it *would* have acted differently if the representation had not been made. Mr Saini QC submitted that *might* is all that needs to be shown regardless of whether the misrepresentation is fraudulent or innocent (or negligent), whereas Mr Quest QC and Mr Howe QC submitted that *might* applies only to fraudulent misrepresentations and that *would* applies to non-fraudulent misrepresentations. I will come back to that issue in a moment, after dealing, first, with the (prior) issue of awareness.

Awareness

281. That there is the awareness requirement is made clear in a number of authorities and textbooks. As to the latter, Mr Howe QC cited a number of examples, starting with *J Cartwright, Misrepresentation and Non-Disclosure* (4th Ed., 2017) where this is stated at [3-50] (*"The requirement of a causal link between statement and loss"*):

> *"Whichever remedy is sought for misrepresentation, it will be necessary to establish an adequate link between the statement and the consequence from which the representee claims to be relieved. If the claim is for damages, the question is whether the statement caused the loss. If the claim is for rescission of a contract, the inquiry is as to the causal link between the statement and the claimant's entry into the contract. The language used in the different remedies, and the legal tests employed for them, will vary, but generally the issue is similar: it is an issue of the claimant's reliance on the statement, and whether the statement caused the harm in issue. A false statement, even one made fraudulently, will not be actionable as a misrepresentation by the person to whom it was addressed if it had no impact on his actions, nor otherwise caused him loss. This means that the statement must have been present to the claimant's mind at the time when he took the action on which he bases his*

claim, but the claimant need not prove that he believed that the statement was true: it is sufficient that, as a matter of fact, he was influenced by the misrepresentation. … .”

Mr Howe QC relied also on what is stated in *Chitty on Contracts* (32nd Ed., 2015) at [7-035], as follows:

“*It is essential if the misrepresentation is to have legal effect that it should have operated on the mind of the representee. It follows that if the misrepresentation did not affect the representee’s mind, because he was unaware that it had been made, or because he was not influenced by it, or because he knew it was false, he has no remedy.*”

Similarly, *Spencer Bower & Handley: Actionable Misrepresentation* (5th Ed, 2014), another textbook cited by Mr Howe QC, has this to say at [6-01]:

“*The representee’s state of mind (inducement) when changing his position after receiving the representation is relevant in all cases of misrepresentation … He must establish that the misrepresentation operated on his mind and caused him, or helped to cause him, to act as he did.*”

So, too, *O’Sullivan, Zakrzewski & Elliott, The Law of Rescission* (2nd Ed., 2014) contains the following passage at [4.101]:

“*Where implied representations are pleaded, the claimant must prove that he understood that the representations alleged were in fact made; otherwise there can be no reliance*”.

282. As Mr Howe QC went on to point out, unsurprisingly perhaps given that the textbooks, of course, reflect the decided cases, in ***Raiffeisen*** Christopher Clarke J at [87] stated as follows:

“… the claimant must show that he in fact understood the statement in the sense (so far as material) which the court ascribes to it: Arkwright v Newbold (1881) 17 Ch D 301[13]; Smith v Chadwick (1884) 9 App.Cas 187; and that, having that understanding, he relied on it. This may be of particular significance in the case of implied statements.”

He went on at [187] to say this:

“It is not, therefore, necessary for the representee to establish that he would have acted differently if he had known the truth. And it may not be sufficient either. If it were, a claimant who gave no thought to any representation, or did not understand it to have been made, might be entitled to recover.”

283. ***Raiffeisen*** was cited by Hamblen J in ***Cassa di Risparmio*** at [224]:

“*As further observed in Raiffeisen, at [87], the claimant must show that he in fact understood the statement in the sense (so far as material) which the Court ascribes to it; and that having that understanding, he relied on it. Analytically, this is probably not a separate requirement of a misrepresentation but rather is part of what the claimant needs to show in order to prove inducement*”.

Subsequently, in ***Foster*** Hamblen J cited this passage at [100]-[101]:

"… the lack of evidence from Mr Foster that he understood the representations to the effect alleged were being made is highly relevant to the issue of inducement – see the CRSM case at [224]. Unless one understands the representation is being made, it is difficult to see how it can be said to have been relied upon. Mr Foster's evidence was that had he known at the time that the factory had financial issues he would not have signed the contract. However, the case is one of positive representation, not non-disclosure. He gives no evidence that he understood that the Defendants were representing to him or telling him that the factory had no financial issues, still less that they were making the more specific representations set out in the pleading. I am accordingly not satisfied that inducement has been sufficiently proved."

So, too, in an earlier implied representation case, ***Brown v Innovatorone***, Hamblen J stated this at [906]:

"*In so far as the Claimants were alleging implied representations it was incumbent on them to prove that such representations were understood to have been made since otherwise there could be no reliance. In relation to most of the alleged implied representations there was no such evidence, or no sufficient evidence, of any such understanding from Lead Claimants or IFAs. Equally, in so far as deceit was being alleged, it was incumbent on the Claimants to prove that the alleged representor understood a representation to the alleged effect to have been made. In relation to most of the alleged implied representations there was no such evidence, or no sufficient evidence, of any such understanding*."

284. Another, somewhat earlier, authority also dealing with implied representations is ***IFE Fund*** in which Toulson J stated as follows at [78]:

"*…it is essential for a misrepresentation to have legal effect that it should have operated on the mind of the representee. It follows that if a representation did not affect the representee's mind, because he was unaware that it had been made, or because he was not influenced by it, or because he knew that it was false, the representee has no remedy*."

Similarly, more recently, in another implied representation case, ***Leni Gas & Oil v Malta Oil*** [2014] EWHC 893 (Comm), Males J explained at [15] that:

"*…a claimant must show that it understood that the representation alleged was being made to it. Without such an understanding, there can be no question of any reliance on the representation.*"

285. Although Mr Saini QC did not take issue with any of these textbooks or authorities, he nonetheless submitted that, when implied representations are being considered, there are special considerations which mean that the representations should be regarded as having been present in the representee's mind even if the representee did not give the representation any conscious thought and that that is all the more likely to be appropriate if it is a case where the 'helpful test' in ***Geest*** is made out. The difficulty with this

submission, however, is that it is not supported by authority – indeed, Mr Saini QC did not himself identify any authority which supported his submission. On the contrary, such authority as there is points in the opposite direction. Thus, and whilst nonetheless acknowledging that the case was not directly on point since it was concerned with an express misrepresentation claim, Mr Howe QC was able to point to one of the authorities to which Christopher Clarke J referred in ***Raiffeisen*** at [87], namely ***Arkwright v Newbold*** (1881) 17 Ch 301 and this statement on the part of Cotton LJ at p. 324:

"*In my opinion it would not be right in an action of deceit to give a plaintiff relief on the ground that a particular statement, according to the construction put on it by the Court, is false, when the plaintiff does not venture to swear that he understood the statement in the sense which the Court puts on it."*

As Mr Howe QC observed, this passage was cited with approval by Asplin J in another express representation case, ***Bonham-Carter v SITU*** [2012] EWHC 3589 (Ch), at [131], as supporting the proposition that "*the representee must establish that he subjectively interpreted the representation in the sense in which the court has found it to be false*". It was also, previously, cited by Rix LJ in ***The Kriti Palm*** [2007] 2 CLC 223 at [253] and, again, at [278] when dealing with the absence of evidence from a Mr Whitaker as to what his understanding was in relation to a particular conversation where the representation was said to have been made (see [274]). It was, indeed, the absence of similar evidence in a claim for misrepresentation where the critical words in a company prospectus (*"the present value of the turnover or output of the entire works"*) were ambiguous which led the House of Lords in ***Smith v Chadwick*** (1884) 9 App Cas 187 (Lord Bramwell dissenting on this point on the facts) to decide that the claim could not succeed. In that case, the claimant gave evidence merely that he understood the words to mean "*that which the words obviously conveyed*" without explaining the meaning he understood them to convey.

286. In the circumstances, I agree with Mr Howe QC when he submitted that these authorities support the proposition that a claimant in the position of Marme in the present case should have given some contemporaneous conscious thought to the fact that some representations were being impliedly made, even if the precise formulation of those representations may not correspond with what the Court subsequently decides that those representations comprised. If the position were otherwise, then, I agree with Mr Howe QC that the consequence would be that there would be a substantial watering down of the reliance requirement. Acceptance of Mr Saini QC's argument would also entail an impermissible application of the ***Geest*** (*"entitled to assume"*) test in a context in which it was never intended (even by Colman J) that that test should operate and in circumstances where the Court of Appeal in ***PAG*** has made it clear that the test is merely 'helpful' and is not determinative. As Mr Howe QC submitted, if Mr Saini QC were right, then, the reliance requirement would largely no longer apply in the case of implied representations, and that simply cannot be right. Furthermore, I agree with Mr Howe QC when he submitted that Mr Saini QC's submissions, in effect, remove the distinction between actionable non-disclosure (where there is no requirement to show that the

claimant understood or was aware of any representation at the time, only that the defendant failed to correct a mistaken assumption) and misrepresentation (where there is such a requirement). That distinction, which is long-established and clear, is described by *Cartwright* at [16-03], as follows:

"*A claimant who seeks to avoid a contract on the ground of either non-disclosure or misrepresentation will typically be claiming that he made a mistake, or entered into the contract on the basis of assumptions as to the relevant surrounding circumstances which he now knows were inaccurate; and now that he knows the truth, he says that he would not have entered the contract had he not made the mistake or made those assumptions. In the case of misrepresentation, he alleges that it was the defendant's misrepresentation that caused him to make the mistake: the defendant's words or conduct communicated information on which the claimant relied in deciding to enter into the contract. But in the case of non-disclosure the defendant has done nothing to cause the mistake or to give rise to the assumptions as to the circumstances surrounding the contract; he failed to give the claimant relevant information which would have corrected the mistake or false assumption*."

If Mr Saini QC were right in what he submitted, there is a real danger not only that the distinction between non-disclosure and misrepresentation is impermissibly blurred but also that implied misrepresentation claims would be allowed to succeed in situations where there is not even any 'duty to speak'.

287. The question for the Court, in these circumstances, is whether Marme (in the shape of Mr Maud given that he was the only witness to give evidence on Marme's behalf) had the necessary awareness as regards the EURIBOR Representations. As previously explained, however, Mr Maud agreed that it would not have occurred to him in 2008 that any bank might put in a false quote into the EURIBOR process. He agreed also that he would not have spent any time in 2008 thinking about the process by which EURIBOR was set, and that he did not start thinking about how EURIBOR might have been manipulated until many years later. This is evidence which makes it abundantly clear that, even as regards EURIBOR being a "*true and honest*" rate, the most that can be said is that Mr Maud *assumed* this to be the position – indeed, as he put it in his second witness statement, he had no reason to think that the position was other than that. An assumption, however, is insufficient for the reasons which I have given. Accordingly, even in relation to the EURIBOR rate being "*true and honest*", since Mr Maud did not give conscious thought to the point, he cannot have had the necessary awareness to mean that reliance has been made out in this case. In truth, Mr Maud simply did not turn his mind to the point at the time. That point is not, however, the point which is made in these proceedings - at least not any longer – since any case concerning the honesty of the EURIBOR rate has not been pursued. Instead, Marme's case is that the EURIBOR Representations were made, yet Mr Maud's evidence (both written and oral) demonstrates that those representations were nowhere near his contemplation, still less that he gave them conscious thought - or anything similar to them since I acknowledge that it cannot be expected that a claimant should be able to know precisely what

the Court might later conclude was represented. He plainly did nothing of the sort, whether at the time (which is what matters) or even when he came to make his witness statements or give evidence at trial.

288. In these circumstances, the position is similar to ***PAG*** where, at first instance, Asplin J stated as follows at [417], when dealing with the question of reliance:

"*I agree with Mr Handyside that the evidence of Mr Wyse and Mr Russell in cross- examination does not support the contention that they entered into the Swaps in reliance upon the LIBOR Representations. Mr Russell accepted in evidence that at the relevant time he knew nothing of the BBA Definition or the way in which submissions were made by Panel Banks, whether RBS was a panel bank or how LIBOR was calculated and that it had never occurred to him that it was capable of manipulation. He was able to say however, that he had 'complete trust and faith that RBS were setting correct and qualified rates...' In Mr Wyse's case, he could not recall any of the LIBOR Representations without seeing them and also accepted that it had not crossed his mind that submissions could be manipulated. He added in cross-examination that he knew that LIBOR was an average and that 'the High Street banks' were involved in making submissions. He stated, however, that he had assumed that LIBOR was the true and correct rate."*

Asplin J went on in the next paragraph ([418]) to say this:

"Equally when asked about the email from Matthew Jones of 6 March 2008, and whether it said anything about LIBOR being a proxy for the cost of funds of LIBOR panel banks, Mr Russell said that he was not sure that he had seen the email at the time and that he did not understand the point. Mr Wyse said that it was something which never occurred to him and that he had no reason to believe that the rates quoted were other than genuine. Mr Russell also agreed that in the email Mr Jones was saying that LIBOR better reflected RBS's cost of funding than base rate and that if PAG's loans were kept on base rate, there would be additional costs for the bank related to its capital requirements and the bank would therefore have to increase the margin charged over base rate to reflect that."

She concluded at [419] as follows:

"It seems to me therefore, that there was no understanding of what are extremely complex and intricate pleaded representations meant and for the most part, the matters which were pleaded did not cross Mr Russell and Mr Wyse's minds. On that basis, in my judgment, they could not have understood the implied representations to have been made and therefore, did not rely upon them. In the circumstances, it is not necessary to consider whether it is appropriate to ask what they would have done if told the alleged truth as against if nothing had been said. It was accepted the form of the implied representations had been 'borrowed' from the Graiseley case and it seems to me that the pleading was not led by the evidence. At best, it seems to me that both Mr Russell and Mr Wyse assumed that LIBOR, which they understood to be a commercial rate of interest, would be set in a straightforward and proper

manner. In my judgment, therefore, they gave no thought to the LIBOR Representations in the form pleaded and did not rely upon them."

Just as Asplin J concluded that, since Mr Russell and Mr Wyse merely made certain assumptions concerning LIBOR without giving any thought to the LIBOR Representations in that case, reliance had not been established, so I find myself in the present case reaching the conclusion that, since Mr Maud merely made certain assumptions concerning EURIBOR without giving any thought to the EURIBOR Representations, reliance has likewise not been established by Marme. Mr Maud did not understand any of the alleged EURIBOR Representations to have been made to him at the time, and so it follows that those representations (or something approximating to them) were not, and cannot, have been *"actively present to his mind"*.

Causation

289. In case I am wrong about this, and anyway by way of completeness, it is right that I should go on and consider the second aspect of the reliance issue. This is the causation aspect. Although it is, again, necessary to address the relevant law since there was some controversy about it (although ultimately not as much as first appeared), ultimately, the conclusion on the question of causation which I have reached does not turn on any dispute as to the law but on the evidence from which it is clear that Marme has singularly failed to make good its case.

290. It was Marme's case that, in order to establish causation for reliance purposes, it must show that it *might* have acted differently if the EURIBOR Representations had not been made. Mr Saini QC submitted that this is all that Marme must do irrespective of whether the case being considered is one of fraudulent misrepresentation or negligent/innocent misrepresentation. Whilst Mr Quest QC and Mr Howe QC both agreed with Mr Saini QC that the relevant question entails considering the position had the EURIBOR representations not been made rather than had they been true, they did not agree with him that what needs to be considered is whether Marme *might* have acted differently in all cases since, although they were prepared to accept that *might* is appropriate as far as fraud is concerned, they submitted that where non-fraudulent misrepresentations are concerned the question to be asked is whether the representee (here, Marme) *would* have acted differently if the EURIBOR Representations had not been made.

291. I will address the *might/would* issue in a moment. However, I should mention that Mr Saini QC, Mr Quest QC and Mr Howe QC were all agreed that, if the representation in question is material (in the sense that it would likely play a part in the decision of a reasonable person to enter into a contract), then, there is a rebuttable presumption (essentially an inference of fact bearing in mind that, as Lord Toulson made clear in ***Zurich Insurance v Hayward*** [2016] UKSC 48 at [68], the question of reliance is a question of fact) that the representation, in fact, induced the representee. This shifts the burden of proof to the representor to show that the representee did not, in fact, rely. This presumption was described by Teare J in ***NIVE v Rembrandt*** at [100], as follows:

"*... Reliance was also placed on the presumption of inducement or 'fair inference of fact' which arises where a false statement is made which is likely to induce a contract and where the representee enters the contract. The inference which arises is that the representee was influenced by the statement: see Zurich Insurance Co. plc v Hayward [2017] AC 142 at paragraph 34 per Lord Clarke of Stone-cum-Ebony. Where the misrepresentation was made fraudulently the inference is 'particularly strong'. The inference or presumption of inducement can be rebutted but that is 'very difficult'; see paragraphs 34-37 per Lord Clarke. In Raiffeisen Christopher Clarke J suggested that Barton v Armstrong may be regarded as establishing that in a case of fraudulent misrepresentation 'the presumption of inducement is not rebutted if all that can be said is that the representee might well have contracted without the [fraudulent misrepresentation]'."*

He went on at [104] to say this:

"However, the representation was made by NIVE for the purpose of persuading Rembrandt to agree the requested price increase and Rembrandt did accept the requested price increase. There is therefore a 'particularly strong' presumption, or a 'fair inference of fact', that the representation induced Mr. Rettig to reach his decision in the sense that but for the representation he would not, or might not, have agreed to the requested price increase. The evidential burden therefore lies on NIVE to rebut that presumption or inference. That is 'very difficult' to do (per Lord Clarke). It is not rebutted (per Christopher Clarke J.) if all that can be said is that the representee might have entered the contract had there been no representation. The presumption will only be rebutted, in a case of fraud, by showing that the representee would have entered the contract had there been no representation."

292. The position is described in this way in *Chitty* at paragraph 7-40:

"***Material misrepresentation and a presumption of inducement.*** *Once it is proved that a false statement was made which is 'material' in the sense that it was likely to induce the contract, and that the representee entered the contract, it is a fair inference of fact (though not an inference of law) that he was influenced by the statement, and the inference is particularly strong where the misrepresentation was fraudulent. There is no set list of matters that might rebut the presumption which arises from a fraudulent statement. One is to show that the misrepresentee had already firmly made up his mind, but even then the misrepresentation might have induced him not to change his mind*."

293. That it is possible to rebut the presumption and the circumstances in which it is possible to do so were discussed in ***Barton v Country NatWest*** [1999] Lloyd's Rep Bank 408 where Morritt LJ stated as follows at [57]:

"*The principal issue between the parties is what must be shown to rebut the presumption. Counsel for the Guarantors submitted that for the representor to rebut the presumption it was necessary for him to show that the representee (i) never knew of the statement until after he had entered into the contract; (ii) discovered before he entered into the contract that the statement was false;*

(iii) showed by words or clear conduct that the statement did not influence his decision. Counsel for the Bank submitted that the question of inducement was one of fact so that if, as in this case, the representee gives evidence the presumption has no part to play and the judge, like a jury, must determine the issue on all the evidence."

He went on at [58] to say this:

"In my view the differences between counsel are more apparent than real. First the presumption is one of fact and capable, like any other such presumption, of being rebutted. It would be dangerous in connection with any issue of fact to suggest that it may only be proved in certain specified ways. Similarly it would be wrong to suggest that as a matter of law the presumption can only be rebutted by proof of certain specified matters. But given that the presumption is that the representation did induce the act or omission in question it is hard to imagine facts sufficient to rebut it which do not fall within any of the categories to which counsel for the Guarantors referred. But my inability to imagine them is no ground for limiting the facts sufficient to rebut the presumption. However I do not accept the submission of counsel for the Bank that once the representee gives evidence the presumption no longer has any force. The effect of the presumption is to alter the burden of proof; the alteration remains unless and until the presumption is rebutted whether or not the representee gives evidence. … ."

294. As for the issue which, ultimately at least, was agreed, despite some indications to the contrary in Mr Saini QC, Mr Tomson and Mr Rose's written opening submissions, namely that what matters for reliance purposes is the position had the representation not been made rather than had the representation been true, this was considered, in some depth, by Christopher Clarke J in ***Raiffeisen***. He introduced that consideration at [178] in this way:

"*In many cases the answer to the two questions will be the same. But not all. It is convenient to take an example. P buys a house from V. He had been considering several houses. He is minded to buy the one which he eventually buys because of its size, shape and character. Shortly before he makes his final decision V's agent tells him that a particular celebrity has the house next door, a circumstance which he regards as advantageous. It is one of the matters he takes into account in deciding to purchase. He had not previously addressed his mind to the characteristics of his potential neighbour. In fact, as it turns out, there is no celebrity next door. Moreover the next door neighbour - Z - whom the agent knows to be the neighbour is one of the few persons, or types of persons, of whom P would never willingly be a neighbour. If he had never been told that there was a celebrity next door, or, having been so told, was then told that there had been a mistake and the celebrity in question did not live there, he would still have bought the house. If he had been told that Z lived there he would not have done so."*

He went on at [179] to say this:

"In determining whether or not P was induced by the representation to purchase, is it relevant to inquire what P would have done if he had been told:

(a) nothing at all;

(b) that there was no celebrity next door;

(c) that Z lived next door.

Question (a) assumes that no representation, and, therefore no misrepresentation, had been made. Question (b) assumes that the representee is told no more than is necessary to ensure that he has not been told an untruth. Question (c) assumes that the representee is given full information as to who actually lives there. In many cases the truth is nothing more than the flip side of the misrepresentation, but, as the above facts show this is not always so. The example taken shows that the representee's state of mind may be different according to whether or not he was given answer (b) or (c)."

He explained at [180] as follows:

"Mr Zacaroli submitted that a claim for misrepresentation requires consideration of what the representee would have done if no representation had been made to him. That is, in my judgment, generally speaking, correct because the claimant must establish the causative impact of the representation on his decision. His essential complaint must be that he entered into the contract on the terms on which he did as a result of what he was told, i.e. that, had he not been told what he was told, he would not have done so. If he would have entered into the relevant contract even if the representation had not been made, he has no valid complaint: McGregor on Damages, 18th Edition, para 41-002; Sir Christopher Staughton in Assicurazioni, para 187 (see para 165 above). That does not mean that a claimant who does not say in terms that, if the relevant statements had not been made, he would not have entered into the contract, necessarily fails: see In re London and Leeds Bank (1887) 56 LJ Ch 321. There the plaintiff had subscribed for shares in what was in fact an insolvent bank on (as he said in his affidavit) 'the faith of' fraudulent statements in the prospectus as to its circumstances and Stirling J rejected a submission that the claim must fail in the absence of evidence in those terms."

Christopher Clarke J recognised, nonetheless, at [181] that:

"Counsel defending claims for misrepresentation habitually ask claimants what they would have done if they had been told the truth and judges use their answers (or the judge's own conclusion on the question) to decide whether inducement has been established. Thus in Assicurazioni Clarke LJ allowed the appeal on the ground that it was:

'open to the judge to hold that ARIG had not shown that, if it had known that Munich Re was participating only in section A, it would not have entered into the contracts or would have taken some other share.'"

295. Christopher Clarke J went on, at [182], to refer to the existence of *"authority that, at any rate where fraud is shown, the question — what would you have done if you had been told the truth? — is not the relevant (or possibly even a permitted) question"*. One of the cases which he cited, ***Downs v Chappell***

[1997] 1 WLR 426, was a case in which the trial judge had found that the claimants (prospective purchasers of a bookshop) would not have contracted had verified figures not been provided by the defendant seller for turnover, before going on to consider whether if the true figures had been provided, the purchasers would have gone ahead anyway. Hobhouse LJ deprecated the taking of this further step, observing as follows at p. 433:

"The plaintiffs have proved what they need to prove by way of the commission of the tort of deceit and causation. They have proved that they were induced to enter into the contract with Mr. Chappell by his fraudulent representations. The judge was wrong to ask how they would have acted if they had been told the truth. They were never told the truth. They were told lies in order to induce them to enter into the contract. The lies were material and successful; they induced the plaintiffs to act to their detriment and contract with Mr. Chappell. The judge should have concluded that the plaintiffs had proved their case on causation and that the only remaining question was what loss the plaintiffs had suffered as a result of entering into the contract with Mr. Chappell to buy his business and shop."

Christopher Clarke J went on at [183] to say this:

"In my judgment the relevance of the question - what would you have done if you had been told the truth? - depends on the circumstances and on who is asking the question and for what purpose."

He added at [184]:

"A claimant who gives credible evidence that, if he had been told the truth (there is no celebrity next door), he would not have entered into the contract is likely to establish that if the misrepresentation had not been made he would not have contracted and that it was thus an effective cause of his doing so, since such evidence is likely to establish both the importance to him of what he was told and its effect on his mind: see Assicurazioni; Dadourian Group International Inc v Simms [2006] EWHC 2973 (Ch), para 546; and Parabola Investments Ltd v Browallia CAL Ltd [2009] EWHC 901 (Comm), paras 104-107. In the latter case Flaux J observed that Hobhouse LJ's dictum in Downs v Chappell did not mean that if the claimant demonstrated that he would not have acted as he did if he had known the true position (namely that the profits were not as stated), he could not have relied on that as evidence of inducement. In Dadourian Warren J described such a question as 'strictly irrelevant although it may be of some assistance in testing whether there was inducement or not'."

He went on at [185], as follows:

"Per contra, a claimant who says that even if he had been told the whole truth it would have made no difference to his readiness to enter into the contract will be likely to fail to establish that he was induced to enter into the contract by the misrepresentation in question. There is an inherent contradiction in someone saying that a representation was an inducing cause and accepting

that, if the truth had been told, he would have contracted on the same terms anyway."

By way of contrast, he explained at [186] that:

"If, however, it is clear that, unless the representation had been made to him, the claimant would not have entered into the contract it is irrelevant to ask what would have happened if he had been told the truth. In those circumstances, the court will not speculate on what might have happened in that event: see Spencer Bower, op cit, para 122. In Downs v Chappell [1997] 1 WLR 426 the trial judge accepted Mr Downs' evidence that he would not have contracted to buy the business if he had not received verification of certain profit figures which were fraudulently misrepresented to him. This conclusion was not surprising since an earlier set of figures had shown insufficient profits to persuade him to buy. So inducement had been established. That being so, it was not then material to consider what he would have done if he had been given the true profit figures - a situation which had never arisen and to which he would not have given thought (except in the context of the subsequent litigation)."

296. I interject to say that the point made by Christopher Clarke J at [186] concerning ***Downs v Chappell*** highlights the sometimes overlooked distinction between the question of whether a misrepresentation has induced a claimant to act in a certain way and the separate question of whether loss has been caused to the claimant as a result of the representation. That distinction is explained in *MacDonald Eggers, Vitiation of Contractual Consent* (1st Ed., 2016) at pp. 646-7 in this way:

"There are in fact two separate issues of causation. The first is one of inducement. The second is the cause of the damage. It is easy to conflate the two causal requirements, but they should be kept separate, namely whether the contract or course of conduct was induced by the misrepresentation and whether the contract or course of conduct gave rise to the damage sustained. The distinction between these two questions is highlighted in BHP Billiton Ltd v Dalmine. SpA, where the defendant fraudulently misrepresented the carbon equivalent value of the steel used in pipes supplied to the claimant for the purpose of being incorporated into the construction of a sub-sea gas re-injection pipeline. It was common ground between the parties that the claimant relied on the representation by using the pipes in the pipeline, such that if it had known the truth (or, presumably, if the representation had not been made) the steel pipes would have been rejected. The factual issue before the Court of Appeal was whether the pipeline would have failed even if the steel pipes had not been incorporated into the pipeline. Much of the argument concerned which of the parties bore the burden of proof. The claimant demonstrated that the pipeline failed where the non-compliant steel pipe had been installed. The Court held that the defendant had to prove that a hypothetical pipeline that did not include the non-compliant pipe would have failed in any event. The defendant accepted it could not discharge that onus. The Court noted that 'There was no submission ... that the "but for" test did not apply in its normal way in the tort of deceit'.

Accordingly, as to the first question the misrepresentation induced the use of the steel pipes; as to the second question, the issue was whether or not the steel pipes caused the relevant damage. In the same case, the Court held that the 'but for' test of causation was a starting point designed to eliminate irrelevant causes. There does not have to be a direct link between the misrepresentation and the resultant damage. There is plainly a continuous line (or chain or net or web) of causation between the misrepresentation and the resulting damage; the dislocation lies in the fact that the damage may have been a wholly unforeseen consequence of the misrepresentation (which is no bar to recovery in a claim for damages for deceit). Accordingly, the two questions are whether or not the representee relied on the misrepresentation and whether or not the course of conduct so induced resulted in damage to the claimant."

297. Furthermore, Christopher Clarke J's approach as set out at [183] to [186], specifically as regards ***Downs v Chappell***, is consistent with the approach adopted by the Court of Appeal in ***Dadourian Group v Simms*** [2009] EWCA Civ 169. In that case, Arden LJ (as she then was) stated as follows at [107]:

"… it is irrelevant how the representee would have acted if told the truth. Mr Samek correctly submitted that, once it is found that a misrepresentation was made, was intended to be relied upon and was relied upon by the representee in deciding to enter into the transaction in question, any speculation as to what the representee would or might have done if he had known the truth is immaterial: see Smith v Kay (1859) 7 HL Cas 750 at 759 and Downs v Chappell [1997] 1 WLR 426 at 433. On the other hand, as the judge observed at J(1) 549, if it could be affirmatively shown that DGI definitely would have entered into the option agreement even if it had known of Jack and Helga's involvement in Charlton, then it would be very difficult for DGI to argue that it was induced to enter into the option agreement in reliance upon the intermediary representation. But that was not this case. The judge held, and was entitled on the evidence to do so, that if Alex and Haig had known of Jack and Helga's involvement, they would not have allowed DGI to enter into the option agreement."

In other words, where reliance has already been established without having to consider what would have happened had the claimant been told the truth, it is generally not relevant to ask what would have happened had the claimant been told the truth. However, as Arden LJ indicated and as Christopher Clarke J also indicated in ***Raiffeisen*** at [185], that is an inquiry which is relevant if the position is that the claimant would have acted in the same way even had the truth been known since that is evidence which weighs against a conclusion that there was the requisite reliance.

298. Christopher Clarke J's ultimate conclusion in ***Raiffeisen*** at [187] was this:

"It is not, therefore, necessary for the representee to establish that he would have acted differently if he had known the truth. And it may not be sufficient either. If it were, a claimant who gave no thought to any representation, or did not understand it to have been made, might be entitled to recover."

This is a conclusion which has been followed in a number of subsequent cases, including in ***Cassa di Risparmio*** at [232] (per Hamblen J) and in ***Leni Gas*** where Males J observed at [17] that:

"The relevant enquiry is whether the claimant would have entered into the contract if the representation had not been made at all, and not whether it would have done so if a different representation (i.e. the truth) had been made to it".

299. Turning to the controversial *might/would* question, this is addressed in *Chitty* at paragraphs [7-038]-[7-039]:

"***'But for' causation normally required.*** *It seems to be the normal rule that, where a party has entered a contract after a misrepresentation has been made to him, he will not have a remedy unless he would not have entered the contract (or at least not on the same terms) but for the misrepresentation. Certainly this is the case when the misrepresentee claims damages in tort for negligent misstatement; and it seems also to be required if damages are claimed for fraud. It seems likely that the same rule applies if he seeks to rescind on the ground of an innocent or negligent misrepresentation.*

'But for' causation not required for rescission for fraud. *In cases of fraud, in contrast, if the representee seeks to rescind, it is no defence for the representor to show that if the misrepresentation had not been made, the misrepresentor would still have made the contract. It is sufficient if there is evidence to show that he was materially influenced by the misrepresentation merely in the sense that it had some impact on his thinking, 'was actively present to his mind'... The rule is intended to deter fraud*."

300. The question was also one of the matters addressed in ***Raiffeisen***, again in depth and by reference, in particular, to the Court of Appeal decision in ***Assicurazioni Generali SpA v Arab Insurance Group (BSC)*** [2002] EWCA Civ 1642, [2003] Lloyd's Rep IR 131 ***('ARIG')***. Christopher Clarke J had this to say on the question at [170]:

"*Mr Zacaroli submitted that, whilst there may be more than one 'but for' cause, in order to establish that any particular representation was a real and substantial cause it is necessary to show that but for such misrepresentation the claimant would not have entered into the contract on the terms on which he did, even though there were other matters but for which he would not have done so either."*

He went on at [171] to say this:

"In the light of decision of the majority in Assicurazioni and the authorities to which I have referred, I accept that submission. The authorities show that inducement is, in essence, a question of causation and that the misrepresentation must be an effective cause of the representee entering into the contract in the 'but for' sense. 'But for' causation means that unless the alleged cause (X) had come about the alleged result (Y) would not have occurred. In the present context that means showing that, unless the

representee had had the representation made to him, he would not have contracted (or would not have done so on the same terms). If such causation is necessary in respect of a single misrepresentation, it must also be necessary in relation to an individual representation which is one of several."

Christopher Clarke J was here describing a requirement that the claimant in a misrepresentation case should show that he *would* not have contracted, not merely that he *might* not have done so.

301. Christopher Clarke J went on at [172] to describe the position as regards the right to avoid for breach of the duty of good faith in insurance law (***ARIG*** was itself a case concerned with that right):

"That conclusion is consistent with the decision of the House of Lords in Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1995] 1 AC 501 in which the majority of the House held: (i) that a 'material circumstance' was one that would have an effect on the mind of the prudent insurer in estimating the risk; but that, for a circumstance to be material, it was not necessary that it should have a decisive influence (such that but for the misrepresentation or non-disclosure the insurer would have declined the risk or accepted it only on different terms). But before an underwriter could avoid for non-disclosure he had to show that he had actually been induced by the non-disclosure to enter into the policy on the relevant terms (i.e. that if the full facts had been disclosed he would not have entered into it or would have done so only on different terms). It is apparent from the speeches of the majority that the 'actual inducement test' applies to misrepresentation (page 516E to G); and is an application to marine insurance of the common law as to inducement (pages 549D to E and 569A to C)."

Christopher Clarke J, then, stated as follows at [173]:

"In Assicurazioni Ward LJ referred to the fact that the 'court does not allow an examination into the relative importance of contributory causes', and was concerned that the decision of the majority might lead the courts back to the error that the misrepresentation must be a decisive cause. In the light of the decision of the majority it cannot be the case that the representation does not have to be a cause at all. It need not be the sole effective cause but it must be an effective cause. A misrepresentation is not an effective cause if the representee would have gone ahead even if it had not been made."

302. Returning, then, to the question of whether *might* is sufficient for reliance purposes, Christopher Clarke J had this, importantly, to say at [195]:

"*Mr Gruder submitted that it was sufficient for a claimant to show that but for the misrepresentation he might have acted differently. I do not agree. Assicurazioni shows (see paras 166 and 181 above) that the question is whether had the representation not been made to him, the representee would not have contracted; not whether he might not have done so. I do not accept the submission that the 'would not' formulation applies in insurance cases but that in other cases 'might not' is the appropriate test."*

He went on, however, at [199] to point to a possible distinction between fraud and non-fraud cases:

"Mr Gruder also referred to Barton v County NatWest Ltd [1999] Lloyd's Rep Bank 408 and Australian Steel & Mining Corporation Pty Ltd v Corben [1974] 2 NSWLR 202, both of which were fraud cases in which the result of the representation relied on was that the representee persevered in a decision previously made. It does not seem to me that either of those cases establishes that, where the case is not one of fraud, it is sufficient merely to show that the misrepresentation was actively present to the representee's mind and that but for it the representee might have acted differently. In Barton the presumption of inducement arising from the fraudulent statement was not rebutted. In Australian Steel the statement (as to the identity of a purchaser to whom Mr Corben, who had decided to sell, was to give an option to purchase) was a 'but for' cause of the agreement. Mr Corben would not have persevered with the deal if he had not known the identity of the purchaser."

303. That distinction is one which subsequent cases have also drawn in deciding that there is a weaker requirement for reliance purposes where fraud is involved than there is in relation to non-fraud cases: *might* rather than *would*. Thus, in ***Cassa di Risparmio***, Hamblen J observed at [232] as follows:

"*As analysed by Christopher Clarke J in Raiffeisen, supra, at [153]–[199], to establish inducement for the purpose of a claim under s.2(1) of the Misrepresentation Act, it is necessary to show that, but for the representation, the claimant would not have entered into the contract that he did."*

He went on at [233] to say this:

"In that case, Christopher Clarke J concluded that where a fraudulent misrepresentation has been made, the requirement is weaker: it is sufficient to show that the representation was a factor in the claimant's decision and that but for it he might have acted differently …. This conclusion was challenged by Barclays. It submitted that a fraudulent representation must cause a loss to create a cause of action and to do so it must cause the entry into the contract from which the loss is said to arise. It follows that it must induce the representee to enter into the contract and be a cause of him doing so. It is not necessary to resolve this issue but I propose to proceed on the basis that the approach of Christopher Clarke J is correct."

Males J, in ***Leni Gas*** at [17], adopted the same approach as Hamblen J and, more recently still, in ***NIVE v Rembrandt***, although again without deciding the point, Teare J did so also. In that latter case, the defendant contracted to buy dried egg product from the claimant. The defendant subsequently rejected the products supplied and the claimant claimed damages for breach of the contract. The defendant denied liability on the basis that, when the price was renegotiated, the claimant made fraudulent misrepresentations, and that the claimant breached certain warranties given to the defendant. Having accepted that a representation had been made concerning the price, Teare J had this to say concerning the question of inducement at [94]:

"It is first necessary to consider what must be established in this regard. Counsel for NIVE relied upon the judgment of Christopher Clarke J. (as he then was) in Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland [2010] EWHC 1392. In that case it was held that a claimant alleging misrepresentation must show that the representation played a real and substantial part in inducing him to enter into the contract in question, that it was not necessary to show that it was the sole inducement or that it played a decisive part but that it was not sufficient to show that the claimant was supported or encouraged in reaching his decision by the representation in question; see paragraph 153. It was further held that in order to establish that the representation played a real and substantial part in inducing the contract it was necessary to show that but for the misrepresentation the claimant would not have entered into the contract on the terms which he did; see the analysis by the judge of the authorities between paragraphs 153-199 and, in particular, of the judgment of Clarke LJ (as he then was) in Assicurazioni Generali SpA v Arab Insurance Group [2003] 1 All E R(Comm) 140."

He went on at [95] to say this:

"The judgment of Christopher Clarke J in Raiffeisen was the only authority to which I was referred on this topic, notwithstanding that Misrepresentation, Mistake and Non- Disclosure by Cartwright 4th .ed. at paragraph 3-54 refers to 'some disagreement in the authorities'. When I raised the matter with counsel for Rembrandt the submission was made that the 'but for' test did not have to be satisfied because the test was not mentioned in Zurich Insurance Co. plc v Hayward [2017] AC 142 and that 'one should take one's lead from the Supreme Court'. However, the issue in that case was whether it was necessary to establish that the representee had believed the misrepresentation to be true. It was held, in particular by Lord Clarke of Stone-cum-Ebony (as he had become) that, whilst the representee's belief might be relevant to the issue of inducement, it was not necessary to establish such belief. There was no discussion of what had to be established to show inducement and neither Assicurazioni Generali SpA v Arab Insurance Group nor Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland were cited to or by the Supreme Court. In those circumstances I am unable to accept counsel's oral submission that the propositions established by those cases as to the need for the 'but for' test to be satisfied must no longer be regarded as good law. (Indeed, Lord Clarke quoted at paragraph 33 with approval a statement by Lord Hoffman in Standard Chartered Bank v Pakistan Shipping [2003] 1 AC 959 at paragraph 15 where the language of the 'but for' test was used in the context of a fraudulent misrepresentation.)."

Teare J, then, at [96], cited Hamblen J in the ***Cassa di Risparmio*** case, before saying this at [98]:

"In Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland Christopher Clarke J. (who was not dealing with a fraudulent misrepresentation) rejected the weaker 'but for the misrepresentation he might have acted differently' test; see para.195. He referred to Barton v Armstrong [1976] AC 104 a Privy Council case on appeal from New South Wales which concerned an agreement entered into as a result of duress. Lord Cross (who gave the majority judgment

in the Privy Council) said that the 'but for' test did not need to be satisfied by analogy with agreements entered into on account of fraud. Lord Cross said that if the duress was 'a' reason for entering the contract it did not matter that the claimant might well have entered the contract even if there had been no duress. Christopher Clarke J. distinguished that case on the grounds that the case before him did not involve a fraudulent misrepresentation. That is no doubt why Hamblen J. observed that Christopher Clarke J. had 'concluded' that in such cases there was a weaker "but for the misrepresentation he might have acted differently" test."

He went on at [99]:

"This suggested weaker test in the case of a fraudulent misrepresentation was not the subject of any submissions in the present case. However, in circumstances where both Christopher Clarke J. and Hamblen J. have recognised the weaker test (although in neither case was it the subject of an actual decision) I consider that I should proceed on the basis that the suggested weaker test applies in the case of fraudulent misrepresentation. Misrepresentation, Mistake and Non-Disclosure by Cartwright 4th .ed. at paragraph 3-54 suggests that it is 'generally accepted'."

He concluded at [102]:

"*In the light of this evidence it seems clear that the representation was one of three matters which Mr. Rettig considered and took into account before reaching his decision. At the very least the representation was a matter which 'supported or encouraged' him in reaching his decision. But that is not enough, as was held by Christopher Clarke J in Raiffeisen at paragraph 153 following Dadourian v Simms [2009] EWCA Civ 169 at paragraphs 99 and 100, itself a case of fraudulent misrepresentation. The representation must be a matter but for which Mr. Rettig would not have reached the decision he did or, since this is a case of a fraudulent misrepresentation, but for which Mr. Rettig might have acted differently. That is not saying that the representation must be the only reason for his decision; for as Christopher Clarke J. accepted in Raiffeisen there can be more than one 'but for' cause; see paragraphs 170-171*."

304. I am quite clear, in the circumstances, that the appropriate course to adopt is that adopted by Hamblen J, Males J and Teare J, and so to proceed on the basis that, as far as fraudulent misrepresentation is concerned, *might* is the right test but that otherwise *would* is what is required. The more so, since on the facts of the present case nothing turns on the *might/would* distinction. I do not accept that Mr Saini QC can be right when he submitted that *might* is sufficient regardless of whether the case involves a fraudulent misrepresentation or a negligent/innocent misrepresentation. On the contrary, had it been necessary to decide the point one way or the other, it seems to me that there would, if anything, be more force in the opposite submission, namely that the requirement ought to be *would* across the board (including as regards fraudulent misrepresentation) and so not a weaker *might* requirement.

305. Mr Saini QC made a number of submissions in this regard, but his main submission was that ***Raiffeisen*** was wrongly decided and contrary both to principle and policy. This submission included the proposition that ***Raiffeisen*** and, indeed, ***ARIG*** are inconsistent with the approach adopted by the Court of Appeal in ***Downs v Chappell***. That case, however, sheds no light at all on the question of whether the appropriate test is *would* or *might*, Hobhouse LJ simply having accepted (without elaboration as to the test applied) that the trial judge "*has found that the representations made did induce the plaintiffs to enter into the relevant transaction …*".

306. Nor, similarly, can Mr Saini QC be right when he went on to submit that ***ARIG*** is inconsistent with ***UCB Corporate Services Ltd v Williams*** [2002] EWCA Civ 555, (2002) 19 EG 149, a case decided earlier the same year as ***ARIG*** was decided. That case concerned the purchase of a matrimonial home over which a charge was granted. In an action for possession, Mrs Williams claimed that the charge was void and unenforceable against her, on the basis, *inter alia*, that she was induced to execute the charge by her husband's misrepresentations and that she executed the charge by reason of her husband's undue influence. The trial judge found that there had been both undue influence and misrepresentations; however, he concluded that, if Mrs Williams had known all of the relevant facts and risks and had been allowed to exercise her own free will, she would still have executed the charge. He also found that UCB was not fixed with constructive notice. Jonathan Parker LJ stated this at [88]:

"*The observations of Hobhouse L.J. in Downs v Chappell (quoted earlier) seem to me to be directly in point in the instant case. In the instant case, as in Downs v Chappell, Mrs Williams was never told the truth; she was told lies in order to induce her to execute the UCB charge. The lies were 'material and successful' in that they induced Mrs Williams to act to her detriment in executing the UCB charge."*

He went on at [89] to observe as follows:

"Moreover, Downs v Chappell affords, in my judgment, a useful illustration of the need, in the context of a claim for damages for misrepresentation, to distinguish between two separate questions: (1) whether the claimant was induced by the misrepresentation to act to his detriment; and (2) if so, what loss he suffered in consequence. As Downs v Chappell shows, the fact that the claimant might have acted differently had he not been induced by the misrepresentation is not relevant to question (1), but it is relevant to question (2) (as, indeed, Mr Barker pointed out in the course of his submissions). For present purposes, however, it is the analogy with question (1) which is of importance. Expressed purely in terms of misrepresentation, the issue in the instant case is whether Mrs Williams was induced by the misrepresentation to execute the UCB charge. In that context it matters not, in my judgment, whether, had she not been so induced, she would nevertheless have done so."

Mr Saini QC relied as to this last passage, in particular, on the suggested need for the lies to be "*material and successful*" in order to have induced Mrs Williams, submitting that this is far removed from a 'but for' test and that it

represents a low test for inducement. He highlighted, specifically, the reference in the last sentence to the word "*would*". Again, however, Mr Saini QC's submission is misplaced. ***UCB*** was a fraud case and so is of only limited assistance to Mr Saini QC's submission as to whether *might* or *would* is required in non-fraud cases. In addition, however, it is quite clear that Jonathan Parker LJ was not dealing with the question of inducement at all. He was, instead, addressing the separate question of causation in the context of damages since that was what was in issue in that case, the trial judge having found in Mrs Williams' favour that she executed the charge because she had been induced to do so by her husband's undue influence and misrepresentations. That is made clear from Jonathan Parker LJ's summary of the trial judge's findings at [80] to [85]. In short, as in ***Downs v Chappell***, in ***UCB*** the question of inducement had already been determined. It follows, further, that there is no conflict between ***UCB*** and ***ARIG*** since the two cases were dealing with different issues. That (as opposed to, for example, any oversight on the part of counsel), no doubt, is why ***UCB*** was not even cited in ***ARIG***.

307. Mr Saini QC submitted also, more fundamentally, that the *might* test is the test which was laid down by Bowen LJ in ***Edgington v Fitzmaurice*** (1885) 19 Ch D 459. I do not agree with Mr Saini QC about this either, however, since I do not read Bowen LJ's judgment in that case as suggesting that he was considering this issue at all. He was, instead, considering the issue of whether it is sufficient that a cause is one of many causes. It was in this context that he observed at p. 482 that "*you must shew that the statement was either the sole cause of the plaintiff's act, or materially contributed to his so acting*" and at p. 483 that "*the real question is, what was the state of the Plaintiff's mind, and if his mind was disturbed by the misstatement of the Defendants, and such a disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference*". He did not apparently address his mind to the *might/would* distinction but to a different question, his conclusion on that different question being that it is not necessary for the misrepresentation to be the sole inducement or even the predominant or decisive cause as long as it plays a real and substantial part in the representee's decision.

308. Mr Saini QC went on to submit that, whilst the majority in ***ARIG*** considered that the 'but for' test is a "*would*" test, Ward LJ (in the minority) had reservations about this being the position and that his dissent supported the submission that the test should be *might* in non-fraud cases. I consider that Mr Saini QC is wrong about this, however, since the issue which the Court of Appeal was considering in ***ARIG*** was not the *might/would* distinction but how decisive (if at all) a particular misrepresentation has to be in order for inducement to be established, specifically whether it is sufficient that it be *a* cause as opposed to *the* cause of the representee taking the action which he did (in that case, entering into a reinsurance contract).

309. That this is the position is clear from looking, first, at what Clarke LJ (as he then was) had to say at [59]:

"*It seems to me that the true position is that the misrepresentation must be an effective cause of the particular insurer or reinsurer entering into the contract but need not of course be the sole cause. If the insurer would have entered into the contract on the same terms in any event, the representation or non-disclosure will not, however material, be an effective cause of the making of the contract and the insurer or reinsurer will not be entitled to avoid the contract. Thus I agree with Sir Christopher Staughton, whose judgment I have seen in draft, that, in this context at least, causation cannot exist when even the 'but for' test is not satisfied…".*

Clarke LJ went on at [60] to say this:

"Those principles seem to me to be consistent with the approach of this court in St Paul Fire & Marine v McConnell: see per Evans LJ (with whom Rose and Nourse LJJ agreed) at pages 827-828, where he discussed the general principles, and at page 831, where he held that, if the three underwriters who gave evidence had been told the truth, on no view would they have underwritten the insurance at the same premium on terms which included subsidence risk. Evans LJ also considered the role played by presumption in this class of case. He did so in the context of a fourth underwriter who was not called to give evidence, no doubt because the trial took place before the decision of the House of Lords in Pan Atlantic."

He referred, in particular, at [61], to the following passage in Evans LJ's judgment in ***St Paul Fire*** at p. 831:

"The existence of such a presumption is recognised in the authorities; see Halsbury's Laws vol 31 par 1067 where the law is stated as follows:

'Inducement cannot be inferred in law from proved materiality, although there may be cases where the materiality is so obvious as to justify an inference of fact that the representee was actually induced, but, even in such exceptional cases, the inference is only a prima facie one and may be rebutted by counter evidence.'

The authorities cited include Smith v Chadwick (1884) 9 App Cas 187 and in my judgment they justify the above statement of the law. This provides a reminder of the need to distinguish 'materiality' from 'inducement', although inevitably the two overlap.

Here, the evidence of the three underwriters who did give evidence and of the expert witnesses was clear. If the underwriters had been told the true state of the ground conditions, as revealed by the 1982 report, and of the conflicting views expressed by the authors of that report and by Worleys, then they would have called for further information and in all probability either refused the risk or accepted it on different terms. In fact, all four underwriters including Mr Earnshaw accepted it without any relevant enquiries. There is no evidence to displace a presumption that Mr Earnshaw like the other three was induced by the non-disclosure or misrepresentation to give cover on the terms on which he did. In my judgment, these insurers also have discharged their burden of proof."

Clarke LJ commented as to this:

"It appears to me that a presumption of this kind really amounts to no more than this. It simply operates where the evidence before the court is enough to lead to the inference that the insurer or reinsurer was, as a matter of fact, induced to enter into the contract."

Clarke LJ, then, summarised the relevant principles of inducement, in this context, in this way at [62]:

"(i) In order to be entitled to avoid a contract of insurance or reinsurance, an insurer or reinsurer must prove on the balance of probabilities that he was induced to enter into the contract by a material non-disclosure or by a material misrepresentation.

(ii) There is no presumption of law that an insurer or reinsurer is induced to enter in the contract by a material non-disclosure or misrepresentation.

(iii) The facts may, however, be such that it is to be inferred that the particular insurer or reinsurer was so induced even in the absence from evidence from him.

(iv) In order to prove inducement the insurer or reinsurer must show that the non-disclosure or misrepresentation was an effective cause of his entering into the contract on the terms on which he did. He must therefore show at least that, but for the relevant non-disclosure or misrepresentation, he would not have entered into the contract on those terms. On the other hand, he does not have to show that it was the sole effective cause of his doing so."

Sir Christopher Staughton (in the majority, like Clarke LJ) echoed these observations, saying this at [187]:

"*In reaching that conclusion I have had regard to the classic speech of Lord Mustill in Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1995] 1 AC 501 at p. 549, and I hope that I have followed it. A misrepresentation or non-disclosure which did not make any difference, in the sense that the underwriter would have agreed to the same contract on the same terms if it had never been made, cannot be an inducement. Benjamin Franklin once wrote that for want of a nail a shoe was lost; for want of a shoe the horse was lost; and for want of a horse the rider was lost (Poor Richard's Almanac). But in my view, causation cannot in law exist when even the 'but for' test is not satisfied*."

310. As for Ward LJ's dissenting judgment, upon which Mr Saini QC relied, Ward LJ stated as follows at [215]:

"*I take the law to be this: if it is established that the representee did not allow the representation to affect his judgment in any way then he could not make it a ground for relief. If on the other hand the representee relied on the misrepresentation, then the representor cannot defeat his claim to relief by*

showing that there were other more weighty causes which contributed to his decision to enter into the contract. In this field the court does not allow an examination into the relative importance of contributory causes. In other words, it is sufficient if the representation is a cause even if it is not the cause operating on the mind of the representee when he enters into the contract."

Ward LJ emphasised the words *"a"* and *"the"* in the last sentence in the same way as I did earlier, before going on at [216] to refer to ***Edgington v Fitzmaurice***, as follows:

"In my judgment that has been well established since Edgington v Fitzmaurice …. Cotton L.J. expressed the principle at p. 481 as follows:

'It is not necessary to show that the misstatement was the sole cause of his acting as he did. If he acted on that misstatement, though he was also influenced by an erroneous supposition, the defendants will still be liable.'

Bowen L.J. said at p. 483:

'The real question is, what was the state of the plaintiff's mind, and if his mind was disturbed by the misstatement of the defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference. It resolves itself into a mere question of fact.'

He referred also, at [217], to Fry LJ having stated at p. 485:

"But in my opinion if the false statement of fact actually influenced the plaintiff, the defendants are liable, even though the plaintiff may have been also influenced by other motives."

He added:

"That that still represents the law was affirmed in St Paul Fire & Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd [1995] CLC 818, 827-828 per Evans LJ."

Ward LJ, then, had this to say at [218]:

"I am happy to express my agreement with the analysis of the law conducted by Clarke L.J. subject to this reservation. I am not entirely sure that it is necessary to require the misrepresentation to be an effective cause of a party's entering into the contract on the terms on which he did. If by that qualification my Lord means no more than that it did actually play upon his mind and influence his decision then I have no argument. In other words I readily accept it must have some causative effect. I would be concerned if the insistence on an effective cause were to lead to an evaluation of the weight placed by the representee upon the various matters which in combination lead to the agreement. We must be careful not to be led back into the error that the cause has to be a decisive cause."

311. It was Mr Saini QC's submission that in these passages Ward LJ was disagreeing with Clarke LJ and Sir Christopher Staughton on the *might/would* issue. In my view, however, he was not doing this. On the contrary, it seems to me that Ward LJ was saying the same thing as Clarke LJ and Sir Christopher Staughton since his reference to the misrepresentation needing to "*have some causative effect*" is difficult to square with a view that *might* alone would be sufficient for inducement purposes. That is why Ward LJ expressed his agreement with Clarke LJ's reference to there being a requirement that the misrepresentation be *"an effective cause"* if *"by that qualification"* Clarke J *"means no more than that it did actually play upon his mind and influence his decision"* since he accepted that "*it must have some causative effect"*. Indeed, that this is the position is supported also by Clarke LJ's discussion of Ward LJ's judgment at [78]:

"*I agree with Ward LJ that in determining whether the insurer or reinsurer was induced to enter into the contract the court does not embark upon the exercise of finding the decisive cause or the main reason. However, I remain of the view that the non-disclosure must be an effective (or as Arnould puts it in the passage quoted in paragraph 58 above) a real and substantial cause of the decision to enter into the contract. That conclusion seems to me to be supported by the passages from the judgments in Edgington v Fitzmaurice quoted by Ward LJ."*

Importantly, Clarke LJ went on at [79] to use the language of *would*, suggesting in pretty unambiguous terms that, as far as Clarke LJ was concerned, it was not in relation to *would* (or *might*) that he and Sir Christopher Staughton differed with Ward LJ:

"Having reconsidered the evidence I also remain of the view that it was open to the judge to conclude that what was said (or written) about the participation of Munich Re played no part in ARIG's decision to participate. In short, it was open to the judge to hold that ARIG had not shown that, if it had known that Munich Re was participating only in section A, it would not have entered into the contracts or would have taken some other share and I can see no basis upon which this court could properly interfere with that conclusion."

In short, therefore, the issue in ARIG was as to the relative importance of contributory causes in circumstances where each of those causes meets the *would* criterion, not the *would/might* issue.

312. Even if I am wrong about this, however, it should, in any event, not be overlooked that Ward LJ was in the minority. As such, his judgment cannot assist the argument which Mr Saini QC put forward on Marme's behalf. Mr Saini QC had a further string to his bow, however, since it was his submission that the Court should proceed on the basis that Lord Clarke (as he had become) in ***Zurich v Hayward*** was, as Mr Saini QC put it, *"now a convert"* and in favour of the *might* test applying not only in fraud cases but in all cases. Mr Saini QC relied upon the fact that in ***Zurich v Hayward*** Lord Clarke referred, at [38], to an article written by The Hon K R Handley entitled

'Causation in Misrepresentation' (2015) 131 LQR 277, specifically to what was stated at p. 284, namely:

"The representor must have decided to make the misrepresentation because he or she judged that the truth or silence would not, or might not, serve their purposes or serve them so well. In doing so they fashioned an evidentiary weapon against themselves, and the court should not subject the victim to 'what if' inquiries which the representor was not prepared to risk at the time."

It was Mr Saini QC's submission that Lord Clarke must have been aware that the article was critical of ***ARIG***. As such, he submitted, Lord Clarke should be taken as having changed his mind and so as now being in favour of the appropriate test involving *might* as opposed to *would*.

313. This is an ambitious argument which is also wholly misconceived. First, even if Mr Saini QC were otherwise right and Lord Clarke had changed his mind in the manner suggested, it is not clear on what basis that would justify a conclusion that the Court should not follow ***ARIG*** and cases such as ***Raiffeisen***, ***Cassa di Risparmio*** and ***Leni Gas*** which have followed that authority. Secondly, and in any event, it is clear that what Lord Clarke had to say in ***Zurich v Hayward*** had nothing to do with the *might/would* issue. On the contrary, that case was concerned with a different question altogether: whether a representee needs to show that he believed that the representation was true. In considering this question, Lord Clarke set out in summary his view of the non-controversial principles of inducement. He explained at [18] that:

"*Subject to one point, the ingredients of a claim for deceit based upon an alleged fraudulent misrepresentation are not in dispute. It must be shown that the defendant made a materially false representation which was intended to, and did, induce the representee to act to its detriment. To my mind it is not necessary, as a matter of law, to prove that the representee believed that the representation was true. In my opinion there is no clear authority to the contrary. However, that is not to say that the representee's state of mind may not be relevant to the issue of inducement. Indeed, it may be very relevant. For example, if the representee does not believe that the representation is true, he may have serious difficulty in establishing that he was induced to enter into the contract or that he has suffered loss as a result. The judge makes this point clearly and accurately in the third sentence of para 2.5 of his admirable judgment."*

He went on at [23] to say this:

"I am not persuaded that the authorities lead to any other conclusion. As stated above, the ingredients of the tort of deceit are not in dispute subject to one question, which is whether a claimant alleging deceit must show that he believed the misrepresentation. In my opinion the answer is no."

He continued at [24]:

"There are many formulations of the relevant principles in the authorities. I take two examples. In Briess v Woolley [1954] AC 333, 353 Lord Tucker said:

'The tort of fraudulent misrepresentation is not complete when the representation is made. It becomes complete when the misrepresentation - not having been corrected in the meantime - is acted upon by the representee. Damage giving rise to a claim for damages may not follow or may not result until a later date, but once the misrepresentation is acted upon by the representee the tortious act is complete provided that the representation is false at that date.'

To like effect, Lord Mustill said in Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd (No 2) [1995] 1 AC 501, 542:

'In the general law it is beyond doubt that even a fraudulent misrepresentation must be shown to have induced the contract before the promisor has a right to avoid, although the task of proof may be made more easy by a presumption of inducement.'"

He then set out, at [28], Zurich's argument in support of the position that belief in the truth of the representation is not required, considering each limb of this argument at [29] to [47]. One such limb involved reliance upon the presumption of inducement which applies, in particular, where there is an intention to induce by means of fraud. Zurich submitted that, if the defrauded representee first had to show that he *believed* the misrepresentation, there would be little (or no) utility in having the presumption (see [28(iii)]). It was this submission, relating to the presumption of inducement and no other aspect, which Lord Clarke was considering when he cited the *Handley* article. In short, Lord Clarke's judgment in ***Zurich*** has no bearing on the *might/would* issue.

314. Furthermore, and perhaps more by way of completeness than anything else, having looked at the *Handley* article, I am wholly unpersuaded, in any event, that it provides any basis for the argument which Mr Saini QC sought to advance on the *might/would* issue. Under the heading *"When Misrepresentation is a Contributing Cause"*, the article begins by explaining that it *"will examine the principles which determine whether the misrepresentation was a contributing cause"*. There is, then, reference to what Bowen LJ had to say in ***Edgington v Fitzmaurice***, specifically the need that any misstatement should be *"actively present to [the representee's] mind"*. This is followed by reference to ***Pan Atlantic*** as follows:

"The case was one in deceit but this test for inducement applies in all deliberate misrepresentation cases. The important point is Bowen L.J.'s reference to the misstatement being 'actively present to his mind'. This excludes only those misrepresentations where the truth is known and those which have been forgotten or ignored as irrelevant or immaterial. The question was considered in Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd where Lord Goff of Chieveley said that inducement was

established if the misrepresentation had 'an effect on the mind' of the insurer or an 'influence on [his] judgment', which I suggest propounded a single test. Lord Mustill said that inducement was not established where the misrepresentation 'did not influence the judgment', 'did not influence the mind', or 'had no effect on the decision'. Here again I suggest he was propounding a single test. Lord Lloyd of Berwick asked whether the misrepresentation 'might well have influenced the underwriter'.

There, then, follows citation of other cases, including ***In Re London & Leeds Bank Ltd*** (1887) 56 LJ Ch 321, in which *Handley* takes Stirling J to have decided that 'but for' causation does not need to be proved, and ***JEB Fasteners Ltd v Marks Bloom & Co*** [1983] 1 All ER 583, as to which *Handley* says this:

"Properly understood the decision of the Court of Appeal in JEB Fasteners Ltd v Marks Bloom & Co may be consistent with these authorities, and it is only some dicta applied later to deliberate misrepresentations that are clearly out of line. In any event it was an action for negligent misrepresentation and distinguishable in the present context. The trial judge found that: 'the plaintiffs would not have acted differently if they had known the true position as to the accounts'. Sir Sebag Shaw, who gave the principal judgment, said that what the trial judge really meant was that 'while the content of the accounts was observed and considered it did not in any material degree affect [the plaintiffs'] judgment'. This would be orthodox if 'any material degree' was intended to mean 'any' degree, but not if a greater contribution was required. Donaldson L.J. agreed but added that inducement was not established where the misrepresentation related to 'subsidiary factors which support or encourage the taking of the decision'. If these were false the validity of the decision would not be affected because 'if the truth had been known or suspected the same decision would still have been made'. Stephenson L.J., who agreed with Sir Sebag Shaw, but not Donaldson L.J., added that:

'as long as a misrepresentation plays a real and substantial part, although not by itself a decisive part, in inducing a plaintiff to act it is a cause of his loss'."

He goes on:

"Although Sir Sebag Shaw's judgment contains the ratio, the dicta of the other judges proved to be influential.

The decision was rescued from obscurity by Rix J. who in Avon Insurance Plc v Swire Fraser Ltd, a deliberate misrepresentation case, said that it decided:

'[that there is a] distinction between a factor which is observed or considered by a plaintiff or even supports or encourages his decision, and a factor which is ... a real and substantial part of what induced him to enter into the transaction'.

In his view only the latter would be causative. Then in Assicurazioni Generali Spa v Arab Insurance Group 44 Clarke L.J., in the majority, over the dissent of Ward L.J., said:

'If the insurer would have entered into the contract ... in any event the representation ... will not ... be an effective cause of the making of the contract ... [I]n this context ... causation cannot exist when even the 'but for' test is not satisfied ... He must ... show at least that, but for the ... misrepresentation, he would not have entered into the contract ...'.

A requirement that the misrepresentation be a necessary cause is unsupported by authority and is contrary to the Cranworth test. The dictum of Rix J. was applied in Dadourian Group International Inc v Simms where the Court of Appeal said:

'... the presumption of inducement is rebutted by the representor showing that the misrepresentation did not play a real and substantial part in the representee's decision to enter into the transaction, the representor does not have to go so far as to show that the misrepresentation played no part at all'.

These decisions were followed by Christopher Clarke J. in Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc. The recent and novel 'but for', 'a real and substantial cause', and 'only support and encourage' tests require contributory causes to be weighed and should be rejected'."

It is this last passage, in particular, which Mr Saini QC submitted entails *Handley* favouring *might* over *would*. It is quite apparent, however, that the focus here is on something quite different: the relative weight (or decisiveness) to be attributed to particular causes, rather than on the *might/would* question which nowhere is even mentioned in the article.

315. In any event, it is fanciful, in the circumstances, to suppose that by making a single reference to the article (and even then a different passage under the heading *"The Irrelevance of Hypothetical Events"* in which *Handley* is dealing with a different point altogether), Lord Clarke in ***Zurich v Hayward*** should be regarded as somehow changing his mind on the *might/would* issue (not an issue which, in any event, he addressed in ***ARIG***).

316. Mr Saini QC also pointed out that *Cartwright* considers that the *might* test should apply not only to fraudulent misrepresentation cases but more generally. Specifically, *Cartwright* states at paragraph 4.34, as follows:

"The representee is not required to show that he would not have entered into the contract had the representation not been made. The evidence may, however, show that he would or might well still have entered into the contract, even if the misrepresentation had not been made. In such a case one might argue that the representation did not cause him to enter the contract, because 'but for' the misrepresentation he would still have entered into the same contract, or suffered the same loss. On the other hand, it is still true to say that the misrepresentation, if present to his mind and acting as one of the factors

he took into account in making his decision, did in fact cause the representee to enter the contract, and that he should still be permitted to base his claim to rescind upon the representation. At least in relation to fraudulent representations the courts have indicated that they will not deny the representee the right to rescind on this ground."

Again, however, the question which *Cartwright* is here considering is not the *might/would* question but whether one of multiple causes can be an effective cause. That, indeed, is made clear by the reference in the third line of this passage to *"would or might well"* without drawing any qualitative distinction between *would* or *might*.

317. It follows that I reject Mr Saini QC's submissions based on *Handley* and *Cartwright*, as well as his suggestion that Lord Clarke in ***Zurich v Hayward*** is to be treated as though he were supportive of *might* being the broader test as opposed to the test applicable only to fraud cases. As previously explained, I proceed, instead, on the basis adopted in ***Raiffeisen***, ***Cassa di Risparmio***, ***Leni Gas*** and ***NIVE v Rembrandt***, namely that in cases of fraud *might* is the appropriate test but in non-fraud cases the *would* test applies. I need not, in the circumstances, decide whether, as a matter of principle, that ought to be the case. However, it seems to me that there is considerable force in the view, expressed in *Vitiation of Contractual Consent* at pp. 658-662, that the *would* test should operate in all cases (whether fraud or otherwise). Specifically, this is stated at p. 660:

"*If the purpose of this measure of damages assumes that the loss associated with the contract or other conduct would not have taken place but for the misrepresentation, there is no reason why a test of inducement should be any different. That is, it is a test that presupposes a strong sense of causation. If it were otherwise, the claimant might well receive a windfall …*

It is suggested that the Court should adopt a strong test of inducement for all misrepresentations, even in cases of deceit. Whilst no one likes a fraudster successfully to have deceived an innocent, it is difficult to see why the Court should allow a cause of action to exist, the mark of which is the suffering of damage, where in truth no damage has been sustained by reason of the misrepresentation. How can it seriously be suggested that a representee has suffered damage when that representee would have concluded the contract or pursued the line of conduct alleged to have been induced in any event (and consequently suffered the same loss) even if no misrepresentation had been made? It is understandable that the Courts, explicitly fuelled by moral considerations, might be prone to punish fraud even if no damage resulted from the wrong. Unlike the making of fraudulent claims in the context of insurance contracts, where no inducement need be proved; damage resulting from the wrong remains an essential requirement of the cause of action in deceit. If, for policy reasons such as apply with particular force to insurance contracts, the law wished to remove the element of damage (i.e. iniuria) from the cause of action, the Courts should say so."

Mr Saini QC criticised this, suggesting that the passage conflates the issue of causation of loss with the question of reliance, but I do not agree since the

point which *MacDonald Eggers* is making is that, since the *iniuria* requirement is an ingredient of the cause of action, the fact that a claimant *might* not have contracted on the same terms had there been no misrepresentation is obviously highly material. I need not, however, base my approach to this case on *MacDonald Eggers* being right and, accordingly, do not do that, instead adopting the approach which is consistent with that adopted in ***Raiffeisen***, ***Cassa di Risparmio***, ***Leni Gas*** and ***NIVE v Rembrandt***.

318. Against this (admittedly somewhat lengthy) background, I turn to the evidence in this case, which I can deal with very shortly indeed, if only because Mr Saini QC's submissions on the issue were themselves very short. They amounted, in essence, to a single point. This was that, if the Court were to conclude that the EURIBOR Representations were made (which, for present purposes, the Court is assuming, even though, in fact, the opposite conclusion has been reached), then, *"the starting point"* (a reference, it seems, to the presumption of inducement) should be that Marme, through Mr Maud, relied on the EURIBOR Representations. As Mr Saini QC put it in closing, that *"starting point will be particularly difficult for the Defendants to displace if Marme succeeds on fraud but even if it does not the evidence does not displace the presumption"*.

319. As to that *"evidence"*, in opening Mr Saini QC had observed that it *"would be a surprising conclusion to draw that an experienced businessman such as Mr Maud was indifferent to the honesty of RBS in the setting of EURIBOR which could … have been to the substantial disadvantage of Marme"*. In closing, however, reliance was placed on submissions which Mr Saini QC made on the question of damages, specifically the so-called counterfactuals, in support of the proposition that Marme *"would not have contracted on the same terms if it had known the truth"*. I cannot agree with Mr Saini QC about this for various reasons.

320. First, as Mr Howe QC and Mr Quest QC submitted, even if the alleged EURIBOR Representations were made (which is to be assumed for present purposes) and they were 'material' so as to engage the presumption of inducement (which, again, is to be assumed for present purposes), the presumption invoked by Mr Saini QC is quite obviously rebutted in this case given that the alleged representations never crossed Mr Maud's mind before the Transaction was entered into. I have addressed this matter already, and so need say no more about it. The short point is that Mr Maud did not suggest that he gave any thought to any of the EURIBOR Representations at the time that the Transaction was entered into. The most that he did, at least possibly, was to assume that EURIBOR was a "*true and honest*" rate. If this is all that Mr Maud did, it is inconceivable (indeed, impossible) to conclude that he relied upon the EURIBOR Representations.

321. Secondly, it is, in any event, clear that in the present case there was no reliance since, critically, Mr Maud did not say in evidence that, if the EURIBOR Representations had not been made, he (and so Marme) either *would*, or even *might*, have acted differently. It is striking, indeed, that Mr Saini QC made no attempt in closing (whether in his written or in his oral submissions) to point to evidence from Mr Maud where he described how he *would* or *might* have

acted differently had the EURIBOR Representations not been made. His submissions were, instead, entirely premised on the presumption of inducement applying. This was for, no doubt, good reason since it is perfectly obvious, in the circumstances, based on Mr Maud's own evidence, that the EURIBOR Representations were not *"actively present to the mind"* and cannot have played any role in his (or Marme's) decision-making. Mr Saini QC was able in his submissions to point to no evidence from Mr Maud which addressed this.

322. Thirdly, although I am conscious that it is important not to stray into impermissible territory, testing the position by reference to what Marme would have done had it known the truth, it is clear, as I shall come on to explain when dealing with the question of damages, that what it has been suggested Marme would have done is not supported by the evidence which Marme adduced at trial. On the contrary, it is clear that, had Marme known the truth, it would have acted in precisely the same way as it, in the event, did. Given this, the suggestion that there was the requisite reliance in this case is quite hopeless.

Conclusion

323. It follows that Marme's reliance case must fail – even assuming that the EURIBOR Representations were made at all and, if they were, that they were false as I have found. That is the position irrespective of whether they were made fraudulently or not since, ultimately, in the circumstances, the reliance issue does not turn on the *might/would* distinction.

Rescission

324. I turn, then, to the issue of rescission – before coming on to address the alternative damages claim which Marme has advanced. I assume for this purpose that the EURIBOR Representations were made, falsified and relied upon by Marme. The Banks accept that Marme would, in principle, be entitled to rescind. They maintain, however, that this is a case in which Marme should be taken as having affirmed, alternatively that what Marme seeks is, in truth, partial rescission and that is not permissible.

Affirmation

325. There was no dispute as to the relevant law dealing with affirmation. Thus, in ***Peyman v Lanjani*** [1985] Ch 457, at p. 494, May LJ set out the position as to the knowledge required for affirmation in the following way:

> "*The next feature of the doctrine of election in these cases which in my opinion is important is that when the person entitled to make the choice does so one way or the other, and this has been communicated to the other party to the contract, then the choice becomes irrevocable even though, if and when the first person seeks to change his mind, the second cannot show that he has altered his position in any way.*

This being so, I do not think that a party to a contract can realistically or sensibly be held to have made this irrevocable choice between rescission and affirmation unless he has actual knowledge not only of the facts of the serious breach of the contract by the other party which is the pre-condition of his right to choose, but also of the fact that in the circumstances which exist he does have that right to make that choice which the law gives him. To hold otherwise, subject to the considerations to which I shall refer in a moment, would in my opinion not only be unjust, it would be contrary to the principles of law which one can extract from the decided cases."

The position is summarised, also, in *Virgo, Principles of the Law of Restitution* (3rd Ed., 2015) at pp. 27-28:

"*The claimant cannot rescind a transaction which he or she has affirmed. Two conditions must be satisfied before the transaction can be considered to have been affirmed. First, the claimant must know of the circumstances which enable him or her to rescind the transaction, as will be the case where the claimant discovers that he or she was induced to enter into the contract by virtue of the defendant's misrepresentation. But rescission will not be barred if the claimant merely had the means of discovering that there was a ground for rescinding the transaction, even if this could have been discovered with due diligence.*

Secondly, the claimant must unequivocally show by words or conduct that he or she has decided not to rescind the contract. It is not necessary for the claimant to communicate this affirmation to the defendant."

As to the second element, the conduct must be "*inconsistent with an intention to rescind the contract*": see *Chitty* at paragraphs 7-132 and 7-133.

326. It was Mr Quest QC and Mr Howe QC's submission that, by making payments under the Swaps in February 2014, Marme was taking a step which was obviously inconsistent with an intention to rescind. That did not appear, indeed, to be a controversial proposition since Mr Saini QC's focus in resisting the affirmation case was on the requirement, which Mr Quest QC and Mr Howe QC acknowledged exists, that a party in Marme's position should not only have "*full knowledge of the true facts*" (as it was put by Kerr J, as he then was, in ***The 'Siboen' and The 'Sibotre'*** [1976] 1 Lloyd's Rep 293 at p. 325) but also knowledge of its right to affirm or rescind. It was Mr Saini QC's case that this could not be shown in the present case.

327. Mr Saini QC criticised the Banks' pleadings in this respect, highlighting Slade LJ's observations in ***Peyman v Lanjani*** at pp. 500-501, as follows:

"*If A wishes to allege that B, having had a right of rescission, has elected to affirm a contract, he should in his pleadings, so it seems to me, expressly allege B's knowledge of the relevant right to rescind, since such knowledge will be an essential fact upon which he relies*."

As to this, RBS pleaded in its Re-Re-Amended Defence that Marme:

"*has affirmed the Swap by continuing with the Swap without seeking at the earliest opportunity to rescind it and by making payments under it with knowledge of the matters of which it now complains".*

The plea went on to refer to Marme having:

"made a payment under the Swap on 20 February 2014, two-and-a-half months after the press release upon which its claim is based".

Similarly, the Non-RBS Banks pleaded in their Re-Amended Defence and Counterclaim that:

"*Marme has affirmed the Swaps by making payments under them in February 2014, after the alleged falsity of the (denied) EURIBOR Representations was known to it, following the 4 December 2013 press release …*".

It can be seen, therefore, that Mr Saini QC was, strictly speaking, right that that none of the Banks expressly pleaded that Marme had knowledge of its right to rescind. In circumstances, however, where there has been no suggestion on Marme's part that it has been, in any sense, prejudiced by this pleading deficiency, and given that it must have been obvious, at all times, that the Banks were meaning to allege knowledge of a right to rescind given that affirmation has been alleged, however imperfectly, it would be inappropriate to decide the case on this technical basis. The more so, since, as I shall now explain, in substance, the affirmation case is unanswerable.

328. The Banks' affirmation case is straightforward: they say that Marme had the requisite knowledge by the time that they made their payments under the Swaps in February 2014 in view of the fact that those payments were made just over two months after the EU Commission had issued its press release on 4 December 2013 – the very press release relied upon by Marme in order to prove the falsity of the EURIBOR Representations. In short, therefore, Mr Quest QC and Mr Howe QC submitted that, Mr Maud (and so Marme) must have known about the matters set out in that press release before deciding to make the payments (and so to take a step which, it is not in dispute, amounts to an *"inconsistent"* act).

329. Although Mr Saini QC suggested that it was not adequately put to Mr Maud in cross-examination that he (and Marme) knew that Marme had the right to rescind when the payments were made, that is not a submission which I can accept. It seems to me that, on the contrary, the case was more than adequately put to Mr Maud by Mr Quest QC. The relevant exchanges started with this:

"*Q. Now, at some point after the default in September 2013 you became aware, didn't you, of the fact that the European Commission had fined RBS for participation in the cartel?*

A. Sometime in early 2014 I did, yes.

Q. Well, the fine against RBS was quite big news at the time, wasn't it?

A. Well, I read about it, obviously, because I became aware of it.

Q. Yes. And you told us before that you would keep up, as it were, with news reports about RBS particularly?

A. Well, I wouldn't say I kept up with; I didn't have it on my computer as a watch or something like that. But whenever I saw an article in the press about RBS, I tended to read it, yes.

…

Q. I'm going to suggest to you, just so it's clear, that it's likely you would have found out about the European Commission fine at the time it was made because it was reported extensively in the newspapers.

A. Well, if you show me where it was reported extensively, I'll let you know whether I saw it. But I don't believe I saw it in late 2013, I believe I saw it in the beginning of 2014, and it was a result of becoming aware of it that I first discussed the matter with lawyers."

Albeit a little grudgingly, it can be seen, therefore, that Mr Maud accepted that by the start of 2014 he had become aware of the EU Commission Press Release. Mr Maud need not have been so grudging, however, because he had at an earlier stage of the proceedings, in his second statement, stated as follows:

"*RBS's involvement in Euribor manipulation had become a matter of public knowledge on 4 December 2013, when the European Commission announced by a press release that it had fined eight international institutions a total of €1,712,468,000 for participating in illegal cartels in markets for financial derivatives covering the European Economic Area. RBS was fined €131 million for its participation in the cartel of banks that had colluded to manipulate Euribor, which also included Deutsche Bank, Société Générale and Barclays. I believe that I became aware of this development in early 2014*."

330. Mr Quest QC went on to put to Mr Maud, squarely in cross-examination, that he already believed that the EURIBOR rate was *"a corruptly established rate"* by the time that the payments came to be made and yet Marme made those payments without any reservation of rights:

"*Q. So when you read about RBS's involvement in the cartel in the press, you formed the view that RBS had concealed a corruptly established rate from you?*

A. Yes

…

Q. Right. My question is this: if you had – as you say you did – interpreted the European press release as showing that RBS had been guilty of concealing

corruption from you, wouldn't the natural response have been for you to complain to RBS?

A. We were – the reason I put the company into insolvency, protective insolvency, was to protect from what I believed was the imminent enforcement by RBS of its security against the company to the detriment of the company, and acting in the best interests of the company, I put it into protective insolvency to protect it from RBS, amongst others. And therefore our dialogue, I've got to say, at that point was limited.

Q. Well, you say it was 'limited'. Just to get the chronology, in December 2013 the European Commission press release is published. You read it at some point, or you read the report of it either then or some point later. You form the view that RBS has concealed corruption from you. But you don't make any complaint to RBS?

A. Well, my lawyers wrote a letter before action to them.

Q. Well, your lawyers wrote a letter before action in August 2014, didn't they?

A. Whenever it was, they wrote a letter before action to them.

Q. Well, we'll come to that in a moment. But so far as you are concerned, at no stage in December, January, February, all the way up to August, did you contact anyone at RBS and say –

A. Well –

Q. – 'What's happened here?'

A. No, I didn't, but I think it's fair to say that RBS were not engaging with me at that point. On the contrary, they were seeking to enforce against the asset which I was director of, a company I was director of and which I was one of the beneficial owners of, in detriment to the company and in detriment to myself, and we didn't have a dialogue. And I thought -- you know, even if I thought of writing to RBS, I think they would have treated it in the normal disdain that they treated at that time any communication from me.

Q. So even though you say you'd formed the view that EURIBOR was corrupt and RBS had concealed it from you, you didn't think there was any point in writing to them?

A. Well, no, I didn't, for the reasons I've just told you."

I interject to acknowledge that, whilst these latter exchanges embraced time periods which went beyond February 2014, Mr Quest QC was, then, careful to steer Mr Maud back to the relevant time period in these further exchanges:

"Q. Now, in February 2014 the next quarterly payment fell due under the swap, didn't it?

A. It did.

Q. Yes, And that was another €5 million net –

A. Yes.

Q. -- that Marme had to pay under the swap to RBS?

A. Yeah.

Q. If you had formed the view that EURIBOR was a corruptly established rate and RBS had concealed that from you, why did you allow that payment to be made?

A. I thought about it long and hard, and the reason I did was that I didn't want to give any -- any reason to RBS or justification for RBS to terminate the swap.

Q. Right. But you didn't even write to RBS to make any kind of reservation of rights or any complaint at all?

A. We had conversations, but at that time I didn't --I didn't -- you know, we were not in a dialogue where we were discussing this sort of thing. Generally communication was through lawyers or professional advisers. And I did think very long and hard about making the payment and -- but we decided -- I decided fundamentally to make the payment because I didn't want to give RBS and the other banks the excuse of terminating the swap at that point.

Q. So you made the payment without making any complaint, even though you say you were aware by then that RBS had contributed to the corruption of EURIBOR?

A. Well, we were considering bringing these proceedings at that time and -- and I didn't think it was appropriate to warn them of those proceedings at that time.

Q. You didn't even think it was appropriate to complain to them about what you thought you discovered?

A. Well, you're presupposing a situation where there is a convivial relationship between two parties. There wasn't."

Mr Quest QC was here, very clearly, putting to Mr Maud that the payments which Marme made in February 2014 were made at a time when Marme could have chosen not to pay. If there were any doubt about what was being put, however, that doubt is dispelled by what followed:

"Q. Mr Maud, you were formerly a practising lawyer, weren't you?

A. Oh, a long time ago.

Q. But you probably remember, don't you, from your legal practice the principle that if you are misled into entering a contract, that you're able to set it aside or rescind it?

A. Pardon me?

Q. You probably remember, don't you, the principle that if you are --

A. Yes, but --

Q. -- misled into entering into a contract, that you may be able to set it aside?

A. Yes. I also remember that to do that, you need to bring legal proceedings."

331. The conclusion is clear: Mr Maud, a former solicitor, knew that Marme had a choice to rescind or not to rescind and opted for the latter after giving the matter *"long and hard"* thought. A tactical decision was made not to rescind and, instead, to take action which is about as inconsistent with rescission as it is possible to imagine. It follows that the affirmation case put forward by the Banks must prevail, and so that any right to rescind which might previously have existed no longer does.

Partial rescission

332. In the circumstances, the partial rescission issue does not arise. I should, however, address it in case my conclusion on affirmation is wrong.

333. Noting that Marme originally sought rescission of the Senior Loan but that this plea was withdrawn in August 2017, so that Marme's claim as currently pleaded is that it is entitled to "*rescind the Swaps and to seek restitution of all sums paid to the Defendants thereunder*" and, as such, does not extend beyond the Swaps, Mr Quest QC and Mr Howe QC submitted that should not be the order sought since that would entail merely "*partial rescission*". As to this, they cited ***Murad v Al-Saraj*** [2004] EWHC 1235 (Ch), in which Etherton J (as he then was) stated as follows at [294]:

"It is a trite law that, if a contract is to be rescinded, the representee must rescind the whole contract or none of it. He cannot elect to rescind only the part affected by the misrepresentation, whilst retaining the advantages of the remainder of the contract. Similarly, if the representee is unable to make restitution of parts of the benefits obtained under the contract, he cannot rescind as regards the remaining part."

Mr Quest QC and Mr Howe QC submitted that this applies also to situations where a number of interdependent contracts are entered into and form part of an indivisible wider bargain where rescission of a single contract would amount to a rewriting of the parties' (overall) bargain. On this basis, Mr Quest QC and Mr Howe QC submitted, rescission of the Swaps alone ought not to be ordered in this case, given that they form part of the (overall) Transaction along with the Senior Loan (which was entered into not just between Marme and the Banks but also with Postbank and RZB, non-parties to the present

proceedings), the Junior Loan and certain equity funding (which concerned Ramblas and Mr Maud and Mr Quinlan personally). To permit the Swaps alone to be rescinded, Mr Quest QC and Mr Howe QC submitted, would entail the rewriting of the bargain into which not only Marme and the Banks entered but also other parties which are not before the Court.

334. Mr Saini QC disagreed with these submissions. His submission was that the Swaps are free-standing agreements which created obligations independent from those in the Senior Loan. As such, there is no obstacle to rescission because it would not involve merely partial rescission. Alternatively, he submitted that, even if the Swaps and the Senior Loan are interdependent, rescission is still appropriate in this case because Marme had made it clear that it would not oppose an order which provides that rescission of the Swaps is conditional on repayment of the Senior Loan. On that basis, Mr Saini QC submitted, Mr Quest QC and Mr Howe QC's *restitutio in integrum* argument goes nowhere.

335. In support of their contention that a contract which constitutes an inseparable part of a larger transaction cannot be rescinded in isolation, Mr Quest QC and Mr Howe QC relied upon ***De Molestina v Ponton*** [2001] CLC 1412. In that case, the claimants sought to rescind certain share distribution agreements on account of allegedly fraudulent misrepresentations made by the first defendant. The defendants applied for the rescission claim to be struck out on the ground that the share distribution agreements could not be rescinded because they were inseparable parts of a larger transaction. The transaction also contained a master agreement and a share buyback agreement. Pursuant to the share buyback agreement, the company would first buy back its own shares from some of the existing shareholders. It would, then, distribute those shares to new shareholders via the share distribution agreements. The claimants accepted that the master agreement and share buyback agreement could not be rescinded but maintained their case that rescission should be awarded in relation to the share distribution agreements. After considering, at [6.1]-[6.3], the authorities supporting the general principle that "*a misrepresentee is permitted to rescind the whole of a contract but not part of it*", Colman J went on to say this at [6.4]:

"*The principle that rescission of part of a contract is not an available remedy has been applied in cases where there is as a matter of form more than one contract comprised in a wider transaction. Thus in A H McDonald & Co Pty Ltd v Wells (1931) 45 CLR 507 the High Court of Australia held that where a contract had been entered into and then replaced some months later by a second contract - both having been induced by innocent misrepresentation - the remedy of rescission could be available only if the entire transaction, including the earlier contract, were rescinded and the question whether restitutio in integrum could be substantially achieved had to be tested by reference to restoration of the position before the earlier contract had been made. That was not possible because it would have involved treating the representor as if he had had the benefit of exploiting the patents in question for a period of three years during which the representee was entitled to that*

benefit. No relief could be moulded 'which will accomplish an approximate restoration that will be just' … ."

He continued in the next two paragraphs by considering the claimants' submission that English law was insufficiently certain on this issue, explaining at [6.7] as follows:

"*I conclude that on this issue the present state of English law is not in any doubt at all and nothing in Vadasz renders it doubtful, whatever may be the position in Australia. By reference to the state of English law as so far developed at House of Lords level that case was wrongly decided. Unless and until the House of Lords overrules the analysis by Lord Browne- Wilkinson in Barclays Bank v O'Brien and its particular application in TSB Bank v Camfield the principles binding on this court are well-settled. The scope of the equitable discretion in a rescission claim is confined to adjustments to achieve substantial restitution to accommodate events that have occurred after the contract has come into force and does not extend to the general reconstruction of the bargain to achieve an objectively overall fair result."*

He concluded at [6.9]:

"The crucial issue in the present application is, however, one of mixed fact and law and it is how one identifies the criteria for determining whether a number of separate contracts are part of a single overall transaction for the purposes of the rule against rescission of part of a transaction. On this point there is little or no help in the authorities, but application of general principles strongly suggests the necessary criteria. If a representee is induced to enter into separate contracts A & B by the same misrepresentation, it may be that performance of contract B depends on the prior performance of contract A. In that case one cannot rescind contract A without also rescinding contract B. To permit the survival of contract B would be inconsistent with the principles of restitutio in integrum. But there may be cases where although both contracts were induced by the same misrepresentation either can be performed without performance of the other. In that case the representee may rescind unless the contract not sought to be rescinded would never have been entered into by the parties without also entering into the other. Thus, for example, in a case where the transaction is divided into different contracts simultaneously negotiated, it may be that the consideration for the whole bargain is written into one contract, leaving only nominal consideration in the other contract. In that event it would not be open to the representee to leave open the contract that gave him the main consideration while rescinding the other under which his primary performance obligation lay. Again, to do otherwise would not effect restitutio in integrum. Or there may be cases where it is clear from the terms of the contracts and the matrix evidence that the subject matter of the contracts is so interrelated that, although it would be theoretically possible to perform each separately, one would never have been entered into without that contract sought to be rescinded. However, in the absence of structural interdependence between separate contracts, the most usual determinant of inseparability is likely to be the distribution of consideration for the whole bargain between the separate contracts."

On that basis, Colman J explained, at [7.1], that the three share distribution agreements were interdependent and so one could not be rescinded without rescinding the other two, whereas the equivalent issue as regards the share buyback agreement and its relationship with the share distribution agreements could not be conclusively determined and the issue should go to trial (see [7.12]).

336. The same principle is set out in *O'Sullivan, Zakrzewski & Elliott, The Law of Rescission* (2nd Ed., 2014), at paragraph 19-05:

"*The rule against partial rescission applies to bargains rather than individual contracts. Rescission will accordingly be refused where the contract in question is part of a wider transaction, the components of which are commercially interdependent in the sense that they were contracted each in consideration or contemplation of the others and were intended to be performed together. For example, in Maguire v Makaronis the High Court of Australia reversed the decision of the court below, which had been to rescind a mortgage while leaving the underlying contractual covenants intact. The effect of that had been to leave the borrower in possession of the loan money while depriving the lender of his security. The High Court considered this to involve an impermissible reformation of a single bargain comprised of two instruments."*

In the next paragraph this is stated:

"By contrast, where a contract or wider transaction is severable according to conventional principles, there is usually no difficulty with rescinding one severable part and leaving the remainder on foot. In effect the court must find that the obligations in respect of which rescission is claimed form a self-contained bargain. There may be cases, however, in which a defendant would suffer unjustified prejudice if one agreement were set aside in circumstances where a second independent agreement remained on foot, such that substantial restitutio in integrum is not possible."

337. The principle was also applied in ***NGM Sustainable Development v Wallis*** [2015] EWHC 2089 (Ch) and was restated by Sir Jeremy Cooke in ***Deutsche Bank v Unitech*** [2017] EWHC 1381 (Comm) at [43]:

"*The rule against partial rescission applies, it is said, to bargains rather than merely to individual contracts. Rescission will be refused where a contract in question is part of a wider transaction, the components of which are commercially inter-dependent, in the sense that they were contracted each in consideration or contemplation of the others and were intended to be performed together*."

338. It is clear, therefore, that the bar on partial rescission applies not only to inseverable parts of a single contract but also to contracts which form part of an indivisible bargain. The underlying principle is that a party seeking rescission should not be allowed to pick and choose which parts of the transaction to perform since that would involve rewriting the parties' bargain.

339. Mr Saini QC did not take issue with the existence of the partial rescission bar. It was his submission, rather, that the Swaps in this case ought not to be regarded as interdependent but, instead, as free-standing agreements which did not depend for their performance on the Senior Loan. There is no question, he submitted, of the Swaps forming part of any inseverable contract (as in ***De Molestina***), not least because the parties to the Senior Loan and individual Swaps are different. He suggested that, in the circumstances, rescission would simply require benefits received by Marme from the Banks (the floating EURIBOR payments) to be 'netted off' against the payments received by the Banks from Marme (the fixed rates).

340. I cannot accept these submissions as they seem to me to ignore the commercial reality that the Syndicate banks would not have advanced funds under the Senior Loans without the Swaps (or equivalent interest rate hedging) being entered into at the same time. More specifically, the Swaps and Senior Loan are structurally interdependent in that Marme was required by Clause 8.3 of the Senior Loan to maintain Hedging Arrangements in a notional principal amount not less than the amount of the loan. Furthermore, without the Swaps, Marme could not have fulfilled this obligation since Marme was required by Clause 19.6 of the Senior Loan to ensure an ICR of at least 105% and, without the embedded loan created by the stepped nature of the payments under the Swaps, Marme could not have maintained this. The fact that the Senior Loan could have been structured differently, without the Swaps, is no answer to this point since that would, in effect, entail a rewriting of the parties' bargain (see ***De Molestina*** at [6.2]). Although it may not strictly be the case that performance of one agreement depends on performance of the other since Clause 8.3 provides that satisfactory hedging arrangements must be maintained rather than providing specifically for the Swaps in their exact form and, similarly, Clause 19.6 provides that "*The Company must ensure that Interest Cover is, at all times, at least 105 per cent*" without envisaging the Swaps specifically, nonetheless, Colman J plainly had in mind that contracts can still be interdependent if the contracts would never have been entered into without also entering into the other.

341. Although the Swaps and Senior Loan could each, theoretically, have come into existence without the other, the commercial reality is that they were entered into as part of a single transaction. Moreover, the reality is that they would never have been entered into other than as part of a single transaction since it is clear that the Banks would never, in fact, have permitted Marme to take the Senior Loan without having the Swaps as a hedge against interest rate risk. The Swaps made the Transaction realistic by enabling the parties to ensure that Marme would be able to cover payments under the Senior Loan even if interest rates were to rise. That the Non-RBS Banks would not have entered into the Senior Loan in the absence of the Swaps was, indeed, confirmed by the evidence of Mr Goodwin for RBS, Mr Feenstra for ING, Mr Grey for HSH and Mr Greenland for Bayern. It was also part of Mr Maud's own evidence that the Swaps were required to get the Transaction "*over the line*".

342. In addition, and again in practice, the Senior Loan would not have worked from a financial perspective without the Swaps, as they provided not only hedging, but also an embedded loan as part of the funding. This was accepted, in terms, by Mr Maud in cross-examination. The embedded loan was created by the stepped nature of the Swaps. It was this which made the deal possible by allowing for lower interest payments in the early years of the Senior Loan, at which time the rental payments received by Marme from Santander would not have been sufficient to cover them.

343. Nor, in reality, would Marme have entered into the Senior Loan without the Swaps because the Swaps protected Marme from changes in the EURIBOR rate. This is a matter to which I will return when addressing the question of damages. However, it should be noted in this context that Mr Greenland of Bayern also gave evidence that Postbank and RZB, who took part in the Senior Loan but not the Swaps, would not have entered into the loan without the comfort of interest rate swaps so as to ensure that Marme would be able to service the Senior Loan. There was also evidence from Mr Greenland that the assignment of the benefit of the hedging formed part of the security package required by the Senior Lenders, even though Clause 2.2 of the Security Agreement did not specifically stipulate the Swaps but merely provided that "*The Chargor assigns absolutely, subject to a proviso for re-assignment on redemption, all of its rights under any Hedging Arrangements*".

344. There is, then, the further point that the consideration for the lending was spread across both the Senior Loan and the Swaps. Mr Grey gave evidence on behalf of HSH that it would not have taken an underwriting position if it did not also have a *pro rata* share in the interest rate swap. Mr Feenstra gave evidence that taking part of the Swaps was an important part of the deal for ING and the other banks given the additional revenue involved. Mr Maud gave evidence in cross-examination that he understood that the Swaps were a principal element of the Banks' profit from the transaction and that they were a condition for entering into the deal. Indeed, as will appear later, Marme's own case as regards its second 'counterfactual' is premised on Marme being able to achieve a discount of 50 bps across both the Swaps and Senior Loan, which presumes that the consideration was considered as being for the Transaction as a whole, rather than allocated to each constituent part.

345. For all these reasons, in my view, the various contracts were, quite obviously, interdependent, and so the principle in ***De Molestina*** is engaged. Mr Saini QC submitted, nonetheless, that, even if the contracts are to be regarded as being interdependent, the rule against partial rescission is not engaged since Marme is willing to make rescission conditional upon repayment of the Senior Loan. He highlighted the fact that Marme is able to repay the Senior Loan because Ciudad Financiera is about to be sold. It was Mr Saini QC's submission that, in view of this, there can be no issue about partial rescission because there is no possibility that Marme would be unjustly enriched at the Banks' expense were rescission to be ordered. In support of this contention, Mr Saini QC submitted that the rule against partial rescission is an aspect of the principle of *restitutio in integrum* and that, since the rationale of the rule of *restitutio in integrum* is to prevent the representee being unjustly enriched, it follows that,

if such unjust enrichment can be avoided, then, the partial rescission bar has no application.

346. Mr Saini QC cited, in this context, ***Portman Building Society v Hamlyn Taylor Neck*** [1998] 4 All ER 202, in which Millett LJ (as he then was) made the following observation at p. 208D-E:

"*The obligation to make restitution must flow from the ineffectiveness of the transaction under which the money was paid and not from a mistake or misrepresentation which induced it*."

That case, however, involved a claim in restitution for money 'had and received'. It is not, as such, altogether clear how it assists in considering the rationale for the rule against partial rescission. An authority more directly on point is, however, ***Halpern v Halpern*** [2008] QB 195, in which, at [75], Carnwath LJ (as he then was) endorsed Professor Treitel's view that:

"*the essential point is that the representee should not be unjustly enriched at the representor's expense; that the representor should not be prejudiced is a secondary consideration*."

That said, it is clear that what Carnwath LJ was really addressing here was the question of which parties needed to be "*restore[d] … to their previous positions"*. ***Halpern*** is, accordingly, not entirely on point.

347. Mr Saini QC also relied upon *O'Sullivan, Zakrzewski & Elliott, The Law of Rescission* at paragraph 19.03, as follows:

"The rule against partial rescission has two bases. The most general and fundamental is that the court should not involve itself in the rewriting of bargains along lines it may consider to be fair. Where the court cannot say which part of the consideration the claimant received related to which of his obligations – in other words, where the contract is not severable – the court cannot properly erase only some of the obligations. A fortiori a claimant cannot avoid his obligations while insisting that the defendant's obligations should remain on foot or, what is in effect the same thing, while refusing to make restitutio in integrum. The rule against partial rescission and the rule requiring restitutio in integrum are for this reason closely related."

Mr Saini QC submitted that the last sentence of this passage, taken together with Colman J's observation in ***De Molestina*** at [6.2] that "*the principle that there cannot be partial rescission is part of the wider requirement that there cannot be rescission unless there can be restitutio in integrum*", demonstrates that the rule against partial rescission and *restitutio in integrum* are concerned with preventing the unjust enrichment of a representee at the representor's expense. Mr Saini QC submitted, accordingly, that the partial rescission rule is, as he put it, directed at *"preventing unjust enrichment, and not some abstract concern about rewriting bargains*". It is for this reason, he suggested, that, if there is no unjust enrichment, the rule against partial rescission has no application. It follows, he went on to submit, that the partial rescission rule

does not apply in the present case, Marme having agreed to repay the Senior Loan in return for rescission being ordered.

348. I do not agree with Mr Saini QC about this. There is nothing in ***De Molestina*** or in any other authority to which the Court was taken to suggest that lying behind the partial rescission rule is the question of unjust enrichment. On the contrary, in ***De Molestina*** Colman J described the applicable rationale in these terms at [6.2]:

"*These authorities do, in my judgment, make it very clear that the principle that there cannot be partial rescission is part of the wider requirement that there cannot be rescission unless there can be restitutio in integrum. Further, that requirement is the conceptual consequence of the basic nature of the remedy of rescission which is to discharge all the parties from the bargain into which the misrepresentor has induced them to enter. It is not and never has had the function of providing compensation for the misrepresentation or some hybrid solution to reflect what would be fair between the parties having regard to the nature of the representation and the extent to which one party has been misled by another. Consistently with that, the court has no power to create a new bargain for the parties. What has been induced is the original bargain and it is the purpose of the remedy to return the parties to their position before that particular bargain was made. There is therefore no room for any form of equitable engineering directed to re-constructing the fabric of the original contract.*"

I agree with what is stated in this passage since it seems to me that it encapsulates the underlying principle in helpful terms. What it makes clear is that, where contracts are inseparable, it is not appropriate to attempt to unravel some of those contracts but not others since doing that brings with it the risk (or more) that a *"new bargain"* will be created for the parties based on notions of what is or is not fair which are necessarily born out of impermissible hindsight. That is why the partial rescission rule operates, essentially, on an 'all or nothing' basis.

349. It follows that what Marme proposes in an effort to sidestep the partial rescission rule cannot work as a matter of principle. Nor, however, on analysis, would it work in practice since what it would entail is Marme being permitted to rescind the Swaps whilst at the same time performing the Senior Loan contract by repaying it ostensibly in accordance with its terms despite the fact that the Swaps themselves formed part of the consideration for the Transaction. It follows that, if Marme were to rescind the Swaps whilst nonetheless performing the Senior Loan, Marme would receive the use of the money lent under the Senior Loan for less than the anticipated consideration. Even if Mr Saini QC were right, therefore, as to the rationale for the partial rescission rule, what Marme proposes would not avoid its being unjustly enriched were rescission of the Swaps to be permitted. To allow this to happen would mean, in effect, not only that there were a rewriting of the parties' bargain, but also one which involves a reduction in the level of agreed consideration.

350. The position in these respects can be contrasted with ***Deutsche Bank AG v Unitech*** [2016] EWCA Civ 119, [2016] 1 WLR 3598, an authority cited by Mr Quest QC. In that case, the defendant to a claim for failure to repay a loan agreement defended the claim by seeking to rescind the agreement for misrepresentation. The defendant accepted that it would only be permitted to rescind on condition that it repaid the loan. The Court of Appeal decided that it could order the defendant to make an interim payment of that amount before trial or make its defence conditional upon making that payment: see [53]. This was not a case of interdependent contracts, however, and the amount payable on rescission was distinguished from the amount payable on performance of the loan agreement.

351. Nor is this a case such as ***Erlanger v New Sombrero Phosphate Company*** (1878) 3 App Cas 1218, relied upon by Marme as an example of conditional rescission, where the Court was invited to achieve substantial restitution by making adjustments so as to facilitate rescission. In ***Erlanger***, the claimant wished to rescind a contract for the purchase of a phosphate mine on the ground of non-disclosure of a material fact by the defendant. The issue that arose was that the claimant had worked the mine and obtained some benefit from it. The House of Lords held that the claimant could rescind the contract, upon condition that it returned the mine to the defendant and accounted for the profits that it had made. At pp. 1278-9, Lord Blackburn stated as follows:

"*It would be obviously unjust that a person who has been in possession of property under the contract which he seeks to repudiate should be allowed to throw that back on the other party's hands without accounting for any benefit he may have derived from the use of the property, or if the property, though not destroyed, has been in the interval deteriorated, without making compensation for that deterioration. But as a Court of Law has no machinery at its command for taking an account of such matters, the defrauded party, if he sought his remedy at law, must in such cases keep the property and sue in an action for deceit …*

But a Court of Equity could not give damages, and, unless it can rescind the contract, can give no relief. And, on the other hand, it can take accounts of profits, and make allowance for deterioration. And I think the practice has always been for a Court of Equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract."

Erlanger was considered by Lord Wright in ***Spence v Crawford*** [1939] 3 All ER 271 at pp. 288-289, where Lord Wright cited ***Erlanger*** and stated as follows:

"*In that case, Lord Blackburn is careful not to seek to tie the hands of the court by attempting to form any rigid rules. The court must fix its eyes on the goal of doing 'what is practically just'. How that goal may be reached must depend on the circumstances of the case. But the Court will be more drastic in exercising its discretionary powers in a case of fraud than in a case of innocent misrepresentation. This is clearly recognised by Lindley, L.J., in the Lagunas case. There is no doubt good reason for the distinction. A case of*

innocent misrepresentation may be regarded rather as one of misfortune than as one of moral obliquity. There is no deceit or intention to defraud. The Court will be less ready to pull a transaction to pieces where the defendant is innocent, whereas in the case of fraud the Court will exercise its jurisdiction to the full in order, if possible, to prevent the defendant from enjoying the benefit of his fraud at the expense of the innocent plaintiff. Restoration, however, is essential to the idea of restitution. To take the simplest case, if a plaintiff who has been defrauded seeks to have the contract annulled and his money or property restored to him, it would be inequitable if he did not also restore what he had got under the contract from the defendant. Though the defendant has been fraudulent, he must not be robbed, nor must the plaintiff be enriched, as he would be if he both got back what he had parted with and kept what he had received in return. The purpose of the relief is not punishment, but compensation. The rule is stated as requiring the restoration of both parties to the status quo ante, *but it is generally the defendant who complains that restitution is impossible. The plaintiff who seeks to set aside the contract will generally be reasonable in the standard of restitution which he requires*."

352. In ***Erlanger*** the issue was whether it is possible to permit rescission notwithstanding that *restitutio in integrum* is impossible but where substantial restitution can nonetheless be made by the claimant giving compensation for, as in that case, deterioration. The answer given in ***Erlanger*** was that this is possible, the Court's task in such a situation being to approximate the parties' *pre-contractual* position. In the present case, however, the position is not the same at all for two reasons. First, it is not the position in the present case that *restitutio in integrum* is practically impossible. On the contrary, the reason that Marme does not seek to rescind the Senior Loan is merely because Marme *chooses* not to do so. The fact that, as Mr Quest QC and Mr Howe QC observed, Marme might not be able to do so because that would involve prejudicing third parties, namely Deutsche Postbank and RZB (lenders under the Senior Loan but not counterparties to the Swaps), does not change the fact that, as between Marme and the Banks, Marme has *chosen* to treat the Senior Loan as remaining on foot. Secondly and in any event, whereas in ***Erlanger*** the Court sought to achieve an outcome which returned the parties substantially to the position they had been in *before* the contract was entered into, the position contended for by Marme in the present case would put Marme partly in the position which it was in before the Transaction (including the Swaps) was entered into (by rescinding the Swaps) and partly in the position in which Marme would be in had the Transaction been performed (through the performance of the Senior Loan and other financing arrangements). That 'mix and match' approach is not an approach which ***Erlanger*** would justify.

353. It follows that the partial rescission rule precludes rescission in this case even if there were not also the affirmation obstacle. I need not, in the circumstances, determine the merits of a further submission which was made on the Banks' behalf. This is that, even if Marme could rescind the Swaps, this would simply mean that the Banks would have a claim in damages against Marme under Clause 8.3 of the Senior Loan for breach of the obligation to maintain

appropriate hedging arrangements in place. That damages claim, it was submitted, would equate to the value of any sums repayable under the Swaps which would create a circularity of action. In this respect, Mr Howe QC drew an analogy with what was said about partial rescission in ***Al Nehayan***. That was a case which concerned a scheme to restructure some companies and provide for payment of part of the capital contribution which Sheikh Tahnoon had made to the business, which had been paid by Mr Kent. Two agreements were made between Sheikh Tahnoon and Mr Kent. The first agreement was a Framework Agreement which provided for demerger of the business. The second was a promissory note by which Mr Kent agreed to pay the relevant sum to Sheikh Tahnoon. At [220], Leggatt J (as he then was) stated as follows:

"In closing submissions Mr Rees QC on behalf of Sheikh Tahnoon argued that Mr Kent cannot on any view rescind the promissory note alone. Mr Rees cited Molestina v Ponton [2001] CLC 1412 for the proposition that a contract which forms an inseparable part of a larger transaction cannot be separately rescinded. In the face of this authority, Mr Kent abandoned his claim to rescind the promissory note. I think it was plain that he was right to do so. The promissory note was not a freestanding agreement but was an inseparable part of the overall transaction by which the interests of Mr Kent and Sheikh Tahnoon in the Aquis and YouTravel companies were demerged pursuant to the Framework Agreement. Its ancillary nature is demonstrated by the fact that clause 5.2 of the Framework Agreement provided for the issue of the promissory note. It seems to me impossible to separate the benefits which Mr Kent received in return for entering into the promissory note from the totality of the benefits that he received under the Framework Agreement, which included the transfer to him of the shares held by Sheikh Tahnoon in Aquis UK and Stelow. Mr Kent could not restore those benefits without rescinding the Framework Agreement. In any event, even if it were possible to rescind the promissory note without rescinding the Framework Agreement, doing so would not free Mr Kent from liability, as it would leave clause 5.2 of the Framework Agreement in effect and would simply place Mr Kent in breach of that clause, giving rise to a liability in damages equivalent to the value of the promissory note."

It is, of course, the last sentence which Mr Howe QC highlighted in support of his submission. It was Mr Saini QC's submission, nonetheless, that ***Al Nehayan*** can be distinguished on the basis that, whereas there was no qualification to Mr Kent's obligation to provide the promissory note, Clause 8.3 of the Senior Loan would only be breached by Marme if it failed to maintain such hedging arrangements as the Banks might require acting in good faith and in accordance with the purpose of Clause 8.3 and not arbitrarily, capriciously or unreasonably. As a result, he submitted, Clause 8.3 does not require Marme to agree to whatever hedging arrangements the Banks might demand, and so it does not follow that there would necessarily be a Clause 8.3 breach as Mr Howe QC suggested. I decline, in the circumstances, to reach any definitive conclusion on this issue since my earlier conclusion makes it unnecessary that I do so.

354. Lastly, it probably goes without saying that, in the circumstances, my having decided that this is not a case in which rescission would be appropriate given my conclusions on affirmation and on partial rescission, I need not go on to consider the Banks' submissions that, were rescission available, the Court should exercise its discretion to award damages *in lieu* under section 2(2) of the 1967 Act.

Damages

355. Turning to the question of damages, albeit that this is another matter which does not, strictly speaking arise, Marme's case is that, had Mr Maud been aware of RBS's involvement in, and knowledge of, the attempted manipulation of EURIBOR prior to the completion of the Transaction on 12 September 2008, Marme would have entered into the Transaction on materially different terms which would have been more advantageous to Marme since such knowledge on Mr Maud's part would have given him (and so Marme) leverage in any negotiations with RBS and the Non-RBS Banks. Specifically, Marme's case is that it would have entered into the Transaction without any Swaps, instead, re-structuring part of the Senior Loan as a so-called 'PIK' (*'payment in kind'*) debt, alternatively that it would have entered into the Senior Loan on the same terms but with a reduction negotiated in respect of the credit spread applicable to each of the Swaps.

Applicable legal principles

356. The Banks take no issue with Marme's case, based on authorities such as ***Doyle v Olby*** [1969] 2 QB 158 and ***Smith New Court Securities v Scrimgeour Vickers (Asset Management) Ltd*** [1997] AC 254, that, if the EURIBOR Representations had been fraudulently made, Marme would be entitled to recover damages for all loss directly caused by the transaction induced by any of the representation, whether or not that loss was foreseeable, and so that Marme would be entitled to be put in the position which it would have been in had the misrepresentations not been made. They did not agree, however, that this means that the relevant inquiry entails simply asking what would have happened if Marme had known the truth since, Mr Quest QC and Mr Howe QC submitted, this assumes that, but for the EURIBOR Representations, Marme would, indeed, have known the truth when the right approach is to ask what would have happened had the EURIBOR Representations not been made. Unless, they suggested, Marme can show that, if the alleged EURIBOR Representations had not been made, the truth would have been discovered, then, the damages case cannot succeed because the requisite causation has not been established. This requires, in the present case, they contended, Marme to show that, if it had been not reassured by the alleged EURIBOR Representations, it would have made its own inquiries as to the integrity of EURIBOR and would, as a result, have discovered the truth.

357. That this is the correct approach, Mr Quest QC and Mr Howe QC submitted (although, ultimately, in closing, Mr Quest QC was inclined not to press the point), is illustrated by ***Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd*** [2001] QB 488. This was a case in which damages for fraudulent misrepresentation were awarded on the basis that the claimant would have

negotiated a better deal with the defendant. The claimant companies and the defendant company negotiated a distribution agreement for the claimants to sell the defendant's products in France. The defendant had represented to the claimants that these prices were the lowest available in England. Bell J found that this representation was false and fraudulent, before going on to say this (as set out in the judgment of Simon Brown LJ, as he then was, in the Court of Appeal at p. 493C-H):

"*None of the witnesses gave direct evidence as to what the position of [the plaintiffs] would have been if the fraudulent misrepresentation had not been made. But I feel able to judge it on balance of probabilities. I have no doubt that Mr Gwyer wanted his company ... to become the exclusive distributor of [Sovereign's] products in France. I have no doubt that he wanted to buy those products at prices which meant that [Sovereign's] customers in the UK could not buy its products in the UK and take them to France to undersell [the plaintiffs] ... In my judgment it is distinctly more probable than not that, if Mr Dent had not made the false misrepresentations which he did, the ... discussion about [Sovereign's] prices would have revealed the existence of prices to large customers, as in the bulk price lists, and probably the bulk price lists themselves. In my judgment Mr Gwyer would have wished to negotiate a discount from the prices in the bulk price list ... There was no reason why Mr Dent should not have agreed such a discount. The bulk price list ... provided for an agreed salesman's commission of 10% payable on the prices in the list. What [Sovereign] sold to [the plaintiffs] would not carry salesman's commission ... Moreover, [Sovereign] were selling to some customers at prices well below those on the bulk price list, although salesman's commission was generally much less on such sales. Although some such sales appear to have been at prices as much as 25% below bulk price list, no doubt due to particular market pressures, I do not believe that Mr Gwyer would have negotiated a commission or discount as great as that as part of a long term, exclusive distribution agreement. I judge that he would have achieved a discount on bulk price lists prices of somewhere between the May 1978 salesman's commission of 10% and the discount of 25% ... which he achieved on the minimum standard rate price list prices. I can do no better than take the mid-way point of 17-5% as the discount which Mr Gwyer would probably have achieved on the bulk price list prices and agreed as the pricing mechanism in the 1979 agreements which would have followed, if the false and fraudulent misrepresentations, the deceit, had not taken place ... The agreements would have had a price clause with the same provisos as clause 5(1) of the actual agreements, relating to price increases only, but related to prices appearing in [Sovereign's] bulk price lists*."

Mr Quest QC and Mr Howe QC highlighted the fact that Bell J referred in this passage to it being *"distinctly more probable than not that, if Mr Dent had not made the false misrepresentations which he did, the … discussion about [Sovereign's] prices would have revealed the existence of prices to large customers, as in the bulk price lists, and probably the bulk price lists themselves"*. This, they submitted, makes it clear that Bell J had in mind that, had the misrepresentation in question not been made, the truth would have been revealed. They drew attention also to Bell J's reference to Mr Gwyer (on

behalf of the claimant) wishing to negotiate a discount from the prices in the bulk price list and to there being *"no reason why Mr Dent should not have agreed such a discount"*. This, they suggested, again shows that Bell J was considering what the position would have been had the truth been revealed, rather than simply proceeding on the basis that the claimant did not need to establish that the truth would, indeed, have been revealed.

358. Mr Tomson dismissed these submissions, describing them as being wrong in principle and as representing a "*fraudster's charter*". He cited, in this context, a passage in Ward LJ's judgment in ***Clef Aquitaine***, at page 512F, in which he reminded the reader that the *"actual result"* in ***Smith New Court v Scrimgeour Vickers*** [1997] AC 254 *"was to restore the decision of the trial judge which was, with the benefit of hindsight, to ask the hypothetical question what the open market would have been had the truth been known"*. Mr Tomson contrasted this with Mr Quest and Mr Howe QC's suggestion as to what the inquiry should be whether the truth would have been discovered. He also cited what Ward LJ went on to say at page 512G-H:

"*I confess to have been worrying whether there is any meaningful difference between, on the one hand, being put in the position one would have been in had one not been told a lie and, on the other hand, being put in the position one would have been in had one been told the truth. I think the answer is to follow Lord Steyn's approach to its logical conclusion because if one is truly to compare the position of the plaintiff as it was before the fraudulent statement was made to him with his position as it became as a result of his reliance on the fraudulent statement, then just before the fraudulent statement was made the plaintiff was battling in what he believed to be honest negotiations to ascertain the defendant's bottom line and he was denied finding it because of the lies that were told to him. … .*"

Mr Tomson suggested that Ward LJ was here focusing on the position had the truth been known. On analysis, however, it seems to me that what Ward LJ was really doing was highlighting the very distinction identified in the submissions which were made by Mr Quest QC and Mr Howe QC whilst, nonetheless, making the point that in the case before him the plaintiff would have ascertained the truth had the misrepresentations not been made given that the plaintiff had been "*battling … to ascertain the defendant's bottom line"* (and so was actually investigating that bottom line) *"and he was denied finding it because of the lies that were told to him*". Plainly, in Ward LJ's view, but for the lies, the plaintiff's investigations would have revealed the truth. On that basis, it was appropriate to assess damages by reference to the true state of affairs.

359. In his oral closing submissions, Mr Tomson relied upon ***OMV Petrom SA v Glencore International AG*** [2016] EWCA Civ 778, suggesting that this authority is also supportive of Marme's case that there is no prior question such as that identified by Mr Quest QC and Mr Howe QC. This was a case in which Glencore had sold cargoes of crude oil to the claimant, a Romanian state-owned company (Petrom). The cargoes supplied were said to have been particular brands of crude but they had, in fact, been blended using various less commonly traded and cheaper crudes so as to make them resemble the

relevant brands. Petrom sued Glencore in deceit, succeeding at first instance before Flaux J on the basis (as summarised by Christopher Clarke LJ at [11]) that:

"*If Petex or Rafirom had known the true position they would probably have rejected the claim cargoes and purchased the relevant brand elsewhere. They would not have paid the price of Iranian Heavy or GOSM for a bespoke blend or purchased such a blend without being provided with yield information and negotiating a discount*."

Christopher Clarke LJ went on at [55] to refer to an example concerning horses which Flaux J had considered, namely:

"*… the example of the horse with a latent defect dishonestly concealed which turns out to win all its races."*

Christopher Clarke LJ observed that Flaux J had not found the example to be of assistance to Glencore, explaining that he agreed for this reason:

"The upshot of the argument based upon it is that the seller, although fraudulent, is not, on the valuation approach, liable in damages at all. The judge rejected the argument on the basis that it ignored the fact that as a consequence of the fraud the buyer will still have paid more for the crude oil (or the horse) than he would have done if he had known the truth and that it was the difference between the price paid and the actual value which represented the loss."

He went on at [58] to say this:

"Mr Southern submits that it was wrong in principle to ask what the buyer would have done if he had been told the truth, relying on what Lord Steyn said in Smith New Court [1996] CLC 1958 at 1979; [1997] AC 254 at 283F-G:

'... it is not necessary in an action for deceit for the judge, after he had ascertained the loss directly flowing from the victim having entered into the transaction, to embark on a hypothetical reconstruction of what the parties would have agreed had the deceit not occurred.'"

He continued at [59] in this way:

"I do not regard this criticism as well founded. Lord Steyn's observations were designed to confirm that the deceived buyer was entitled to recover all his loss as a result of entering into the transaction and not merely such of his loss as was attributable to the falsity of the representation. In the present case the buyer's loss is the difference between the price it paid and the market value. I accept Mr Matthews' submission that this is a 'generic' exercise which does not require consideration of what alternative transaction the claimant would have entered into if not deceived or a hypothetical negotiation between the actual parties."

It was Mr Tomson's submission that ***OMV*** is authority, as he put it orally, *"that the court shouldn't construct a detailed, complex counterfactual matrix guessing in what circumstances this knowledge came out, who knew, what was said, assuming investigations had taken place …"* since that *"would be to take into account everything known now and to rely on hindsight"*. I cannot agree with him about this, however, since ***OMV*** is a very different case and, more importantly still, what Christopher Clarke LJ was saying in the passages cited by Mr Tomson does not address the issue now under discussion, namely whether there is a prior question which needs to be answered before damages are assessed by reference to the truth. That prior question was not under consideration in ***OMV*** since the issue in that case was as to the appropriate measure of the loss suffered. Furthermore, I do not accept that Mr Tomson was right when he sought to characterise Mr Quest QC and Mr Howe QC's prior question as involving the type of hypothetical inquiry frowned upon by the Court of Appeal in ***OMV***. On the contrary, in my view, all that is required is that it be asked whether, but for the EURIBOR Representations, Marme would have become aware of the truth.

360. It follows that I agree with Mr Quest QC and Mr Howe QC that the prior question must, first, be addressed before the question is, then, asked what Marme would have done had it known that the EURIBOR Representations were false and what the true position was. Although, therefore, in closing Mr Quest QC indicated that RBS was *"prepared to accept Marme's formulation: would it have entered into the alternative deal had it known the true position?"*, strictly speaking, in my view, the prior question does need to be addressed. That said, as Mr Quest QC went on to explain, given that this case is concerned with implied representations, it is difficult, in practice, to approach the question of damages other than by reference to the truth. It follows that I would not, in any event, wish to base my decision as to damages on the conclusion which I have arrived at on this issue but prefer to engage with Mr Tomson's substantive submissions on what might be described as 'the truth question'.

361. Two further matters should additionally be mentioned. The first is that, consistent with what has previously been explained, it was not in dispute between the parties that it is incumbent upon Marme to prove that either of the counterfactuals which it puts forward *would* have happened; it is not sufficient, in this context, for Marme to show merely that one or other of them *might* have happened. This is because, when it comes to damages, the requirement is always *would*. Mr Tomson helpfully confirmed that this is accepted on Marme's behalf during the course of Mr Quest QC's oral closing submissions.

362. Secondly, in his oral closing submissions Mr Tomson cited ***East v Maurer*** [1991] 1 WLR 461. In that case, a hairdressing salon had been purchased and the vendor had made a fraudulent representation that he was going to leave the hairdressing business. This was untrue. In dealing with the issue of damages, Beldam LJ had this to say at p. 467E-G:

"It seems to me that he should have begun by considering the kind of profit which the second plaintiff might have made if the representation which

induced her to buy the business at Exeter Road had not been made, and that involved considering the kind of profits which she might have expected to make in another hairdressing business bought for a similar sum. Mr. Nicholson has argued that on the evidence of Mr. Knowles, an experienced accountant, the judge could have arrived at the same or an equivalent figure on that basis. I do not agree. The judge left out of account the fact that the second plaintiff was moving into an entirely different area and one in which she was, comparatively speaking, a stranger. Secondly, that she was going to deal with a different clientele. Thirdly, that there were almost certainly in that area of Bournemouth other smart hairdressing salons which represented competition and which, in any event, if the first defendant had, as he had represented, gone to open a salon on the Continent, could have attracted the custom of his former clients."

He continued at pp. 467H-468A, as follows:

"The judge, as Mr. Nicholson has pointed out, had two clear starting points. First, that any person investing £20,000 in a business would expect a greater return than if the sum was left safely in the bank or in a building society earning interest, and a reasonable figure for that at the rates then prevailing would have been at least £6,000. Secondly, that the salary of a hairdresser's assistant in the usual kind of establishment was at this time £40 per week and that the assistant could expect tips in addition. That would produce a figure of over £7,000, but the proprietor of a salon would clearly expect to earn more, having risked his money in the business. It seems to me that those are valid points from which to start to consider what would be a reasonable sum to award for loss of profits of a business of this kind. As was pointed out by Winn L.J., in Doyle v. Olby (Ironmongers) Ltd. [1969] 2 Q.B. 158, 169, this is not a question which can be considered on a mathematical basis. It has to be considered essentially, in the round, making what he described as a 'jury assessment'."

Mr Tomson submitted that the same, as he put it, *"fairly rough and ready"* approach should be adopted in the present case when considering the question of loss. I am unconvinced, however, that ***East v Maurer*** provides too much assistance when considering the somewhat more complex counterfactuals put forward by Marme in this case. Marme's case is very specific. It would be quite wrong, in the circumstances, to adopt the type of approach advocated by Mr Tomson. The more so, given that Mr Maud accepted in cross-examination that he would not have walked away from completing the Transaction under any circumstances. Nor, indeed, is it any part of Marme's case that it would have withdrawn from the Senior Loan since, if it had done that, then, it could not have completed the acquisition of the Ciudad Financiera and so would have forfeited its €75 million deposit (the funds for which were provided by Mr Maud and Mr Quinlan) and given up the opportunity of making a very large profit. The claim is, in that sense and for that reason, as Mr Quest QC put it in closing, an *"all or nothing claim"*: either the counterfactuals advanced by Marme are viable or they are not; there is no halfway house.

Bargaining power

363. It is important to appreciate that the case advanced by Marme in relation to both the counterfactuals put forward by Marme has the same starting point, namely that, had the truth about RBS's conduct as regards EURIBOR been known by Marme, this would have increased Marme's bargaining power, so enabling Marme to achieve by way of negotiation either a re-structuring of the 'PIK' debt (counterfactual 1) or entry into the Senior Loan with a reduction negotiated in respect of the credit spread applicable to each of the Swaps (counterfactual 2).

364. By way of context, Mr Saini QC, Mr Tomson and Mr Rose highlighted in their written closing submissions a number of features which, they suggested, made it unlikely that RBS would not wish to complete the Transaction. These included the fact that there was a high-level relationship between Santander and RBS, Santander being likely, as a result, to exert pressure on RBS to complete, as well as the fact that RBS had commercial incentives to complete the Transaction, separate and apart from any profit which it might make on the Swaps, because it was taking a 5% fee for its contribution to the Senior Loan, interest of 1.6% on its share of the Senior Loan, and providing a Junior Loan of €200 million (with a 1% margin) which was tied to a lucrative so-called 'Upside Fee Agreement' which granted it a valuable additional fee of €92 million.

365. As to the former, Mr Tomson submitted that RBS had reached a deal at the highest levels pursuant to which it agreed to control, co-ordinate and deliver the Transaction in return for Santander assisting RBS by taking over certain other Propinvest debt, thereby improving RBS's balance sheet at a time when RBS was in severe financial difficulties having had to raise £12 billion of capital by way of a rights issue 3 months previously. Mr Tomson suggested that Santander would have used this relationship to put pressure on RBS to complete the Transaction as Santander needed the deal to happen for its Tier 1 capital requirements. It was important, Mr Tomson suggested, for RBS to maintain this relationship due to the arrangement which RBS had made with Santander. Reference was made in this respect to certain documents which it was suggested make this clear. These include an email from Mr Sutherland to his colleagues at HSH on 1 August 2008 in which he stated that "*RBS (through their close contacts with Santander) have been brought in to fill the gap and to run the syndication*". In similar vein, a few days earlier in certain ING minutes not specifically highlighted by Mr Tomson referring to a meeting on 25 July 2008, the arrangement was described as being *"not a real estate deal in the proper sense of the word, but a Santander relationship deal"*. The same point was made in minutes relied upon by Mr Tomson relating to a meeting of RBS's Structured Property Finance Group held on 4 August 2008 as they referred to the "*relationship element of the deal*" and to Santander's CFO and Mr Cameron being in negotiations.

366. Mr Tomson highlighted also an email on 24 September 2008 from Mr Goodwin to Mr Sapala, an RBS colleague noting that Mr Cameron and Mr Robertson "*supported this deal at an executive level"* and going on to state as follows:

"RBS participation in Project Brick was part of a wider agreement with Santander to take some stressed assets off our hands where we've sliced other transactions to provide junior debt pieces. Propinvest are a well known client to RBS and real Estate Finance (purchased 25 Canada Square – Citi tower – from us last year)".

This followed another internal RBS email on 9 September 2008 in which Mr Bates told Mr Goodwin that RBS is "*agent/coordinator at request of Santander and we know what the background is there*", so hinting that there was Santander involvement in RBS becoming involved as clearly there was. Thus, in an earlier internal RBS email on 8 August 2008 from Mr Eighteen to Mr Bates it was recorded that Mr Bates "*met with Jose Antonio Soler (Banco Santander) yesterday to discuss the Santander HQ sale and the reciprocal trade with RBS"*. The email went on to report that:

"Jose Antonio stressed that Santander would assist in the selldown of the RBS debt position on their HQ building, would consider other trades with RBS if need be and would look at the existing REF Propinvest facility on Blade 'if they had to"".

The same point is made clear by a circular email sent by Mr Eighteen after the Transaction closed on 12 September 2008, telling the recipients that:

"*This was a key transaction for Santander as it released approx. €600m of tier 1 capital on the sale and consequently REF were able to negotiate on favourable terms a separate €500m asset sale agreement with Santander in return for providing this support*".

367. It was Mr Tomson's submission that this material all demonstrates how important the Transaction was to RBS and, furthermore, that Mr Cameron was taking a close personal interest in how it was coming along. He submitted that, in the circumstances, it is more than likely that he would have personally intervened if it looked as though the proposed deal was in trouble. It was suggested, indeed, that RBS's keenness to ensure that the deal happened is demonstrated by the fact that RBS agreed to plug certain funding gaps through the Personal Loans and Junior Loan, meaning that it made a contribution of €641 million overall. That same keenness is further demonstrated, it was suggested, by an email on 3 September 2008 in which Sebastian Keuchel of RBS told Scott McCoy also of RBS that he believed that "*the executive will agree to this deal at any cost*". Whatever the seniority of Mr Keuchel, Mr Quest QC explaining that he was merely a junior employee, still, Mr Tomson submitted, this email shows how important the Transaction was to RBS.

368. RBS accepts that there was a high-level approach by the CFO of Santander to Mr Cameron of RBS and accepts that this got RBS to reconsider the deal. Mr Bates also gave evidence in cross-examination that, although he could not recall the details, there was a reciprocal trade on the mezzanine and equity pieces of the loans and possibly on the Senior Loan as well. Mr Quest QC submitted, however, that there is nothing in the evidence which suggests that RBS felt in July 2008 that it *had* to do the deal just because Santander asked it to help. Rather, Mr Quest QC submitted, it was as a *quid pro quo* for RBS's

involvement that RBS asked Santander to take on some of Propinvest's doubtful debt as part of the reciprocal trade. He suggested that this shows that it was Marme and Santander which were the parties under pressure, not RBS. That, he went on to submit, is what was under discussion in the 4 August 2008 minutes, as demonstrated by the fact that, under the heading "*Structure*", the minutes recorded the following:

"*CB emphasised the relationship element of the deal: Santander's CFO and Johnny Cameron have been in negotiation in relation to RBS providing liquidity to this deal and it was important to note that JANC was supportive of the transaction*.

CB summarised that there are 2 key selling points for the deal – the 5% fee and Santander taking a REF position in return for us helping them in the sale of their HQ."

Subsequently under the heading "*Fees and Pricing*", Mr Tiesi was recorded as saying the following:

"*... that this deal stacks up on the basis of the rewards (5% fee)/risk therein and any reciprocal trade with Santander is a bonus*."

Under the heading "*Conclusion*", Mr Tiesi was, then, reported to have:

"*... expressed his view that the deal is at market terms, he is comfortable with the yield and the tenant/counterparty. Additionally, he feels that the offloading of Blade debt is a bonus and is overall very supportive of the transaction*."

It was Mr Quest QC's submission that there is nothing in these minutes to show that RBS was desperate to do the deal. I agree with Mr Quest QC about this. I consider also, more generally, that Mr Maud's insistence in evidence that RBS (in the shape of Mr Cameron, in particular) would have intervened in Marme's favour amounts, in truth, to little more than conjecture.

369. The more so, given that Mr Maud had never even met Mr Cameron. Although it was suggested on Marme's behalf that adverse inferences should be drawn from the fact that RBS did not adduce evidence from people such as Mr Eighteen, Mr Cameron or, indeed, the then Sir Fred Goodwin to address this issue, that would not be appropriate in circumstances where, as Mr Quest QC pointed out, it had been made clear on Marme's behalf at an earlier stage of proceedings that this was not a case which was going to be addressed at trial. That is borne out by Mr Quest QC's reference to a letter from Simmons & Simmons LLP dated 8 April 2016 which raised the point that certain "*commercial interest allegations*" which had been made in the (then) Amended Particulars of Claim should not attract disclosure obligations, and by Kobre & Kim (UK) LLP's letter in reply dated 3 May 2016 in which it was stated that those allegations were not *"matters to be determined at trial"*. RBS cannot sensibly be criticised, in the circumstances, for not calling these people as witnesses. It follows that no adverse inference should be drawn.

370. In any event, dealing more directly with the counterfactual case which is put forward by Marme, as Mr Howe QC observed, no attempt has been made on Marme's behalf to explain why the revelations as to RBS's conduct regarding EURIBOR (if that they be) would have made intervention by Santander more likely than in the events as they actually occurred. As Mr Howe QC rightly pointed out, this is critical since the influence which Marme has suggested that Santander had did not arise from any such (counterfactual) revelations. On the contrary, if Mr Tomson is right and Santander's involvement was as important as he described it, then, that was the position in any event and nothing in the counterfactual scenario would have made it any more so. In short, if Marme could rely on Santander to exert pressure on RBS to complete the deal, then, it would clearly have been open to Marme to exploit this fact in what Mr Howe QC described as *"the real world"*. Instead of doing that, however, Marme chose to accept RBS's terms, including its substantial fee, and also gave up on its negotiations to reduce the credit spread and then demanding a credit rebate. The reason why is not difficult to discern: it is because, whatever Mr Maud might now say and whatever might now be suggested on Marme's behalf, any Santander pressure would not have achieved what is envisaged in either of Marme's counterfactuals.

371. As to the suggestion that Marme would have had leverage over RBS more generally had the truth been known concerning RBS's EURIBOR misconduct, Mr Maud's evidence in cross-examination was that *"if the events regarding EURIBOR manipulation had become apparent to me, then I believe that the - that the balance of negotiating - of negotiation strength would have moved from RBS to me"*. This was an answer which Mr Maud gave to Mr Howe QC the day after he had been asked by Mr Quest QC about what he would have done in the counterfactual situation. Those earlier exchanges merit setting out in their entirety since they reveal just how vague Mr Maud's evidence was on this point.

372. The questioning began with Mr Quest QC asking Mr Maud this question:

"What I want to hear from you is: faced with a negotiation with Mr Goodwin, for example, what is it you would have said to him which you think would have persuaded him to change his mind?"

Mr Maud's answer was this:

"Yes, right. So what I would have said was -- what I tried to explain was the context in which I would have said this. I would have had no -- in this hypothetical world we're talking about, I would have said to him, 'Look, you know, we can't trust the rates that you're setting for EURIBOR as -- which obviously feed into the swap rate, and therefore, you know' -- and I don't know if it's, as I say, 1 bp or 100 bps, where the swap in terms of mark to market, in terms of the embedded loan, day one embedded loan, was enormously sensitive to any movement in spread, any movement. I mean, 1 bp made -- you know, I think as you can see from the evidence on the last day, one movement, small movement, actually made a difference between the embedded loan being €100 million, €107 million, then €117 million. So small movements were --

had a dramatic effect. And if actually the rate that we were being offered was not true and honest, I really, really don't want to enter into this swap.

But I do appreciate that the senior loan would be predicated on EURIBOR, but for me that was a quid pro quo that I was prepared to take, because I can terminate the loan without break costs at any time."

The exchanges, then, continued in this way:

"Q. Right. I understand what you're saying your reasons would be. But if Mr Goodwin had said, 'Well, sorry' –

A. You just asked me what my reasons would be; I just told you.

Q. Right. But if Mr Goodwin had then said to you, 'Well, I'm sorry, but I'm not prepared to move from my position' –

A. Yes.

Q. -- what would you have done with the information then?

A. Well, I would -- I would have sought to implore him and his seniors that -- you know, I'm assuming that this would be public information, that's the way I would have found out about it -- that in these circumstances the bank should understand that on a major transaction like this, with what was then, you know, one of their biggest clients, one of their best, biggest real estate clients, they should assist me and, you know, in all honesty and truthfulness, look at this alternative structure which I proposed to them.

Q. So you would implore them to do that. But if RBS said, 'Look, this manipulation business may be serious and we've reported it to the regulators' –

A. Well, I -- yeah, sorry.

Q. – 'and maybe there will be an investigation and maybe there has to be a prosecution, but we can't give you a preferential rate because of that', what would you have done then?

A. Well, I would have continued to argue. I would have gone to Santander. I would have -- I would have sought in all circumstances not to fix into a swap which I believe was predicated on rates which might be costing my company and the interests of my company an enormous amount of money."

Mr Quest QC, then, pressed Mr Maud further:

"Q. Because the truth is if this information had come out earlier, no doubt there would have been an investigation, as there was, perhaps by the Commission, perhaps by the regulator, by whoever, but why should that make any difference to the terms of your deal?

A. Because the situation was that at this stage I believe -- and obviously this is a matter for your client to argue in this case -- I believe that EURIBOR, from what I've read and what I understand, that EURIBOR was being manipulated at this moment and affected the rates that my company was transacting at.

Q. The reality, Mr Maud, though, is if, after listening to your arguments, RBS had said, 'Well, I'm sorry, but we're not going to allow this to affect the commercial terms of our deal with you' –

A. I would have had to reflect on it.

Q. Well, there was nothing you could have done about it?

A. Well, you say there's nothing I could have done about it. I don't know. I would -- I would have done everything I can, in those circumstances, not to fix into rates which were based -- and remember, it's not only on – it's not only on commencement; obviously manipulation of rates has an effect on termination. And in circumstances where I was looking to terminate this swap sooner rather than later, that's equally pertinent. On the basis that I believe that RBS were manipulating rates at this period, then I would have done everything, and I would have taken it to whatever level I needed to, to persuade RBS that they needed to deal with me, as a major -- major real estate client on the largest -- as you said, the largest real estate transaction in Europe, in a proper way. And I knew I would have leverage both through my own relationships, but in particular through the relationship of Santander at the very highest level. And I believe that with that concerted effort, we would have got what we -- what I propose here and what I would have sought."

Mr Quest QC, then, put the point a final time:

"Q. The truth is, if RBS didn't accept your entreaties, you had no option but to go ahead anyway with the swap?

A. Well, as I said before, my intention always was to complete this transaction. I put a lot of effort into it, I had personal funds committed in it, et cetera, et cetera, et cetera. But -- but I would have -- you know, as you can see from the thing -- from the evidence, I can be a very stubborn man, I can be a very hard negotiator, and I wouldn't have let it drop, I wouldn't, and they would have had a very serious time doing anything else but this transaction. As I can say, you know: look, I persuaded RBS to fund me 100% on a £1 billion sterling asset, right? Not everybody can do that. I did it."

373. As well as being very vague, this was evidence which was also somewhat implausible. The truth is that there is no evidence that Santander or Marme could have compelled RBS to do the deal on different terms. This, after all, was a deal which RBS had previously turned down. In July 2008, when RBS got involved, it was Marme and Santander who were under pressure to complete the deal quickly and, although Mr Maud suggested otherwise, the evidence suggests that RBS was the only realistic option left to plug Marme's gap in financing, Bayern having already approached 24 banks and Mr Maud

and Mr Quinlan having both approached their own contacts. It is impossible, in the circumstances, to place any real weight on what Mr Maud had to say. Mr Maud, self-confident as he is, may very well believe that he could have achieved what needed to be achieved, but this does not mean that the Court should agree with him in the face of overwhelming evidence pointing in the opposite direction.

374. That RBS was a final resort is also shown by the fact it was able to introduce certain 'take it or leave it' terms which involved it being given a 5% fee (compared to the 1% fee agreed by the other banks). Taking account of the fact also that Marme was under pressure to complete given the forfeitable personal deposit which Mr Maud and Mr Quinlan had provided, it seems to me that the suggestion that *Marme* would have had increased leverage *over RBS* in the event that its conduct as regards EURIBOR became known is very difficult.

375. In his oral closing submissions, Mr Tomson asked rhetorically whether it is realistic to suppose that, Mr Maud having let it be known to RBS that he was aware of its *"dishonest conduct"*, RBS *"would have just shrugged its shoulders in the face of this and said, 'So what?'"*, particularly since Mr Maud was clear in his evidence that *"he would actually have made a huge fuss about this"*. The answer, I am clear, is not what Mr Tomson suggested, namely that RBS would have been prevailed upon by Marme to go down one of the two counterfactual routes now identified by Mr Tomson, since I agree with Mr Quest QC when he observed in his oral submissions that RBS's likely response would have been to agree with Mr Maud that *"this is very shocking, but that has no connection with your deal and it doesn't entitle you to some special treatment"*. As insistent and dogged as Mr Maud might have been in the face of such a response, I am clear that RBS's response would have stayed the same: that the deal terms were as they had been agreed not only as between Marme and RBS but also with the Non-RBS Banks. The fact that Mr Eighteen, Mr Cameron and Sir Fred Goodwin were not called as witnesses to say this, in terms, is unimportant since, ultimately, it is for the Court to weigh up the probabilities and arrive at a conclusion. That is what I have done.

376. As to the Non-RBS Banks, as Mr Howe QC emphasised in closing, Mr Maud was unequivocal in his evidence that, whatever leverage might have been generated in Marme's favour as against RBS, there would not have been the same (or any) leverage as against the Non-RBS Banks. Mr Maud was clear about this, as the following exchanges with Mr Howe QC demonstrate:

"*Q. Now, I'm not accepting what you say about leverage as against RBS for these purposes is correct. Mr Quest QC has asked you questions and I'm not going to go back over that. But I want to ask you about the position of my clients, the second to fifth defendants. Do you understand?*

A. Mm.

Q. Now, you don't suggest that on this hypothesis the fact of RBS's EURIBOR misconduct becoming public would somehow have given Propinvest any leverage over the second to fifth defendants, do you?

A. No, I don't.

Q. Right. Because you accepted that my clients had no involvement in any such misconduct?

A. No, I believe my leverage would have been over Royal Bank of Scotland, not your clients."

Mr Howe QC, then, explored, in the exchanges set out below, with Mr Maud what he was, in the circumstances, expecting that the Non-RBS Banks would have done:

"Q. So leaving RBS to the side for a moment, in this counterfactual world really the position isn't any different as against my clients, in the situation where you assume you've become aware of EURIBOR misconduct, from the real world, in which things happened as they actually did, is it?

A. Well, I would have expected, as I said in my evidence yesterday when I was cross-examined by Mr Quest, I would have expected Royal Bank of Scotland to sort out the situation …

Q. So what you were suggesting was that RBS might subsidise the other banks?

A. Well, I'm sorry, Mr Howe QC, what I said, if you read the -- all of the answer there, is: '... I don't know how they would have done it. It's not my business ... it's up to them. I would have made [a] proposal to them in the circumstances we're talking about ... it's a hypothetical world: I'm hypothesising what the banks could have done. And one ... thing[] they could have done is ...'

Q. Today, in the context of our discussion about credit spread, you said … that you didn't believe that RBS would have subsidised the other banks in any circumstances.

A. I said in relation to the swap.

Q. In relation to the credit spread.

A. Yeah. But I'm not saying, in a situation where they'd been found to have been criminally and fraudulently manipulating EURIBOR, that I would not have had some leverage with the 4% additional fee, which, as you say, was probably not known to the other banks, in order to do something -- do something to compensate the banks for taking -- the other banks, your clients -- for taking the swap out of the transaction and dealing with my alternative structure. As I said, from the part of the answer which you didn't speak but which I just repeated, that's just one suggestion. I've got no idea how they would have --

Q. Well, I asked you to read the whole of the answer and then I particularly drew your attention to two sentences in it.

A. Yes, but what I'm saying, to finish, is I had no idea how they would have done it, but I would have expected them to do it.

Q. Well, the bottom line is there you really have no idea whether, as you said in the final sentence of your answer --

A. I just gave one hypothetical way in which they could have possibly done it. I'm not saying that they would have done it; I'm not saying they would have considered doing that. I'm just saying that's a hypothetical thing they could have done, in the hypothetical world we were discussing.

Q. At any event, in this hypothetical world that you're postulating, you wouldn't expect my clients, the second to fifth defendants, who are totally innocent of any alleged EURIBOR manipulation, to be taking a financial hit as a result of the new hypothetical structure?

A. I think I -- I think I said that almost implicitly in that statement by saying that in the hypothetical world we were discussing, that they would, I suspect, have needed to be compensated. And that's why I, as you say, postulated that one of the ways that could be achieved would be by taking their 4% additional fee and distributing that to the banks in lieu of the profit they would make from the swap."

377. Marme's position, in addition, was that Santander would have been able to apply pressure on some of the Non-RBS Banks. There is, however, no merit in this point either since, in reality, the Non-RBS Banks had no reason to accept a worse deal in this counterfactual world than they actually received. Furthermore, the suggestion that RBS would compensate the Non-RBS Banks, Mr Maud postulating that RBS could have used its 4% additional fee for this purpose, represents no more than speculation. Indeed, Mr Maud accepted in cross-examination that he had *"no idea"* whether RBS would have done this or how they would otherwise have compensated the Non-RBS Banks, explaining that he *"just gave one hypothetical way in which they could possibly have done it"* but that he was *"not saying that they would have done it"* or *"would have considered doing"* it.

378. Moreover, as both Mr Quest QC and Mr Howe QC pointed out, the Transaction was one which struggled to close. Mr Feenstra recognised that this was the case when saying this:

"The Transaction was not a once-in-a-lifetime deal that was not to be missed, as illustrated by the difficulty that Bayern LB had from the outset finding willing participants."

Mr Feenstra cited Bayern, in particular, in recognition of the fact that Bayern was unable to close the deal before RBS's intervention. In fact, a number of the banks (including Bayern and ING) struggled to get credit approval for the sums originally sought. Mr Greenland's evidence was that the absence of hedging would have made securing credit approval *"extremely unlikely"* and that the Swaps were *"essential"* to ensure that interest rate risks were fully hedged. He confirmed in cross-examination that the PIK structure would not

have solved the issue of interest rate risk to the lender, and he also gave evidence that in 2008 it would not have been usual for Bayern to have lent money without interest rate hedging because it was part of Bayern's *"basic business plan"* to insist on full hedging. He described the possibility of interest rate rises as *"a huge risk to the lenders"* and, when asked what his reaction would have been if he had been asked to underwrite this particular transaction without interest rate hedging he stated that *"It wouldn't have been entertained"*.

379. Similarly, Mr Feenstra's evidence was that ING would *"not have been interested in entering into the Transaction if the structure had not included any interest rate hedging at all"*, that the Swaps were *"a critical part of the Transaction"* and that any proposal that they be removed would have been *"completely unacceptable to ING and, I believe, to the other lenders as well"*. His evidence in cross-examination was that the PIK structure would not have worked because it did not limit the risk in the rise of interest rates. As he put it, *"interest rate swap is the one and only solution"*. He had never seen or done a deal in which a PIK structure was used to deal with the issue of a shortfall in payments at the start of a loan period.

380. Likewise, as regards HSH and Caixa, Mr Grey's unchallenged evidence was that without interest rate hedging *"HSH would simply not have participated in [the Transaction] at all"*. He went on to explain, when cross-examined, that the swap was an essential driver for HSH and a *"very, very important part of the commerciality of this deal"*.

381. Given these difficulties (and the deteriorating market conditions), the suggestion that it would have been possible to close the Transaction with a significantly worse deal for the Non-RBS Banks (and, indeed, for RBS) is implausible.

382. Mr Saini QC submitted, nonetheless, that, at least in the case of Caixa and ING, Santander could have applied significant pressure to make them accept an alternative financial structure. He pointed in this regard to Mr Maud's evidence that Santander's Chairman, Senor Botin, had personally convinced ING to proceed with financing the Transaction when it had appeared to be wavering, as well as to Mr Feenstra's evidence that ING's relationship with Santander was "*the only reason why we ended up in this transaction at the end*", that the Transaction was "*not a commercially attractive deal*" but that "*at a very high level, ING learned from Santander that they would very much appreciate us to come into the deal … My board wanted to do them a favour … Santander was a very appreciated client of ING"*. He also relied upon Mr Maud's evidence that, when Caixa indicated that it would not be able to complete by 12 September 2008, Senor Yanes threatened that, if it did not complete by then, Santander would cut off its credit lines. He submitted that "*Whatever was in fact said plainly had the desired effect, as La Caixa came back into line and was ready on time for completion*". Mr Saini QC submitted, more generally, that both Santander and RBS were substantially larger and more powerful than the other lending banks except for ING. Nonetheless, I cannot accept that, viewed in the round, the evidence is sufficient to justify a conclusion that Santander would have gained any additional leverage over the

Non-RBS Banks in this scenario. It was not, after all, the Non-RBS Banks which had done anything at all wrong. Given this, it is hard to see why they would have been willing to agree to any variation to the arrangements which were, in fact, agreed.

383. It necessarily follows, in the circumstances, that Marme's counterfactual-based case cannot succeed. This makes it unnecessary, in turn, to address the two counterfactual scenarios put forward by Marme. Nonetheless, again by way of completeness, it is appropriate that I should do so – albeit relatively briefly.

Counterfactual 1 – PIK Loan Structure

384. Marme's primary case is that, having discovered that EURIBOR was potentially the subject of manipulation, Mr Maud would have demanded that the Swaps be removed altogether on the basis that Marme could not "*trust*" the EURIBOR rate. In short, Marme says that it would not have entered into the Swaps at all or, indeed, any other type of swap, and that the initial shortfall in rental income necessary to cover repayments under the Senior Loan (solved in the current structure by the stepped nature of the Swaps) would have been made up by way of a PIK loan structure, which would have replaced the use of stepped swaps.

385. A PIK loan is one in which the interest is capitalised and not paid until the principal is repaid. Had a PIK loan been used, this would have resulted in the Senior Loan being bifurcated into paying and non-paying. Marme suggested that the PIK part of the Senior Loan would have been in the amount of €325,000,000. The result is that the vast majority of the Senior Loan would have been paying, but that the PIK part would, as Mr Maud put it, have been "*pay as you can*". Mr Tomson submitted that such a structure would have met Mr Maud's objective of doing away with the Swaps entirely "*which was advantageous to Marme because of the risk that if interest rates fell (as they did rapidly after 12 September 2008) breaking the Swaps on any refinancing would incur huge mark to market break costs (as was indeed the case)*".

386. There is a fundamental difficulty with this submission, however. This is that, far from protecting Marme against EURIBOR manipulation, removing the Swaps from the Transaction would have meant that Marme had no protection against such manipulation. This is because, even if the Swaps were removed, Marme was still exposed to EURIBOR manipulation through the Senior Loan since its obligations under the Senior Loan entailed Marme paying a floating rate which was itself linked to EURIBOR – and to the full extent since *any* manipulation of the published rate would be reflected in the amount thereby payable. Indeed, the whole point of having the Swaps was to hedge the Senior Loan, and so to remove any exposure to EURIBOR as regards Marme's cashflows: although Marme *paid* floating EURIBOR under the Senior Loan, it *received* floating EURIBOR under the Swaps, the two essentially cancelling each other out.

387. It follows that to take the Swaps out of the Transaction would have left Marme far more exposed to EURIBOR than if the Transaction had stayed as it was

(with the Swaps in place). That this would have been the position was acknowledged by Mr Maud himself. He suggested, nonetheless, that he would have used what he had learned about RBS's conduct as regards EURIBOR to *"put an alternative transaction"*. What that would have entailed he did not make clear. It appears, however, that it would still have entailed the Senior Loan being linked to EURIBOR and that, of course, is the position as regards the counterfactual presently under consideration. Given this, the Banks' point remains: without the Swaps, Marme would not have had the protection which they offered.

388. I would add, in this context, that, as I explained when dealing with Mr Maud's evidence more generally earlier in this judgment, I do not accept that Mr Maud was ever opposed to the use of interest rate hedging. On the contrary, despite stating in his first witness statement that Marme "*was very much opposed to the idea of having an IRS as we believed at the time that the pressure on interest rates over the short to medium term was downwards"*, there is no evidence that Marme had ever objected to having a swap – something which was included in its proposals from the beginning. Indeed, in his second witness statement, far from suggesting that efforts were made to persuade Bayern not to hedge, Mr Maud described swaps as having been "*expected*". Indeed, despite his insistence when giving evidence that he was opposed to the idea of an interest rate swap, it is clear, therefore, that such opposition cannot have been too pronounced since, as he himself put it when he was asked about the fact that there is no email or other document in which the opposition is expressed, it was *"pointless me trying to push it in writing when I knew from my conversations with the banks that all the banks we were dealing with – were insisting on an IRS"*. Mr Maud, therefore, recognised that interest rate hedging was essential to the deal and he was prepared to proceed on that basis since he knew that the Transaction would not have got 'over the line' without it. That is clear from this answer in particular:

"At the time, I had – - I had a series of dates which I had to meet in terms of completion and my concern was to get the transaction over the line, and I understood that the majority of the banks or most of the banks in the syndicate required a swap. So it was pointless trying to defeat the object of raising the debt by putting barriers in the way of achieving that. And so, … I reluctantly accepted that we had to proceed ...

But I realised and I was persuaded by my team that there was no point shouting and jumping up and down about it; that we had to proceed with this transaction, in order to get these banks over the line, on the basis of a swap. And that's what we did".

Later on, Mr Maud confirmed this:

"I wanted – I wanted to get this transaction over the line, and the way I realised in rapidly deteriorating capital markets was – that I had any chance of getting over the line was to agree to a swap".

Then, asked whether he thought that interest rate hedging was desirable, Mr Maud's answer was this:

"… My view was: I would have preferred there not to be a swap, for the reasons I've just explained. But I understood that in the very difficult economic climate we were in at that time, back in 2008, that I needed to enter into a swap, otherwise I would not be able to finance this transaction. And that's – that's my evidence".

389. Furthermore, as Mr Quest QC pointed out in closing, the suggestion that Mr Maud was opposed to the Swaps is inconsistent with his willingness to use interest rate hedging in two previous large property deals, Citibank Tower and Project Gemini. As Mr Quest QC put it, whatever Mr Maud may have believed in 2008 about the future direction of interest rates, Marme was established to acquire a real estate asset and not to speculate on EURIBOR. A structure which involved Marme's outgoing cashflow being linked to EURIBOR (through the Senior Loan) but not its incoming cashflow would have created a clear and obvious risk and was never proposed.

390. It is not only Marme's position which falls to be considered, however, since it is very difficult (if not impossible) to see how the Banks would have been willing to proceed without hedging under any circumstances. As Mr Howe QC observed, although a PIK loan would have been affordable in the sense that it would have bridged the inevitable gap which would have been brought about by the fact that the rent would have been insufficient to meet interest payments in the early stages of the Senior Loan (essentially a matter of cashflow), it does nothing at all to address the main reason why the Swaps were used, namely to protect against the risk of interest rate rises. Mr Feenstra was clear about this since, when asked by Mr Saini QC in cross-examination, having made the point referred to above (namely that the effect of the Swaps was that Marme was not exposed to any manipulation risk), Mr Feenstra went on to say that a PIK loan involves it being said, in effect, that *"I can't afford paying you the interest, so can I have it capitalised? But that does not limit the risk that interest rates rise over time"*.

391. The evidence was clear on this. Thus, by way of illustration, Mr Goodwin was clear that it *"would be unorthodox, if not unheard of, for a PIK loan to replace interest rate hedging arrangements"*, adding that he could not see *"any scenario in which Mr Maud's replacement PIK structure would have been acceptable to RBS, or been implemented as a valid finance structure instead of the interest rate swaps"*. As far as he was concerned, it was *"unthinkable"* that RBS's credit committee would have sanctioned the transaction without hedging: *"The deal simply would not have proceeded"*.

392. As for Mr Greenland, he explained in his second witness statement that Bayern would not have agreed to remove the Swaps which were *"essential from our perspective"* to ensure that Marme could repay even if interest rates rose. He also explained that he could not remember any Bayern financing at that time which was not fully hedged. He suggested, indeed, that he would not even have bothered to submit a request to credit approval if there was no hedging. He was not challenged by Mr Saini QC about this when he was cross-examined. Moreover, in questioning by Mr Quest QC, he very clearly explained that in 2008 it was not usual for Bayern to lend money in property transactions without interest rate hedging because:

"… it was part of our basic business plan. We were -- our business plan was modelled upon commercial property investments with secure income streams, with fixed rates of interest, on a non-recourse basis to shareholders. And so in that respect we always insisted upon full hedging, so that we could fix the cash flow and model an accurate cash flow, so that we could see where we were throughout the loan and at the expiry of the loan."

Asked, then, what his reaction would have been if he had been asked to underwrite the Transaction without interest rate hedging, his answer was that *"It wouldn't have been entertained"*.

393. Mr Feenstra's evidence in his two witness statements was much to the same effect, and his evidence in cross-examination was little short of emphatic:

"For us it was key that there was interest rate hedging in the form of a swap".

So, too, was Mr Grey, who made it clear in his first witness statement that *"If the Transaction had not included any interest rate hedging, HSH would simply not have participated in it at all, never mind been willing or able to extend a credit line of over €300 million"*, something which he confirmed when being cross-examined because he described the interest rate hedging as being *"a very, very important part of the commerciality of the this deal"* which was *"instrumental to the whole transaction"* and *"a condition precedent to drawing the facility"*.

394. As Mr Quest QC pointed out, and as is obvious, without hedging, the cashflows were sensitive to changes in interest rates. As at September 2008, rates were forecast to rise to 5.08% and then gradually decline. On that forecast, the alternative deal which Marme puts forward would not entail any breaches of either the ICR or the LTV covenants. However, it would take only a very small degree of stress to that model for repeated quarter-on-quarter ICR covenant breaches to come about. Asked about this in cross-examination, Mr Maud was what Mr Quest QC not unfairly described in closing as *"nonchalant"* about that risk of default. His attitude was that he was *"prepared to take the risk"* that the Senior Loan could have been terminated if he had breached any of the covenants. In his view, the Banks could, and would, have waived any such breach – indeed, he doubted that they would *"even break sweat on it"*. However, as Mr Quest QC pointed out, the ICR covenant had been part of the deal since March 2008. There is no reason to suppose that the Banks would have been quite so relaxed as Mr Maud considered. Mr Feenstra was certainly very clear, when asked about that:

"…the increase of income from Marme over time was not so much of an issue, but what would happen with the three-month rollover interest rates, that was the issue. So the income side was not an issue; it was the expenses that this single purpose vehicle was supposed to make, directly linked to three months interest developments on the market."

This exchange, then, followed:

"Q. Okay, let's split it up then. So we're dealing first of all with rental payment shortfalls, which in principle could be covered by a PIK loan. And your point is separately from that: how are you going to deal with your exposure to EURIBOR? And I think your point is, if I've understood correctly, you need a swap to deal with the exposure to EURIBOR; is that right?

A. You need a swap to fix – to hedge against interest rate rises, for of course there quite a few ways to hedge against interest rate risk. But in this case, because it was so tight that even on day one they could not afford paying interest, interest rate swap is the one and only solution."

There is no suggestion here that the Banks would have adopted a relaxed approach. On the contrary, Mr Feenstra's explanation, which is consistent with evidence given by others (including Mr Goodwin), displays a rather more rigorous approach than that apparently envisaged by Mr Maud.

395. I agree with Mr Quest QC and Mr Howe QC when they submitted that the reality is that Marme's case on this counterfactual was driven by hindsight, specifically the knowledge (with that hindsight) that interest rates later fell dramatically and stayed low. That, indeed, was the view of Mr Greenland who summarised the position during cross-examination in this way:

"Well, let's face it, the PIK loan, the PIK loan in question, or the hypothetical situation in question here is a situation that's just ... it's being modelled on the basis of hindsight. And what the PIK loan doesn't include, and nor does any of the suggested structuring involving the senior and the PIK, it doesn't involve interest rate swaps or hedging. So there's a huge structural gap there, there's a huge risk to the lenders. And so in that respect, if the interest rates were moving up and had moved up, then that's not a satisfactory solution. You can only come to that conclusion with hindsight."

Mr Greenland put this very well. I agree with him. Marme's first counterfactual case involves acceptance of a scenario which I am quite clear would not, in reality, have been capable of being achieved.

Counterfactual 2 – Swap Discount Structure

396. As for Marme's alternative counterfactual case, this entails a Swap Discount Structure. Marme's original case was that it would have negotiated a 0.5% discount on the Swaps, claiming losses of €125 million. Marme's case now, however, is that it would have negotiated a reduction in the fixed payments under the Swaps in the region of 10 bps amounting only to around €29,534,269, of which about two thirds (€19,435,000) represented a reduction in the break costs which the Banks seek in these proceedings. The practical result on this case is that the credit spread on the Swaps would have been thereby reduced from 15 bps to 5 bps. Mr Tomson submitted that, given the overall economics available to RBS in the Transaction (both directly and indirectly in terms of the benefits to it from its deal with Santander) such a modest reduction in the credit spread fees earned under the Swaps was

something realistically achievable for Marme in a hypothetical negotiation. Mr Maud gave evidence, indeed, that there was "*plenty of flex*" in the spread of 15 bps agreed with the banks.

397. I have touched on this previously when dealing with Mr Maud's evidence. However, Marme's original case was based on Mr Maud's second witness statement, signed in January 2018. In that witness statement, Mr Maud stated that, if he could not have obtained the PIK loan, then:

"*I could have argued that the uncertainty over whether Euribor was accurate should be resolved decisively in favour of Marme by a reduction in the fixed rate payable by Marme under the Swaps. I could have argued that each fixed payment rate under the Swaps should be reduced by, for example, 0.5% to compensate Marme for the risk of being exposed to overpayments through the upward manipulation of Euribor … I could also have argued that there should be a reduction in the 15 basis point credit/execution spread imposed by RBS on behalf of the banks: a profit element for the banks which should be reduced in the circumstances. My view of the reasonable market rate for spreads on swaps of this nature was in the range of 5 to 8 basis points, and that is what I would have tried to obtain for Marme. A reduction in the credit/execution spread would have been part of the overall 0.5% reduction in the fixed rate, and not an additional reduction*."

398. The Banks' position was that it would be little short of absurd were there to have been a 50 bps reduction in the fixed rate under the Swaps since that would have entailed that each of the Banks would have entered into the Swaps at a day one loss. So it was that shortly before the start of trial, in a fourth witness statement, Mr Maud stated that he accepted that a 0.5% reduction in the fixed rate of interest payable by Marme on the Swaps would not have made commercial sense and that he would never have proposed such a reduction. He sought in the following passage to explain what he had meant to say in his earlier statement:

"*Accordingly, what I had intended to convey … concerning this second alternative, and what I had thought at the time I signed it was actually being conveyed, was not that there would be a 0.5% reduction in the interest rate payable by Marme on the fixed interest element created by the EURIBOR Swaps, but rather that a reduction of, for example, 0.5% should apply to the overall fixed interest rate payable by Marme from the combination of the Senior Loan interest margin (160 bps) and the fixing of EURIBOR created by the Swaps*."

He explained that Marme's lawyers, in pleading the alternative claim based on his original evidence, had got the "*wrong impression*". Whatever the rights and wrongs of that explanation, what matters for present purposes is that the case as ultimately put forward at trial, after Mr Saini QC had in opening clarified the position, was not based on a contention that a 50 bps reduction in the overall interest rate across the Senior Loan and the Swaps would have been realistically achieved through negotiations with the Banks but that a 10 bps reduction (from 15 bps to 5 bps) in the Swap rates would have been achieved (the other 40 bps reduction being in respect of the Senior Loan

margin). Marme's case (at least at trial and despite not being entirely consistent with what Mr Maud had to say even in his most recent witness statement) was, therefore, in effect, that, whereas a 50 bps reduction in respect of the Swaps would have been unrealistic as it would have meant that the Swaps were loss-making at the outset, a 10 bps reduction would merely have reduced the profit taken by the Banks on the credit spread (and a 40 bps reduction in the Senior Loan would merely have reduced Marme's payment of interest but not required the Banks to make payments to Marme).

399. I am quite clear that there is not the slightest evidential justification for this case. There is, in particular, nothing at all to indicate that the agreed 15 bps spread on the Swaps was anything other than reasonable. Given this, it is very hard to see why RBS would have been willing to agree to a 10 bps reduction to 5 bps, even assuming that Marme had the leverage over RBS which it maintains that it would have had as a result of RBS's EURIBOR misconduct.

400. Mr Goodwin was cross-examined as to what his response would be if he had been asked to agree such a reduction *"under pressure from Santander"*. He was clear that RBS would not have offered any reduction at all since any reduction would have been a trading loss on the overall book. I accept that evidence, which is consistent with the fact that, before RBS joined the syndicate, Mr Williams of Bayern suggested to Mr Littlewood that the credit spread would be 14 bps and the execution spread 2 bps. In response to a query from Mr Littlewood, who thought that it would be closer to 8-10 bps, Mr Williams clarified that the credit spread referable to the embedded loan was 9 bps and the extra 5 bps was referable to the so-called 'vanilla' element (the risk, inherent in any swap, that the market rate might move against the counterparty after execution, leaving the banks exposed to a credit risk in respect of future net periodic payments or break costs due from the counterparty). It is also consistent with the fact that, in internal discussions, Mr Goodwin had suggested to Mr Bates that there was a 4-5 bps spread for the vanilla element and another 8 bps for the embedded element, which he suggested should in reality be greater.

401. Nor is it only RBS's evidence which makes the second counterfactual impossible to accept since there was evidence at trial from Bayern, ING and Caixa which makes it abundantly clear that those banks would not have agreed to a 10 bps reduction in the credit spread either. Thus, Mr Feenstra gave evidence that, even if it should be found that RBS were in some way implicated in the manipulation of EURIBOR, although the decision would ultimately have been that of his Financial Markets colleagues, it is "*highly unlikely that they would have agreed to a 10 bps reduction in the credit spread on the Swaps because a credit spread of 15 bps was already lower than would have been expected on a deal such as this"*. He went on to explain that at the time he considered *"that a credit spread of 18 to 20 bps would have been appropriate because of the high level of credit risk on the transaction, which was primarily a result of the high loan-to-value ratio and the fact that the borrower was an SPV*". Mr Greenland similarly gave evidence that, although the reduction would have been for his swap colleagues, he did not see "*any reason why BayernLB would have entertained any reduction in its credit*

spread due to RBS's alleged conduct, wholly unrelated to BayernLB (or for that matter to any of the other Non-RBS Banks". As for Mr Samhan, he explained that he did not consider that "*in September 2008, Caixabank would in any circumstances have approved a swap of this type – i.e. a step-up swap with this level of risk and exposure – for a total spread of around 5bp*". He added that the credit spread and profitability on the swap was already very tight and that Caixa's usual spread would have been closer to 20 bps.

402. As Mr Howe QC submitted, given that Mr Maud accepted that Marme would have no greater leverage over the Non-RBS Banks even in this counterfactual scenario, there would have been no reason for them to have accepted any less income from the Swaps than they had already agreed. Mr Tomson submitted, nonetheless, that, if necessary, in other words if the Non-RBS Banks had refused to countenance any reduction in their own spreads, RBS could have subsidised them. He suggested that, even after a 10 bps reduction in the credit spread, the Non-RBS Banks together would have had a credit spread of €3,278,400, representing a reduction of €10.92 million, and that RBS "*could and would easily have compensated them for, if necessary, out of its overall direct and indirect deal economics*". However, as Mr Quest QC pointed out, RBS's effective spread on the Swaps was 17.9 bps. It was, therefore, in fact, higher than 15 bps because RBS retained more than its proportionate share of the 2 bps execution spread given that RBS was the bank responsible for market execution. It follows that, if RBS was going to compensate the Non-RBS Banks, RBS's effective spread on its own Swap would have reduced by 31.6 bps overall to below zero, specifically minus 13.7 bps. RBS's loss would, therefore, on this basis, have been very significant indeed.

403. Although in his oral closing submissions Mr Tomson drew attention to the UFA, specifically various provisions indicating that RBS would receive payment in the event that Marme refinanced in stipulated time periods (specifically €20 million within 3-6 months and €45 million within 6-12 months), suggesting that these are monies which needed also to be factored into the "*overall economics*", I remain unswayed by Mr Tomson's submissions on this aspect. In my view, it is simply unrealistic to suppose that RBS would have agreed to so substantial a reduction by undertaking to compensate the Non-RBS Banks. Indeed, as Mr Quest QC pointed out, were RBS to have compensated the Non-RBS Banks, the reduction involved would have been so substantial as to mean that it was approaching the 50 bps which Mr Maud and Marme themselves now accept would have been commercially unacceptable.

Conclusion

404. It follows that neither of Marme's counterfactuals is viable, and so that its damages claim must fail.

Liability of the Non-RBS Banks: Agency

405. It is no part of Marme's case that the Non-RBS Banks had any involvement in, or were privy to, any attempted or actual manipulation of EURIBOR or that they were dishonest in any other way. Rather, Marme contends that the Non-

RBS Banks are liable on the basis that RBS acted as agent for the Non-RBS Banks in making the EURIBOR Representations so that Marme is entitled to rescind not only the RBS Swap but also the Non-RBS Banks' Swaps or to claim damages from them. Obviously, this is yet another issue which does not, strictly speaking, arise in view of my earlier conclusions.

406. It is also important to make it clear at the outset that it is not Marme's case that RBS had any authority (actual, usual or apparent) to enter into any contract on behalf of the Non-RBS Banks. It is not, therefore, Marme's case that the Swaps were entered into by RBS as agent for the Non-RBS Banks. It is important also to make it clear that the agency case put forward by Marme entails the contention not that RBS had actual authority to make the EURIBOR Representations but that RBS had apparent authority to do so. Mr Saini QC expressly disavowed any actual authority argument during the course of his oral opening submissions.

407. Mr Howe QC pointed out, with some justification, that Marme's case on agency has shifted somewhat over time. Specifically, although Marme had previously relied heavily on RBS's role as MLA as well as on RBS acting as "*de facto sole lead arranger*" and as 'Facility Agent'/'Security Agent' in relation to the Senior Loan, ultimately these were matters which were relied upon as secondary matters, more by way of background than as freestanding reasons why it was suggested by Marme that the Court should conclude that its apparent authority case is established. By the time of closing, Marme's case had become more concentrated upon RBS's role in agreeing the credit spreads (so Mr Saini QC suggested, on behalf of the Non-RBS Banks) and in setting the market *"mid"* rate and the steps for the Swaps on an execution call which did not involve the Non-RBS Banks. Mr Saini QC, indeed, in his oral closing submissions focused, seemingly exclusively, on these latter aspects rather than on RBS's role as regards the Senior Loan.

Apparent authority – the law

408. Although there was a considerable measure of agreement as to the legal principles concerning apparent authority, that agreement was by no means complete.

409. It is convenient to start by setting out the following well-known passage which appears in *Bowstead & Reynolds on Agency* (21st Ed., 2018) at paragraph 1-001 (Article 1):

> "*(1) Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.*

(2) In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties.

(3) Where the agent's authority results from a manifestation of assent that he should represent or act for the principal expressly or impliedly made by the principal to the agent himself, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority.

(4) A person may have the same fiduciary relationship with a principal where he acts on behalf of that principal but has no authority to affect the principal's relations with third parties. Because of the fiduciary relationship such a person may also be called an agent."

Clearly of particular relevance in the present case are (3) and (4). There was, however, controversy concerning the reference in (4) to *"fiduciary relationship"* since it was Mr Saini QC's contention that fiduciary duties are not a *sine qua non* of an agency relationship whereas it was Mr Howe QC's submission that the existence of fiduciary obligations is a strong pointer to the existence of an agency relationship.

410. Mr Saini QC also submitted that a person may be an agent where he acts on behalf of a principal but has no authority to affect the principal's relations with third parties. This was another proposition with which Mr Howe QC did not agree. It was his submission that it is inherent in the concept of agency both that there is a fiduciary element to the relationship and that the agent can affect the principal's relations with third parties.

411. In support of what he had to say, Mr Howe QC cited certain other passages in *Bowstead & Reynolds*, starting with paragraph 1-015 which states as follows:

"***Fiduciary relationship between agent and principal.*** *Since the paradigm agent has conferred on him special powers which enable him to change the legal position of another, the law also imposes on him special duties of a fiduciary nature towards that other*."

He went on to refer to paragraph 6-035:

"***Agent as fiduciary***. *An agent in the strict sense of the word holds a power to affect the legal relations of his principal. This power is conferred by the law in the implementation of the supposed intentions of the parties; but it is not surprising that the law also imposes controls on the way in which the holder of such a strong power may behave towards the person who conferred it. This is not a situation like the more usual one regulated by the law in which the parties are in an adverse commercial relationship, for example a simple hire of services. Agency services are services of a special kind. Even when no such power to affect legal relations was conferred, as in the 'incomplete agency' case of the canvassing agent, the relationship of the parties still imports an*

undertaking by one to act in the interests of the other rather than his own, and this likewise, though to a lesser extent, justifies the law's intervention."

Also of note, he suggested, is paragraph 6-037:

"***Are all agents always fiduciaries?*** *Turning first to the question of how the incidence of the duties should be explained, it will be noted that the formulations in Article 1 and in the present Article treat the relationship of principal and agent as by definition a fiduciary one, and therefore in effect say that every agent is a fiduciary and hence owes fiduciary duties. This can be criticised on the basis that not every person who can be described by the word 'agent' is subject to fiduciary duties; and that a person who certainly is so to be described may owe such duties in some respects and not in others. Hence it is said that there may be a 'non-fiduciary agent', and that in some functions an acknowledged agent may not act as fiduciary at all. Rather than talk of a 'non-fiduciary agent' it seems better to say that where an agent does not act in a fiduciary capacity (e.g. because he simply carries out specific instructions), this is a reflection of the scope of his duties and the boundaries of the equitable rules.*

…

It is certainly true that fiduciary relationships arise in situations other than those of agency. Nevertheless, it is submitted that the fact that an agent in the strictest sense of the word has a power to alter his principal's legal position makes it appropriate and salutary to regard the fiduciary duty as a typical feature of the paradigm agency relationship. To do so will not mislead so long as two things are borne in mind.

The first is that the word 'agent' can be used in varying senses, and not all persons to whom the word is applied are agents in the full (or sometimes, any) legal sense. A canvassing, or introducing agent, for instance, may do no more than bring two parties together and thus may in many situations do little involving the incidence of fiduciary responsibilities at all; though equally he can, as has been stated above, in some circumstances become liable for breach of such duties, as when he conceals from his principal the existence of further offers. Further, even canvassing agents usually have authority to make and receive communications on behalf of their principals, and can be expected to act loyally in exercising those powers. A distributor or franchisee, though sometimes called an agent, is in most respects in a position commercially adverse, rather than fiduciary, to the person whose goods he distributes: he buys and resells. But again it is conceivable that circumstances might give him knowledge of and power over his principal's affairs which could justify the imposition of some fiduciary duties; and this is quite apart from the possibility that he may also in some circumstances exercise true agency functions, for example as regards complaints concerning the goods, and be subject to fiduciary duties in that respect.

The second matter which should be borne in mind is that the extent of an agent's equitable duties (a phrase that embraces more than the strictly

fiduciary duties to avoid conflicts of interest and not to profit) and also common law duties may vary from situation to situation."

412. As to decided authority, in support of both propositions, Mr Saini QC relied upon the relatively recent Court of Appeal decision in ***UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH*** [2017] EWCA Civ 1567. In that case the issue was whether Males J was correct to have concluded that, in procuring that KWL enter into certain transactions with UBS, an intermediary called Value Partners had acted as UBS's agent and that a bribe paid by Value Partners to KWL's CEO was something done within the scope of that agency so as to mean that UBS was responsible for its payment despite not knowing anything about it. In considering this issue, Lord Briggs and Hamblen LJ (giving the majority judgment) quoted, at [83], the extract from *Bowstead & Reynolds* at paragraph 1-001 set out above, before going on, at [84], to quote paragraph 1-019 (now paragraph 1-020 in the most recent edition), as follows:

"***Incomplete agency: internal relationship only – the 'canvassing' or 'introducing' agent****. Article 1(4) seeks to achieve completeness by taking in a well-established type of intermediary who makes no contracts and disposes of no property, but is simply hired, whether as an employee or independent contractor, to introduce parties desirous of contracting and leaves them to contract between themselves. In effecting such introductions he is remunerated by commission, which he may sometimes take from both parties. Such a person is a common figure in most western legal systems and may well be referred to as an agent. The most obvious example of such an intermediary in the English cases is the estate agent, who introduces purchasers to vendors and tenants to lessors of houses, and vice versa. Such persons are sometimes also referred to as brokers, and indeed in some English-speaking countries the estate agent is referred to as a 'real estate broker': but this may be misleading since the current practice, at any rate in England, is to use the term 'broker' for persons who go beyond introductions and certainly do make contracts for their principals, e.g. commodity brokers, insurance brokers and stockbrokers. Canvassing agents are on the fringe of the central agency principles used by the common law, since their powers to alter their principals' legal relations are at best extremely limited. They often, however, have authority to receive and communicate information on their principals' behalf, and in so doing have the capacity to alter their principals' legal position. They also usually act in a capacity which may involve the repose of trust and confidence, and hence may be subject in some respects to the fiduciary duties of agents towards their principals. They are also subject of typical rules, largely developed in estate agent cases, as to entitlement to commission, which are normally regarded as part of agency law and are relied on also by agents who have greater powers to bind their principals. They may sometimes hold money (e.g. deposits) for their principals. The rules applicable to the internal relationship between principal and agent will therefore apply as appropriate, and for this reason such persons should certainly be treated in a work on agency even though they lack the external powers of the agent. It is an advantage of the formulation of basic agency principle in Article 1, which selects the internal relationship between principal and agent as a*

distinguishing feature of agency, that it can be taken to cover such persons. Canvassing agents are persons to whom the internal parts of agency law may apply, but who, because of the limited nature of their external powers to affect their principals' legal positions, are not agents in the full sense of the word. They may therefore be said to provide an example of 'incomplete agency'."

What is here being described, therefore, is not the type of agent identified in Article 1(1) but, instead, the type of 'incomplete agent' described in Article 1(4), namely a person who is a fiduciary of his principal but who has no authority to affect the principal's legal relations. The 'incomplete agent' may be called an agent but is not an agent *"in the full sense of the word"*. It was this distinction which was at the heart of UBS's case, Lord Falconer on behalf of UBS submitting that the corrupt payment made by Value Partners *"exhibited none of the settled characteristics of agency"*, including the authority to affect the legal relations of the principal and the existence of a fiduciary duty, and Mr Tim Lord QC arguing for KWL that these were not essential prerequisites of agency: see [85] and [86].

413. In considering these rival submissions, Lord Briggs and Hamblen LJ cited ***Branwhite v Worcester Works Finance Ltd*** [1969] 1 AC 552 at [88], observing that, whilst *"it is difficult to derive any clear statements of legal principle from the speeches"*, nonetheless, that is authority for the following two propositions:

"*(i) The court should not impose an agency analysis upon a relationship which may better be analysed in other terms, in particular where the intermediary (in that case the car dealer) has its own interest in the transaction as a principal;*

(ii) There may be identified within a general relationship which is not one of agency, specific tasks for which one party assumes an ad hoc agency responsibility for the other, such as the delivery of the hired car to its new owner."

Lord Briggs and Hamblen LJ, then, went on at [89] to refer to ***Plevin v Paragon Personal Finance Limited*** [2014] 1 WLR 4222, describing the Supreme Court in that case, at [33], as reinforcing "*the warning to be found in the Branwhite case against forcing into an agency analysis a relationship better explained in some other way*", before citing, at [90], ***Tonto Home Loans Australia PTY Limited v Tavares & Others*** [2011] NSWCA 389, a New South Wales Court of Appeal decision in which this was stated, at [177], concerning Article 1 of *Bowstead & Reynolds*:

"*These expressions of the central characteristics of the relationship reveal the closeness of identity that is required for the relationship to exist. Not every independent contractor performing a task for, or for the benefit of, a party will be an agent, and so identified as it, or as representing it, and its interests. Agency is a consensual relationship, generally (if not always) bearing a fiduciary character, in which by its terms A acts on behalf of (and in the interests of) P and with a necessary degree of control requisite for the purpose of the role. ... In McKenzie v McDonald [1927] VLR 134 at 144 Dixon AJ, in*

saying that not every agent stands as a fiduciary, was recognising that the word 'agent' is used in many senses and is apt to mislead, citing Kennedy v De Trafford at 188. That is, however, no more than to say that the word 'agent' has a potentially wide and varying meaning in life and business and that, on some occasions, the business description will be given to someone who is not a fiduciary. … It is sufficient to recognise that the essential characteristic is that one party (A) acts on the other's (P's) behalf, and that this will generally be in circumstances of a requirement or duty not to act otherwise than in the interests of P in the performance of the consensual arrangement. Bowstead and Reynolds on Agency, the Restatement and Seavey op cit at 863 include in the conception of agency the characteristic of fiduciary duty. The duty will, of course, conform with the extent and scope of the agency and thus be of potentially varied content, recognising that context (in particular, perhaps, a market or commercial context) may attenuate the rigour or content of the fiduciary duty … . The necessary good faith implicit in a fiduciary character in the relationship reflects the character of identity or representation that the relationship essentially carries."

Lord Briggs and Hamblen LJ went on at [91] to address Lord Falconer's submission:

"*Lord Falconer sought to derive from the Tonto case a principle that a relationship could never be identified as one of agency if none of the main characteristics, namely authority to affect the principal's relationships with third parties, fiduciary duty or control by the principal, was present. We would not be minded to go quite that far, but the absence of any of these main characteristics must nonetheless be a significant pointer away from the characterisation of a particular relationship as one of agency, even though there may be rare exceptions."*

They continued at [92] in what may, strictly speaking, amount to *obiter dicta* (as Longmore LJ considered in ***Medsted Associates Limited v Canaccord Genuity Wealth (International) Limited*** [2019] EWCA Civ 83 at [31]-[32]):

"Mr Lord took us to Halton International Inc v Guernroy Limited [2005] EWHC 1968 (Ch) per Patten J at [138]-[9], and to Tigris International NV v China Southern Airlines Company Limited [2014] EWCA Civ 1649, per Clarke LJ at [155], in support of his submission that the existence of a fiduciary duty was by no means an essential characteristic of agency. We agree. There are no doubt many forms of non-fiduciary agency, just as there are forms of fiduciary agency in which the agent has no authority to affect the principal's relations with third parties."

414. It can, therefore, be seen that Lord Briggs and Hamblen LJ had in mind three matters: first, that the *"main characteristics"* of an agency relationship include (as Lord Falconer submitted) the authority to affect the principal's relationships with third parties and the existence of a fiduciary duty; secondly, that the absence of such *"main characteristics"* represents *"a significant pointer away from the characterisation of a particular relationship as one of agency"*; and, thirdly, that *"the existence of a fiduciary duty"* is *"by no means an essential characteristic of agency"*. As to fiduciary duty, therefore, whilst it

is one of the *"main characteristics"* of agency, it should not be regarded as being *"essential"* in the sense that there can, at least in principle, still be an agency relationship without there being a fiduciary duty in existence. That said, as Lord Briggs and Hamblen LJ went on to explain at [94], when explaining that they disagreed with the decision arrived at by Males J:

"*We see no reason to force that corrupt arrangement into an agency analysis for any purpose, let alone the purpose of deciding whether UBS is legally responsible for the bribe paid by Value Partners to Mr Heininger."*

There were four reasons why they took this view, as set out at [95] to [99]. The first two reasons were these:

"95 First, Value Partners was, and was known by UBS to be, the fiduciary agent of its captive clients before the corrupt arrangement with UBS was made. It is therefore a case, like the Plevin case, where a pre-existing agency relationship with another party is hostile to, albeit not necessarily irreconcilable with, an agency relationship with another party seeking to transact with the intermediary's pre-existing principal.

96. Secondly, the substance of the corrupt arrangement was that UBS would secretly assist Value Partners in abusing its pre-existing fiduciary relationship with its captive clients, including KWL. This could not be achieved either by UBS holding out Value Partners as its agent, or by Value Partners asserting an agency for UBS in dealings with KWL. On the contrary, the arrangement would only achieve its intended results if, from start to finish, Value Partners purported in its dealings with its captive clients to act loyally on their behalf."

The third and fourth reasons were, however, particularly pertinent:

"97. Thirdly, the arrangement did not involve, or authorise, Value Partners to affect legal relations between UBS and any third party, even by the making of representations, or the receipt of information, as sometimes occurs within the context of a canvassing agency or an estate agency.

98. Fourthly, the judge did not find, and in our view the facts which he did find do not admit, the existence of a fiduciary duty by Value Partners to UBS. Each of the participants in the corrupt arrangement was pursuing its own interests, for its financial benefit. Neither was paying or otherwise remunerating the other."

In other words, the fact that Value Partners did not owe UBS a fiduciary duty was in that case regarded as significant. So, too, was the fact that the arrangement did not involve or authorise Value Partners affecting legal relations between UBS and any third party.

415. It seems to me, in the circumstances, that ***UBS v KWL*** is authority for two propositions. The first is that the Court should not feel constrained to find that there is an agency relationship when the facts do not support such a conclusion. Reliance on specific and limited acts which might be capable of

being characterised in terms of agency but which, viewed in the round and taken together with other features which are either present or absent, do not justify a conclusion that there is an agency relationship ought not to result in such a finding. Indeed, it should be noted that in ***Branwhite*** itself and in ***Shogun Finance v Hudson*** [2001] EWCA Civ 1000, [2002] QB 834 it was decided that, even where all contact was between the third party (the car buyer and the finance company respectively) and the supposed agent, with no direct involvement on the part of the supposed principal at all, it was decided that no agency relationship existed. Secondly, ***UBS v KWL*** is authority for the proposition that, whilst the fact that there is no fiduciary relationship and no ability to affect legal relations are not critical to a conclusion that there is an agency relationship, they are, nonetheless, factors which point away from such a conclusion.

416. It follows, therefore, that Mr Saini QC was right when he submitted that a person may be an agent where he acts on behalf of a principal but has no authority to affect the principal's relations with third parties and that it is not a *sine qua non* that an agent should owe his principal a fiduciary duty. It would be quite wrong, however, to approach matters on the footing that the absence of these features is immaterial, the more so when *both* features are absent, since to do so could result in a finding that there is an agency relationship in situations where such a finding would be wholly inappropriate.

417. It is worth mentioning at this juncture two further points in relation to fiduciary duties. The first concerns the circumstances in which such duties arise, as to which Leggatt LJ had this to say in ***Al Nehayan*** at [159]:

"*Thus, fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person. (Such duties may also arise where the responsibility undertaken does not directly involve making decisions but involves the giving of advice in a context, for example that of solicitor and client, where the adviser has a substantial degree of power over the other party's decision-making: see Lionel Smith, 'Fiduciary relationships: ensuring the loyal exercise of judgement on behalf of another' (2014) 130 LQR 608.) The essential idea is that a person in such a position is not permitted to use their position for their own private advantage but is required to act unselfishly in what they perceive to be the best interests of their principal. This is the core of the obligation of loyalty which Millett LJ in the Mothew case [1998] Ch 1 at 18, described as the 'distinguishing obligation of a fiduciary'. Loyalty in this context means being guided solely by the interests of the principal and not by any consideration of the fiduciary's own interests. To promote such decision-making, fiduciaries are required to act openly and honestly and must not (without the informed consent of their principal) place themselves in a position where their own interests or their duty to another party may conflict with their duty to pursue the interests of their principal. They are also liable to account for any profit obtained for themselves as a result of their position.*"

Secondly, it was Mr Saini QC's submission that the fact that a person is not an agent and fiduciary at all times and for all purposes does not mean that he is

not an agent at some points and for some purposes. That is clearly right and was not, indeed, disputed by Mr Howe QC. If authority were necessary, however, Lord Wilberforce's observation in ***New Zealand Netherlands Society 'Oranje' Incorporated v Kuys*** [1973] 2 All ER 1126 at p. 1130 is apposite:

"*A person in his position may be in a fiduciary position quoad a part of his activities and not quoad other parts: each transaction, or group of transactions, must be looked at.*"

So, too, is ***Brandeis (Brokers) Ltd v Black*** [2001] 2 All E.R. (Comm) 980, in which Toulson J explained at [40] that:

"*The Law Commission was right to emphasise that the extent of a person's fiduciary duties may vary according to what the parties have agreed or may reasonably be taken to expect. Fiduciaries are not all required, like the victims of Procrustes, to lie on a bed of the same length*."

418. As to the legal principles applicable to apparent authority more generally, this is stated in *Bowstead & Reynolds* at paragraph 1-011:

"*… the law may treat a third party dealing with a person who appears to have authority from a principal as entitled, by virtue of the principal's manifestations to him by words or conduct, to assume that the person in question has such authority, regardless of whether anything has occurred from which the law would draw that conclusion if the matter were in issue only between the supposed agent and the supposed principal. This reasoning takes effect in the doctrine of apparent authority. This applies both where the supposed agent is not authorised to act at all, and also where he appears to have a greater authority than was actually conferred on him. It is said in the English cases that this reasoning depends on estoppel. But it is suggested below that this is a very weak form of estoppel, and to be distinguished from other agency-related situations where the principles of estoppel as normally stated more obviously apply. The doctrine operates regardless of whether the agent himself believed that he was authorised, provided that he reasonably appeared to the third party to be authorised. But the basis of the doctrine makes it essential that he has purported to act on the principal's behalf*."

419. This statement is based, in part, on the description of the relevant principle given by Diplock LJ (as he then was) in ***Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd*** [1964] 2 QB 480 at p. 503, as follows:

"*An 'apparent' or 'ostensible' authority … is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation*

but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract."

Diplock LJ went on at p. 505 to explain as follows:

"*… where the agent upon whose 'apparent' authority the contractor relies has no 'actual' authority from the corporation to enter into a particular kind of contract with the contractor on behalf of the corporation, the contractor cannot rely upon the agent's own representation as to his actual authority. He can rely only upon a representation by a person or persons who have actual authority to manage or conduct that part of the business of the corporation to which the contract relates. The commonest form of representation by a principal creating an 'apparent' authority of an agent is by conduct, namely, by permitting the agent to act in the management or conduct of the principal's business. Thus, if in the case of a company the board of directors who have 'actual' authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter on behalf of the corporation into contracts of a kind which an agent authorised to do acts of the kind which he is in fact permitted to do usually enters into in the ordinary course of such business*."

420. ***Freeman & Lockyer*** has long been regarded as the classic statement of the relevant legal principles. That, indeed, is precisely how Lord Sumption characterised it in ***Kelly v Fraser*** [2013] 1 AC 450 and almost three decades earlier in ***The 'Ocean Frost'*** at p. 731C-E Robert Goff LJ (as he then was) also cited ***Freeman & Lockyer*** when observing that *"the most common form"* of representation (or holding-out) is *"by conduct, by permitting the agent to act in some way in the conduct of the principal's business with other persons, and thereby representing that the agent has the authority which an agent so acting in the conduct of his principal's business usually has"*. Robert Goff LJ went on, then, to address the facts of the case under consideration which involved a chartering broker named Mr Magelssen. He explained as follows at p. 732B-F:

"…a representation by an agent within his ostensible authority may give rise to an estoppel against his principal. However, where, as here, it is suggested that it was within the agent's ostensible authority to communicate to the third party the principal's approval of the agent entering into a transaction which would otherwise not be within the agent's authority, the only representation of the principal which can give rise to such ostensible authority is a representation to the effect that the third party can rely upon the agent's communication of the principal's approval. It is possible to construct a theoretical case in which such a representation is expressly made by a principal, where he states to the third party that he should look to the agent for the necessary approval, and that he can rely upon the agent's statement whether such approval has been given. But I can see no basis for concluding,

on the facts of the present case, that the defendants ever made any such representation regarding Mr. Magelssen. No doubt, by appointing Mr. Magelssen to his position and allowing him to act as such, they did represent that he had authority to bind his principals to those contracts which an agent in his position ordinarily has authority to make; and no doubt that ostensible authority would embrace the making of such representations concerning the subject matter of any such contract as might reasonably be understood to fall within such usual authority. But that does not, in my judgment, embrace authority by Mr. Magelssen to communicate approval by his superiors to his making contracts which, to the knowledge of the third party, he had no authority to enter into without such approval, with the effect that the defendants would be bound by such communication."

Subsequently, in the House of Lords, at p. 779D-G Lord Keith agreed with Robert Goff LJ about this, specifically with this observation:

"... the effect of the judge's conclusion was that, although Mr. Magelssen did not have ostensible authority to enter into the contract, he did have ostensible authority to tell Mr. Jensen and Mr. Dannesbøe that he had obtained actual authority to do so. This is, on its face, a most surprising conclusion. It results in an extraordinary distinction between (1) a case where an agent, having no ostensible authority to enter into the relevant contract, wrongly asserts that he is invested with actual authority to do so, in which event the principal is not bound; and (2) a case where an agent, having no ostensible authority, wrongly asserts after negotiations that he has gone back to his principal and obtained actual authority, in which event the principal is bound. As a matter of common sense, this is most unlikely to be the law."

Lord Keith, then, added:

"It must be a most unusual and peculiar case where an agent who is known to have no general authority to enter into transactions of a certain type can by reason of circumstances created by the principal reasonably be believed to have specific authority to enter into a particular transaction of that type. ... ."

Lord Keith had earlier summarised the relevant principles concerning apparent authority at p. 777A-E in this way:

"*Ostensible authority comes about where the principal, by words or conduct, has represented that the agent has the requisite actual authority, and the party dealing with the agent has entered into a contract with him in reliance on that representation. The principal in these circumstances is estopped from denying that actual authority existed. In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question. Ostensible general authority may also arise where the agent has had a course of dealing with a particular contractor and the principal has acquiesced in this course of dealing and honoured transactions arising out of it. Ostensible general authority can, however, never arise where the contractor knows that the agent's authority is limited so as to exclude entering into transactions of the*

type in question, and so cannot have relied on any contrary representation by the principal … .

It is possible to envisage circumstances which might give rise to a case of ostensible specific authority to enter into a particular transaction, but such cases must be very rare and unusual. Ex hypothesi the contractor knows that the agent has no general authority to enter into the transaction, as was the position here. The principal might conceivably inform the contractor that, in relation to a transaction which to the contractor's knowledge required the specific approval of the principal, he could rely on the agent to enter into the transaction only if such approval had been given. In such a situation, if the agent entered into the transaction without approval, the principal might be estopped from denying that it had been given. But it is very difficult to envisage circumstances in which the estoppel could arise from conduct only in relation to a one-off transaction such as this one was."

421. It follows that it will be rare for an apparent authority argument to succeed where, rather than there being a general holding out of an agent as having authority, there is merely *"a one-off transaction"* instead. It is clear also, however, that care needs to be taken when considering the *scope* of any apparent authority since, as demonstrated by what Lord Keith stated in ***The Ocean Frost*** at p. 777, a person may be held out as having general authority to act on behalf of the principal or as having authority to undertake certain specific acts. An illustration of the distinction, should it be necessary, is ***Spooner v Browning*** [1898] 1 QB 528. In that case, a firm of stockbrokers employed a clerk who was permitted to pass on orders to them but was not authorised to accept orders on their behalf. On three occasions, the claimant gave orders to the clerk which were transmitted to the stockbrokers and executed, the resultant notes acknowledging the order sent to the claimant through the clerk. The claimant paid via cheques provided to the clerk: on the first two occasions, the cheques were made out to the stockbrokers; on the third they were made out to the clerk. Further orders were subsequently given by the claimant to the clerk, who did not pass them to the defendants and who, instead, misappropriated the cheques, giving the claimant forged notes purporting to show the share purchases. The Court of Appeal held (Collins LJ dissenting) that the stockbrokers were not bound by the actions of the clerk, AL Smith LJ (as he then was) explaining at pp. 534-535, as follows:

"*It seems to me that, although there was evidence fit to be left to the jury that the defendants held out Dennis as their agent to receive orders, which they might or might not thereafter execute as they pleased, there was no evidence that he was held out by the defendants as their agent either to make contracts on their behalf, or to bind them to accept orders when brought by Dennis to them … .*"

422. Another, more recent, example is ***MCI Worldcom***, a case concerning a contract which was being negotiated between Primus and one of WorldCom's subsidiaries (MCI WorldCom). WorldCom was also to be a party to the contract. The terms of the contract were negotiated by a Ms McKibbin, a lawyer employed by MCI WorldCom. An issue raised was whether certain representations allegedly made by Ms McKibbin were arguably (it was a

summary judgment case) within the scope of her ostensible authority as agent for WorldCom. MCI WorldCom was, on the face of it, acting as agent of WorldCom in negotiating the contract. At first instance, Colman J took the view, at [34] and [35] ([2003] EWHC 2182 (Comm)), that it was *"completely unreal"* and *"completely fanciful"* to suppose that *"an employee in the legal department of the UK subsidiary of a United States corporation would have authority to give answers to be relied upon by the opposite party to negotiations as to the existing or future financial viability of the parent company"*. The Court of Appeal ([2004] EWCA Civ 957) reached a different conclusion in ordering that the matter should go to trial. It is clear that the Court of Appeal did not quibble with it being necessary to ask whether the specific representations alleged fell within the scope of Ms McKibbin's apparent authority. On the contrary, it is clear that this was precisely what Mance LJ envisaged would be explored at trial since Mance LJ explained at [23] that *"it will in practice be easier for a judge who has seen the witnesses to form a view as to the likelihood of the words used having been understood to have the meaning or significance, or being relied on in the way, which Primus asserts"*.

423. Although it is, perhaps, already obvious, I should add in this context that it was not in dispute as between Mr Saini QC and Mr Howe QC that, whilst most cases of agency concern the ability of an agent to bind his principal in contract, it is possible to have an agent who is held out as having a more limited apparent authority to do something falling short of doing that. Mr Saini QC cited ***Freeman & Lockyer*** in support of this proposition, specifically this passage in Diplock LJ's speech at p. 506:

"*In each of the relevant cases the representation relied upon as creating the 'apparent' authority of the agent was by conduct in permitting the agent to act in the management and conduct of part of the business of the company. Except in Mahony v. East Holyford Mining Co. Ltd.; it was the conduct of the board of directors in so permitting the agent to act that was relied upon. As they had, in each case, by the articles of association of the company full 'actual' authority to manage its business, they had 'actual' authority to make representations in connection with the management of its business, including representations as to who were agents authorised to enter into contracts on the company's behalf*."

Mr Saini QC highlighted the reference here to the making of representations.

424. The next matter to consider in relation to the law is the requirement that any holding out by the principal is reasonably relied upon by the third party (in this case, Marme). There must, in short, be reliance by the third party and that reliance by the third party must be reasonable. It is not right only to ask how things would have appeared to a reasonable person in the shoes of the third party since that is the second part of the question which only arises if the third party establishes reliance by him. That this is what the law requires is illustrated by ***Egyptian International Foreign Trade v Soplex Whole Supplies Ltd (The 'Raffaella')*** [1985] 2 Lloyd's Rep 36. In that case, Egyptian International Foreign Trade Co. had entered into a contract with the first defendants, Soplex, for the purchase of a cargo of cement. Soplex

obtained a letter of guarantee from the second defendant, Refson, undertaking to guarantee the payment due. Refson denied liability, contending that the documentary credit manager who had signed the undertaking, a Mr Booth, had no authority to provide any guarantee without obtaining the express consent of a director who would have needed to countersign the document. The issue was whether the undertaking was within the apparent authority of Mr Booth. The Court of Appeal decided that Refson held out Mr Booth as being a manager of the kind who dealt with his client's affairs generally and who could reasonably be expected to have general authority, and that the evidence was sufficient to have entitled the trial judge to conclude that Mr Booth had been held out by Refson as having apparent authority to sign the undertaking. Browne-Wilkinson LJ (as he then was) explained, wholly unexceptionally, at p. 41 that since *"the doctrine of holding out is a form of estoppel"* so "*the starting point is that the principal must be shown to have made a representation, which the third party could and did reasonably rely on, that the agent had the necessary authority"*. It follows, no less obviously, that, if an apparent authority case is to succeed, the representee must be aware of the holding out. That, indeed, is illustrated by the discussion in which Kerr LJ engaged in the same case at pp. 44-45 involving the consideration of a number of hypothetical factual scenarios of holding-out. That Kerr LJ's focus was on what the representee knew about is apparent from his observation at p. 45 that:

"*Ultimately, these are of no direct relevance, because the plaintiffs' representatives were then also unaware of them, except in general terms and in relation to this particular transaction, and possibly one earlier transaction with Mr Druker.*"

It is apparent also from the fact that he went on to observe as follows:

"*Nevertheless, if the plaintiffs had known these facts and had relied upon them as part of the matters which caused them to believe that Mr. Booth was equally authorized to assist Mr. Druker by signing the letter of July 26 on his own, there could be no doubt that they would have provided evidence of Mr. Booth's actual authority from which his apparent authority to sign the letter could have been inferred, however unusual such activities might have been in relation to persons employed as documentary credit managers in either banks. On the relevant evidence in this case, the facts known to the plaintiffs lie between these two extremes, although they are closer to the latter. Was this evidence, taken as a whole, sufficient to entitle the Judge to conclude that Mr Booth had been held out by Refson as having apparent authority to sign the letter on his own?*"

Quite clearly, Kerr LJ was here considering the representee's awareness, not merely what somebody in the representee's position should reasonably be regarded as having known. This is the first part of the dual requirement described earlier by Browne-Wilkinson LJ. The same approach is set out in *Bowstead & Reynolds* at paragraph 8-023:

"***No estoppel through simple negligence**. It is plain that if the third party does not know of the existence of any principal, there cannot be apparent authority, as when the agent purports to deal as principal. A representation that does not*

come to the notice of the third party is no representation. The mere fact that the principal enables the agent to commit fraud by putting him in a position where he can do so is not, without more, decisive. The common law has avoided, so far at least, a concept of estoppel by negligence. The mere possession of another's goods or documents (including those of title) creates no representation of entitlement to deal with them, since there can be any number of reasons why a bailment of them subsists. The doctrine does not apply even if the principal represents that the agent is the owner of goods or of a business where the third party was unaware of the representation, though in many such cases the related doctrine of apparent ownership may apply, or there may be evidence that permits an inference of a grant of actual authority by the undisclosed principal."

425. There is a last point concerning the law which should be addressed. This concerns a submission which was made by Mr Saini QC in opening and maintained in closing, namely that there is no requirement on the part of a representee to show that the agent made the relevant representations within the scope of his apparent authority and that it is sufficient to show in the present case, therefore, merely that at some point in the negotiations the EURIBOR Representations were made even if at the time that they were made RBS was not then acting as the Non-RBS Banks' agent. As Mr Saini QC put it in his oral closing submissions, if the EURIBOR Representations are to be treated as having been made at an earlier stage when RBS was not acting as an agent, that is sufficient since, although *"they may start very early on"*, they are to be regarded *"as continuing from the time that RBS are being held out as agent"*. In support of this proposition, reliance was placed on Article 79(1) of *Bowstead & Reynolds*, which is in these terms:

"Where a principal, whether disclosed or undisclosed, sues the other party to a contract made by the principal through an agent, the other party has all the defences which he would have had against the principal if the principal had himself made the contract in the same circumstances."

It is clear, however, that this is a principle which applies only where a contract has been entered into *"through an agent"*. In the present case, by contrast, Marme has disavowed any case that the Non-RBS Banks contracted with Marme through RBS acting as agent. Furthermore, despite the unqualified terms in which the principle is expressed, it is apparent from the commentary in paragraph 8-097 that the position is not quite so clear-cut. That commentary reads as follows:

"*It is not yet clear whether the third party's defence under Rule (1), where based on an agent's misrepresentation, requires that the misrepresentation have been made within the agent's actual or apparent authority, so long as the agent had some authorised role in the transaction. If the relevant contract was entirely negotiated by the agent, the principal may find it difficult to deny the agent's apparent authority to make the statements that induced it if he wishes to enforce the contract. In such circumstances, it is unlikely to matter that at the time the misrepresentation was made the agent had not yet been appointed, so long as the representation can be regarded as continuing after*

the appointment. Obviously, the third party will be in a weaker position where the misrepresenting agent had a lesser role to play in the process."

The commentary, then, continues by referring to certain authorities relied upon by Mr Saini QC (including ***The New Brunswick and Canada Railway and Land Company v Conybeare*** (1862) 9 HLC), as follows:

"However, it has been suggested that there is a general principle that 'no person can take advantage of the fraud of his agent', which precludes the principal from enforcing a contract induced by deceit whether or not the agent had express or apparent authority to have made the statement. In New Brunswick Railway v Conybeare, both Lord Westbury and Lord Chelmsford adverted to the possibility of a contract procured by the fraud of an agent being rescindable even though no action for damages would lie against the principal (actual or apparent authority normally being required before tortious liability for an agent's misstatements arises) There are other dicta, although it is difficult to find a case which has in fact turned on this point. The principle being advocated appears to be an example of the idea that a principal should not be permitted to approbate and reprobate. Although the cases relied upon involve fraud, it is not clear why the principle, if it exists, should be confined to fraud. On the other hand, where the agent had no actual or apparent authority to make the statement, and neither the principal nor any agent whose approval was needed for the making of the contract knew of the misrepresentation, it seems likely that rescission would be permitted only where the principal could adequately be put back in his pre-contractual position."

Preliminary observations

426. Before I come on to consider the apparent authority case in more detail, I should make some preliminary observations which echo, at least to some extent, those made by Mr Saini QC and Mr Howe QC in closing.

427. First, Mr Saini QC made the point that in cases of apparent authority, as in all cases of agency, it is not necessary that the agent should be performing the role of agent at all times. On the contrary, Mr Saini QC suggested, the agent *"can be stepping in and out, doing particular tasks, but in other tasks not be an agent"*. Mr Saini QC made this submission in the context of his explaining that *"even if one might be able to say that, for example, negotiating aspects of the Senior Loan, it looks like RBS was not the agent of the other banks, it doesn't follow from that for the purposes of representations being made relating to the swap transactions, they couldn't be the agent"*. As a general proposition, Mr Saini QC may well be right about this. It does not mean however, that the Court should assume that an agency role is being performed at any given point in time since that risks the type of forced conclusion which was reached at first instance in ***UBS v KWL***. As Lord Briggs and Hamblen LJ indicated in ***UBS v KWL*** at [92], the Court *"should not impose an agency analysis upon a relationship which may better be analysed in other terms, in particular where the intermediary … has its own interest in the transaction as a principal"*. The position is all the more acute given that what is alleged in

the present case is that certain implied representations were made, and even then through conduct rather than as a result of particular language being used.

428. There is, in addition, the further point which was made by Mr Howe QC in closing, namely that in this case RBS, the alleged agent, was, on any view, acting as principal and so for its own benefit and in its own right even if it was also acting as the Non-RBS Banks' agent. The question in the present case is not, therefore, whether an agent was authorised to do a particular thing by the principal for which the agent was purporting to act. The question is, instead, whether a party which is itself acting as a principal is also to be treated in a particular respect as acting as an agent. It follows that, whilst Mr Saini QC's point needs to be borne in mind, the Court should not assume too readily that RBS was acting as the Non-RBS Banks' agent as opposed to as principal (and only as principal).

429. Secondly, as I have mentioned, Marme's case has undergone a certain amount of change during the course of the proceedings. Whilst some natural evolution or refinement might be expected in the ordinary course, the change in this case has been more than merely that. This is somewhat surprising given that the apparent authority case necessarily entails consideration of the contemporaneous understanding which was held by Marme (in truth, Mr Maud) and not, at least primarily or fundamentally, consideration of communications or matters about which Marme/Mr Maud had no awareness at the time. Despite this, as Mr Howe QC rightly highlighted in closing, Marme's approach in these proceedings has throughout been to seek to craft a case out of documents which it has received through disclosure instead of focusing on what it alleges was its (or Mr Maud's) relevant contemporaneous understanding.

430. A particular example of this approach given by Mr Howe QC is instructive as it entails an application which was made at an early stage and which saw Marme seeking documents described by Hamblen J in his ruling on the application as *"communications between RBS and the other Defendants, in respect of (i) RBS's appointment as joint lead arranger of the Senior Loan syndicate; and (ii) its negotiation of the IRSs"*. That application was refused on the basis that, as Hamblen J explained at [51] ([2015] EWHC 173 (Comm)), the apparent authority (and, in fact, the issue concerning *"the making of the alleged representation"*) would not be *"affected by the proposed disclosure"*. As Mr Howe QC went on to observe, the same approach was adopted even at trial, during which a substantial amount of Marme's focus was directed at matters about which neither Marme nor Mr Maud would have been aware and so which were unlikely to be supportive of the apparent authority case.

431. Various other preliminary points were raised both by Mr Saini QC and by Mr Howe QC in closing. These need not all be addressed. However, it is worth highlighting two particular matters. The first follows on from the fact, as previously mentioned, that it is no part of Marme's case that RBS entered into the Swaps as the Non-RBS Banks' agent. In other words, not only did RBS enter into the RBS Swap as principal, but so did each of the Non-RBS Banks when they entered into their respective Swaps. The significance of this is that,

since the conduct relied upon by Marme as giving rise to the alleged EURIBOR Representations amounts to no more than a willingness to enter into a EURIBOR-linked instrument, if any alleged EURIBOR Representations were made, then, as a matter of analysis, they would each have to be regarded as having been made by each of the Banks (not only RBS but also each of the Non-RBS Banks) as regards each of the Swaps. In other words, again as Mr Howe QC submitted, taking the Swap entered into by Bayern as an example, if RBS is to be treated as making the alleged EURIBOR Representations concerning its conduct and knowledge in respect of the RBS Swap, so also should Bayern be treated as making those representations in respect of its Swap and its involvement in EURIBOR manipulation or attempted manipulation. If that is right, then, once again as Mr Howe QC submitted, it is difficult to see why RBS should be treated as making any of the EURIBOR Representations on behalf of the Non-RBS Banks.

432. The second matter to mention is that, in putting forward Marme's case, Mr Saini QC drew no distinction between a holding out of RBS by the Non-RBS Banks which is general and broad enough to cover the making of the EURIBOR Representations, on the one hand, and a holding out which is specific in relation to the making of the EURIBOR Representations on the Non-RBS Banks' behalf, on the other. Instead, Mr Saini QC simply proceeded on the basis that it is sufficient that Marme should demonstrate that RBS was involved in negotiations on the Non-RBS Banks' behalf. In truth, as Mr Howe QC submitted, in circumstances where it has never been suggested by Marme that there was any specific holding out, unsurprisingly given that it has never been suggested (and nor was it in cross-examination of the Non-RBS Banks' witnesses) that the making of the EURIBOR Representations ever occurred to the Non-RBS Banks, the second scenario would obviously never have been viable. If the apparent authority case is to succeed, therefore, it is incumbent upon Marme to establish that RBS had some level of general authority which would justify the conclusion that RBS thereby had apparent authority to make the EURIBOR Representations. The difficulty with this, however, besides the fact that Mr Saini QC disavowed such a case, is that it is accepted by Marme that RBS was *not* held out as having authority to *enter into* the Swaps on the Non-RBS Banks' behalf and it is unclear how any other type of authority enjoyed by RBS (even assuming that there was such other authority) would warrant the conclusion which is required if the apparent authority case is to succeed.

433. This is all the more the case given that it is very hard to see why the *Non-RBS Banks* (as opposed to RBS) should be taken as having held out RBS to make representations on their behalf concerning something about which they themselves had no knowledge, namely *RBS's* own knowledge of, or involvement in, EURIBOR misconduct. As Mr Howe QC put it in closing, having heard Mr Saini QC explain in closing that the EURIBOR Representations should be treated as having been made by RBS on behalf of the Non-RBS Banks because *"the central issue or one of the central financial reference rates in the transaction is going to EURIBOR"* and the Banks *"have to take the rough with the smooth"* given that the agent (RBS) which they *"put in to bat for them had some particular knowledge"*, this entails *"a huge and*

unjustified leap". In short, even if Marme were able to establish a holding out of RBS by the Non-RBS Banks, I do not consider, in any event, that Marme would be able to establish that the EURIBOR Representations were thereby made by RBS on the Non-RBS Banks' behalf.

434. These are more than matters of mere detail. On the contrary, they have direct significance for the apparent authority case which has been advanced on Marme's behalf. That case, after all, requires it to be established that there was a relevant holding out. Without this, there can be no apparent authority and so no question of agency being established. Standing back, however, and looking at matters more broadly with the approach adopted in ***UBS v KWL*** in mind, it is significant in the present case that it was common ground that RBS did not have power to bind any of the Non-RBS Banks in contract. In addition, I am clear that the case that RBS owed fiduciary duties to the Non-RBS Banks is unsustainable. Indeed, although Mr Saini QC, Mr Tomson and Mr Rose sought to suggest otherwise, it is to be noted that their primary position, as demonstrated by the earlier discussion concerning ***UBS v KWL***, was that the absence of fiduciary duties is not a prerequisite to agency being established. As they acknowledged, in a number of significant respects RBS was acting in its own (not the Non-RBS Banks') commercial interests in a manner, indeed, which conflicted with the Non-RBS Banks' interests. An example cited by Mr Howe QC in closing, and addressed later when considering Marme's execution case, saw RBS seek to secure the role of undertaking sole market execution, and enlisting Marme to assist in achieving this, to the exclusion of the Non-RBS Banks, on Marme's case RBS's principals. The suggestion by Mr Saini QC, Mr Tomson and Mr Rose in their written closing submissions that RBS's conduct is *"strongly indicative of fiduciary duties"* is not a suggestion which I can accept. The present case is far removed from that described by Leggatt LJ in ***Al Nehayan*** at [159]:

> *"… fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person. … The essential idea is that a person in such a position is not permitted to use their position for their own private advantage but is required to act unselfishly in what they perceive to be the best interests of their principal."*

It is unrealistic to suggest that in the present case RBS managed the property or affairs of the Non-RBS Banks. That is simply not what happened at all. The suggestion, in particular, that RBS's role in relation to execution on 12 September 2008 entailed RBS acting in a fiduciary capacity (indeed, that this is *"plainly"* the case) is not sustainable for reasons which I shall come on to explain later.

435. Having made these preliminary observations, I come on now to address the case which ultimately came to be advanced on Marme's behalf by Mr Saini QC, beginning with his submissions concerning the role which was played by RBS as regards the Senior Loan and then addressing what turned out to be Mr Saini QC's primary submissions concerning RBS's role in relation to the Swaps themselves.

The Senior Loan

436. Marme's case as pleaded was that at all material times from 24 July 2008, *"by its conduct as de facto sole lead arranger of the Senior Loan Syndicate, RBS held itself out as acting as the agent of the Second to Fifth Defendants as the other members of the Senior Loan Syndicate in relation to all aspects of the negotiations for the Senior Loan (including in relation to the Swaps)"*. In their written closing submissions, Mr Saini QC, Mr Tomson and Mr Rose highlighted two particular aspects in this respect. The first was RBS's role as MLA; the second involved the submission that RBS was 'running the show' allied with reliance on various descriptions in internal bank documents or in Mr Feenstra's evidence of RBS being the *"Bookrunner"*, *"Document Agent"*, *"Hedge Coordinator"*, *"Facility Agent"* and *"Security Agent"*. It was their submission that, whilst Bayern and HSH retained their status as joint-MLAs, it was RBS which was running the syndicate from the time when it re-entered the fray, as Mr Saini QC, Mr Tomson and Mr Rose put it, in late July 2008.

437. There are, however, a number of difficulties with Marme's position. First, as to the MLA point and whilst acknowledging that there is force in Mr Saini QC's observation in closing that there is *"no magic in a name"*, it clearly cannot be the case that RBS's (shared) MLA status means, in and of itself, that it held the position of the Non-RBS Banks' agent in the negotiations with Marme which led to the Transaction (and so the Swaps) being entered into. Not even Mr Saini QC, ultimately at least, suggested otherwise. Nor, realistically, could he given that Mr Feenstra, Mr Greenland, Mr Grey and Mr Bates each gave (unchallenged) evidence that, in their experience, a party performing the MLA role does not act on behalf of the other banks but, instead, acts merely as a conduit for the relaying of information.

438. That is consistent with the following description in *Wood, Law and Practice of International Finance* (2008) at paragraph 7-07:

> *"…the arranger's position is commonly not documented in detail: it is not usually stated who the arranger is acting for, the arranger is closely involved in structuring and organising the loan and the arranger receives a significant fee for its services. In the normal case it is considered that the arranger is in the position of an independent contractor and is not an agent or fiduciary of either the borrower or the banks. The arranger is selling a service in the same way that a seller may sell a washing-machine or car. It is suggested that clear words or conduct would be required to put the arranger in the position of an agent or fiduciary of either the banks or the borrower."*
>
> Professor Wood continues at paragraph 7-08 as follows:
>
> *"If the arranger were an agent then this may attract the usual range of draconian fiduciary duties, including a duty of due diligence, a duty of full disclosure, and duties not to put itself in conflict of interest and not to benefit personally from the agency, e.g. by taking unauthorised profits. Although the letter from the borrower to the arranger authorising the arranger to organise the loan is expressed to be a mandate, thereby suggesting agency, this should not itself characterise the arranger as agent of the borrower. In negotiating*

the term sheet and then negotiating the documentation, the arranger would seem to be performing functions for the benefit of the banks and this might therefore suggest that the arranger is somehow the agent first of the borrower and then of the banks. The solution to this oddity of the shifting boss is that the arranger is the agent of nobody. Nevertheless, the precise relationship depends on the facts, including the language used in the mandate letter, the language used by the arranger in soliciting participants and any clear assumption of responsibilities as agent by the arranger. Statements such as 'we will organise this on your behalf', 'we will look after this for you', and 'you can rely on us to look after your interests', etc. would have to be construed in the above light, but the assumption of agency duties should be unambiguous in order to attract responsibilities not matching the usual expectations in market practice."

439. It is consistent also with the co-ordination role described in *Mugasha, The Law of Multi-Bank Financing: Syndicated Loans and the Secondary Loan Market* (2007) at paragraph 3.04:

"*A simple explanation of the common procedures for syndicating a loan is that one bank, the mandated lead arranger or simply 'the arranger', obtains a mandate from the borrower to arrange a syndicated loan. The mandate or permission may be a result of competitive bidding or successful discussions with the borrower. With the borrower's mandate, the arranger starts assembling the syndicate. This consists of promoting the loan and obtaining commitments from other banks to advance money to the borrower. The initial step is to solicit other banks for indications of interest in the loan. There is no standard procedure for doing this, although it is easiest to send facsimile or e-mail messages to potential participants. The more prudent method, however, is to target those likely to be interested and send them facsimiles or e-mails that are essentially 'term sheets'. These contain brief but important information about the proposed credit facility, the borrower, and the relevant fees. The banks which express an interest later receive an information memorandum, sometimes also called a placement memorandum. This document discloses wide-ranging information pertinent to the proposed credit, including the borrower's financial condition as well as other economic and political factors that are relevant to the ability to repay the loan. It thus expands on the information previously circulated in the initial facsimile or e-mail. At the same time as the arranger assembles the syndicate, it is also discussing the documents, and in particular negotiates the terms of the loan agreement with the borrower with the intention that there should be a draft agreement for consideration by the participants as soon as they are identified. When the syndicate members have been identified and the agreement is drafted to all parties' satisfaction, the deal is completed-which means that the borrower and the lenders execute the loan agreement. At this point in time, the duties of the arranger end. Further coordination between the lenders and the borrower is done by an agent bank that is specifically chosen for that purpose. It is common practice for the lead arranger to be nominated as the agent bank as well.*"

440. Similarly, *Hewetson and Mitchell, Banking Litigation (4th Ed., 2017)*, in a passage relied upon by Mr Saini QC as illustrating that there is *"no magic in a name"*, state as follows at paragraph 3-009:

"*While it is outside the scope of this chapter to deal with the mechanics of syndication in any great detail, it is important to understand the basic processes at work and the roles which are played in order to understand the various relationships which arise or which are alleged to arise. Moreover, syndication tends to lead to a plethora of names and titles for various lenders, often denoting different levels of involvement in the transaction and different levels of fees. In addition to the Arranging Bank there can be 'co-underwriters', 'co-arrangers' or 'managers'. Often these participants do no more than any ordinary participant in the syndicated loan. Accordingly, labelling in itself may lead to confusion but can, and often does, play a part in the legal analysis of the obligations and duties taken on by participants in a syndicated loan to each other and to outside parties … ."*

They go on to say this in the next paragraph:

"The Arranging Bank is the principal point of contact with the borrower and acts, at the very least, as a conduit for information between the borrower and the other banks involved in the loan. While it has the borrower's mandate it is effectively marketing the loan to other banks. It will also be looking after its own credit risk and negotiating the terms of the loan facility and security with the borrower. It takes a small amount of consideration of this (in some ways, dual) role to appreciate that it is fraught with risk for the bank which takes it on although it is a risk which is compensated by increased fees. … ."

441. In much the same vein, *Cresswell, Encyclopaedia of Banking Law* (2018), states at paragraph 1663:

"*The arranger is in a different position from the agent bank appointed under the loan agreement although often the arranger (or main arranger) is appointed as the agent bank once the credit agreement is signed.*

The powers and duties of the agent bank are defined in detail in the credit agreement, the agent is agent of the banks, the agent bank is awarded a lowish fee and the agent bank's role is largely administrative with few powers to alter the legal position of the banks. Effectively the agent bank is a mechanical conduit. By contrast the arranger's position is commonly not documented in detail, the arranger is closely involved in structuring and organising the loan and the arranger receives a significant fee for its services.

It is not easy to define precisely the role and consequential responsibilities of the arranger. This is one of the great dilemmas of syndicated transactions. In one sense, as the arranger is acting upon a mandate granted to it by the borrower, it is fulfilling a function as the borrower's agent or representative in terms of soliciting interest from the banks and generally in arranging the transaction. On the other hand, in negotiating the terms of the overall transaction and the documentation that will encapsulate it, the arranger has in mind the interests of the banks (which almost inevitably will include itself as a

member of the syndicate), but the arranger will also have made clear to the banks that it does not purport to accept any responsibility towards them in relation to making any credit assessment, the truth or accuracy of any information that has been provided or for the scope or effectiveness of the documentation. One way of analysing the situation would be to say that the arranger was really no-one's agent and so was acting more in the capacity of an independent go-between. Another approach might be to say that the arranger acts in a limited way as the borrower's agent but that this fades away once the documentation stage has been reached in the progress of the transaction, after which it is not acting on anyone's behalf."

442. As these various commentaries make clear, the status of MLA does not necessarily bring an agency relationship with it – whether as between the MLA and the syndicate banks or as between the MLA and the borrower. Adopting the ***UBS v KWL*** approach, therefore, a conclusion that there is in this case, as a result of these matters, an agency relationship is not essential. On the contrary, a non-agency analysis is at least as plausible as an agency analysis. There is, accordingly, no need to arrive at any sort of forced conclusion that this is a case of agency. That must all the more be the case where, as in the present case, the Senior Loan (which did not change from the form which it was in when a draft was first produced) contains terms mirroring the LMA recommended form which include at Clause 22.2 a provision stating that *"Except as specifically provided in the Finance Documents, each Arranger has no obligations of any kind to any other Party in connection with any Finance Document"*. Such a provision would sit most unhappily with a determination that, given its role as MLA, RBS was acting as the Non-RBS Banks' agent in the negotiations which took place with Marme.

443. As to the second aspect of Marme's case concerning the Senior Loan, the submission by Mr Saini QC that RBS was, in effect, 'running the show', there is no issue about the fact that RBS took a leading role in the finalisation of the Transaction after joining the syndicate at the end of July 2008. The Non-RBS Banks accept that this included RBS being the primary point of contact between them and Marme, and co-ordination by RBS of the final stages of the negotiation of the Senior Loan documentation (in conjunction with A&O on behalf of the Banks, and BLP on behalf of Marme). Mr Saini QC highlighted in this respect how, for instance, Mr Samhan's evidence was that Caixa would always go to RBS with any questions (albeit that he would have spoken to Propinvest directly had it been necessary to do that) and how there was very little by way of documentary exchanges between the Non-RBS Banks and Marme. There is, however, an insurmountable difficulty in relation to this as far as Marme is concerned. This is that what Marme relies upon is consistent with, and explained by, RBS's role as the MLA since that role would have embraced the very activities cited by Mr Saini QC as entailing RBS 'running the show'. The more so in the present case given that the Senior Loan had already essentially been agreed before July 2008 when RBS became involved – in particular, the fact that there would be hedging, the fact that this would be done through the use of a stepped IRS, the fact that the relevant duration would be 15 years and the fact that there would be a 105% ICR as set out in an information memorandum which had already been prepared by Bayern.

444. Specifically, activities such as putting together a syndicate, seeking to agree a set of provisional terms acceptable to the borrower and attractive to potential participants, acting as principal point of contact between the borrower and syndicate banks, acting as a conduit of information and negotiating legal agreements with the borrower are all typically carried out by MLAs or others but not as agents properly so described. This is illustrated, indeed, by certain evidence which was given by Mr Feenstra concerning the types of co-ordination activities in which an MLA and others with different titles are typically engaged in transactions such as the present. Thus, Mr Feenstra explained in evidence as follows:

"*In addition to the role of MLA, there are certain other roles on a deal such as the Transaction that will earn a bank a fee. For completeness, and based on my experience of working on large deals such as the Transaction, such roles include the following:*

(a) In circumstances where a number of banks will be underwriting the deal, the 'Bookrunner' is required to co-ordinate the syndication process and run the books for the deal, which includes maintaining a record of interest and participation in the deal as it develops. On the Transaction, Bayern LB originally took on the role of Bookrunner, but this role was later assumed and performed by RBS.

(b) The 'Document Agent' (which is not to be confused with the 'Facility Agent' (see subparagraph (d) below)) is responsible for dealing with the transaction documentation leading up to the deal closing. This is a coordinating role; the Document Agent has no mandate whatsoever to negotiate or agree the substance of legal documents on behalf of any financing bank and rather collates and documents the information that is passed to it. For deals on which I have worked, it has been typical for the bank playing the MLA role to also take on the role of Document Agent in the later stages of the deal (whether or not officially given the title).

(c) On some deals, one of the banks will act as a 'Hedge Coordinator'. The role of Hedge Coordinator is an operational role to hedge the market risk and pass on to the other swap counterparties their share of that hedge. The Hedge Coordinator is not acting as an agent of any other lender nor has it instructions or authority to represent any other lender or to make decisions for them. The role of Hedge Coordinator is usually fulfilled by one of the MLAs. The pricing (costs and fees) and documents for the swap are reviewed, discussed and agreed to by each swap counterparty at its sole discretion.

(d) In addition to these roles, there are a number of other roles which kick in after a deal has closed, for example the 'Facility Agent' (which acts as agent for a syndicate of lenders in administering the facility with the borrower) and the 'Security Agent' (which holds the collateral on behalf of the lenders as security for performance of the borrower's obligations under a loan agreement). The party that takes on each of these roles will act as the agent of the lending banks in relation to matters pursuant to the

relevant loan agreement, for the duration of that agreement from completion onwards (but not before)."

445. It does not assist Marme to point, as Mr Saini QC, Mr Tomson and Mr Rose did in their written closing submissions, to an email such as that sent on 11 August 2008 by Mr Clemens Durkop of RBS to Mr Sutherland of HSH (in fact, an identical email was also sent to Mr Greenland) stating:

"*To assist you with working through the docs/diligence we can confirm RBS is the Agent and doing the KYC. Should you have any specific requirements please let us know and we can send through the relevant documents*."

Asked about this in cross-examination, Mr Greenland suggested that this was a reference to the 'Facility Agent' under the Senior Loan, making the point that somebody who would perform such a role would typically carry out certain administrative functions such as 'Know Your Customer' even before being appointed. Mr Greenland was probably right about that. It is not easy to see, however, how this assists Marme since the activities described in the email are limited. Nor does it follow that whatever administrative functions Mr Greenland had in mind would be performed, ahead of time, as it were, by RBS on the Non-RBS Banks' behalf since the position under Clause 8.3 (*"Hedging"*) is unambiguous: the 'Facility Agent' is a species which only has any role under the Senior Loan after completion. Mr Saini QC did not, indeed, argue the contrary. Thus, Clause 8.3 provides as follows:

"(a) From and including the Utilisation Date the Company must maintain Hedging Arrangements satisfactory to the Majority Lenders in accordance with this Subclause.

(b) (i) The Interest Hedging Arrangements must:

(A) be with a Counterparty; and

(B) have a notional principal amount not less than the aggregate amount of the Loan.

(ii) All Hedging Arrangements must be:

(A) in form and substance satisfactory to the Facility Agent; and

(B) the subject of security under a Hedging and Account Security Agreement … ."

Since the need to maintain Hedging Arrangements from and including the Utilisation Date only arises post-completion and those arrangements must be in form and substance satisfactory to the 'Facility Agent' (as well as to the 'Majority Lenders'), it necessarily follows that it is only at the post-completion stage that the 'Facility Agent' is called upon to do anything. Mr Durkop's 11 August 2008 emails were not, in any event, documents which Marme (and Mr Maud) would have seen at the time and, as such, are of no relevance for present purposes. Indeed, nor is there any evidence that Mr

Maud or anybody else at Marme took any notice of Clause 8.3, still less that they placed any reliance on what it has to say.

446. The same applies to another RBS internal exchange on 6 August 2008, which again Marme would not have seen and which entails a Ms Hughes asking a Mr McDonald "*Has any decision been made about who will be the Agent*?" and Mr Bates replying by saying:

"*Allister – do we (you!) want to be agent. Given that we are now book runner/ leading bank its not a great leap to make us agent but I'm sure that Bayern would still take it if they could. It is €100k a year and we'd have direct access to the borrower etc.*"

Mr Saini QC put to Mr Bates in cross-examination that the reference to "*agent*" was to RBS acting as agent in co-ordinating the closing of the Transaction. Mr Bates did not agree, explaining that his recollection was that this referred to an agency "*that came into play after the deal had closed*". He was plainly right about that since the reference to an annual remuneration of €100,000 tallies with the fact that this was the remuneration which it was envisaged would be payable to the Facility Agent once the Transaction had completed, Clause 24.1 of the Senior Loan stating as follows:

"*The Company must pay to each Facility Agent for its own account an agency fee in the amount and manner agreed in the Fee Letter between the Facility Agent and the Company.*"

Furthermore, as Mr Howe QC pointed out, the Agency Fee Letter dated 12 September 2008 stipulates that:

"*The agency fee payable under the Agreement is: (i) for the first payment, €100,000 per annum … .*"

447. Nor is another document relied upon by Mr Saini QC in opening of any assistance to Marme's apparent authority case, namely an internal RBS communication which again Marme would not have seen at the time and which seems to have been created by RBS shortly before the execution of the Transaction and which contains the following paragraph:

"***RBS as Agent Bank***

- At GCC, it was requested that the role of Agent be transferred from RBS to one of the other 'arranging' banks to avoid potential conflicts of interest given that we are now providing a Junior loan of €200m for the transaction.

- The role of Agent was offered to HSH and Bayern but both declined. Therefore approval was sought for RBS to act as Agent to facilitate closing of the deal. This has been approved by Philip Carraro (see attached email) subject to RBS trying to move the agency role to another bank post completion."

Although Mr Saini QC suggested to Mr Bates in cross-examination that the words "*to facilitate closing of the deal*" reflect the fact that it was RBS's role as "*Agent*" to facilitate the closing of the Transaction, that plainly cannot be right since the role of "*Agent*" referred to in this passage was the role which had been *"offered to HSH and Bayern"* and *"declined"*, and these can only be references to the role of 'Facility Agent' under the Senior Loan (a post-contractual role). Indeed, if Mr Saini QC were right, it would make no sense for the last sentence to refer to *"RBS trying to move the agency role to another bank post completion"* since there would by that stage no longer be any role which could *"move"*. Furthermore, again if Mr Saini QC were right, then, it would have made no sense for Mr McDonald to have sent an internal email to Mr Shome and Mr Atkins on 1 September 2008 asking them to "*check with HSH if they want to take on the [Agency] role"* and referring in that email to the *"Agreed agency fee"* being *"€100k p.a.*". Nor would it have made sense for Mr Bates to write to Mr Greenland and Mr Worley at Bayern on 8 September 2008 saying "*If Bayern wish to undertake the Agency role then please let me know*". It is tolerably clear, in the circumstances, that, far from pointing to RBS acting as an agent of the Non-RBS Banks in closing the Transaction, the document's reference to *"facilitating closing"* was merely reflecting the rather obvious fact that the Transaction could not close until there had been agreement as to who should act as the 'Facility Agent' - and nothing more than that.

The Swaps

448. Coming on, then, to deal with Marme's case concerning the Swaps and bearing in mind that, as Mr Saini QC put it in closing, *"it's the swaps which are the issue in this case"*, Marme's case, ultimately, as Mr Saini QC explained in closing, entailed reliance on two matters. First, Mr Saini QC relied on the fact that, so it was suggested, the Swaps were primarily negotiated between Marme and, on the Banks' side, Mr Goodwin at RBS with *"no evidence of the credit spreads being negotiated directly between the Banks and Propinvest/Marme, other than through Mr Goodwin"*, as Mr Saini QC put it. Secondly, Mr Saini QC relied on the fact that, having agreed with the Non-RBS Banks that it would perform sole execution of the Swaps, RBS proceeded with the execution call and during that fixing, again so it was suggested, the rates for all the Swaps in the absence of any representatives from the Non-RBS Banks.

449. I will address these two matters in what follows. I should mention, however, that the first of the points raised was not raised in the Particulars of Claim and nor was it raised in certain Further Information served by Marme ahead of trial where other points concerning the proportion of the hedging to be performed by each of the Banks and whether there would be a credit spread rebate in the event of early termination of the IRS were raised notwithstanding that these were not pursued in closing. I agree with Mr Howe QC when he submitted that it is somewhat surprising that it was not until Mr Saini QC, Mr Tomson and Mr Rose's written opening submissions that reliance was placed on the credit spread point. This is, after all, an apparent authority case. It is, therefore, to be expected that Marme (in truth, Mr Maud) would know what it was that

was relied upon – specifically that Mr Maud regarded the fact that RBS was negotiating the credit spread as entailing a holding out by the Non-RBS Banks of RBS as their agent. Mr Maud did not say this in his witness statements, however, instead merely mentioning credit spread in his second witness statement, when describing *"the economics of the Transaction"*, in these terms:

"RBS imposed a spread of 15 basis points for each of the hedging banks … It appears that the arrangement RBS had agreed with the banks was for RBS to charge a credit spread of 15 basis points on behalf of each of the hedging banks for their respective swaps, 2 basis points of which would go to RBS as its fee for execution of the Swaps, the remaining 13 basis points to the banks as a credit spread."

450. It is also worth making the point at the outset that Marme's case as regards the Swaps necessarily has as its focus a relatively short timescale - no earlier than the end of August and, more likely, based on when the specific negotiations concerning the credit spread took place, on around 11-12 September 2008. In view of my rejection of Marme's case focused on RBS's role more generally, this means that until very shortly before completion all parties should be regarded as having dealt with each other on a principal-to-principal basis. This means, in turn, as Mr Howe QC observed, that it is inherently implausible that a general holding out of ostensible authority on the part of RBS, sufficiently broad in scope to encompass the alleged EURIBOR Representations, would have suddenly arisen at the very last moment.

The credit spread negotiations

451. Turning, then, to the credit spread negotiations, these took place on 10 and 11 September 2008. Thus, Mr Goodwin emailed Mr Frohnsdorff, Mr Littlewood and Mr Maud at 10.49 am on 10 September 2008 in these terms:

"*Need to tie down the credit spread each bank needs. Ideally we'd get these all to the same level so your swap is all at the same rate(s). How do you want to do this – do you want me to co-ordinate & feed back to you then look to negotiate to the same spread or do you want me to ask each bank to go back to you direct then you can manage it*?".

Mr Littlewood replied at 10.51 am, saying *"we will call you soon to discuss"*. Mr Goodwin, then, emailed again at 2.56 pm, saying:

"credit spreads are something we need to discuss and confirm ahead of Friday. Please let me know how you want to play it."

These exchanges followed an earlier email from Mr Goodwin to Mr Maud, Mr Frohnsdorff and Mr Littlewood sent on 26 August 2008 at 9.11 am, in which he set out a number of things which needed to be determined or agreed in advance of execution. Mr Goodwin stated, in particular, as follows:

"You need to get spreads agreed in advance. Some of the banks involved won't fully understand the embedded loan risks and costs etc. Whereas this

could work for you, it's more likely to hurt you as the tendency will be to price conservatively, especially in this environment. I can speak to the banks about this in conjunction with Bayern & HSH. I've not been to credit yet as we don't have a final swap structure but could make some initial calcs. This will also allow you to trade at the same swap rate."

That afternoon, Mr Littlewood and Mr Goodwin spoke, Mr Littlewood asking (*"almost begging"* as Mr Goodwin put it when passing on the request within RBS in an email sent at 2.27 pm) that there be *"some form of swap spread rebate agreement"*. Mr Eighteen's response to that request was unequivocal (*"Absolutely No … particularly in this case"*) and Mr Goodwin conveyed that refusal to Mr Littlewood.

452. Mr Howe QC submitted that these exchanges demonstrate that, if RBS was acting for anybody, then, that party was Marme rather than the Non-RBS Banks. Indeed, Mr Maud accepted in cross-examination that these messages show Mr Goodwin providing options as to how Marme wanted RBS to take the issue of the credit spread forward. That said, as Mr Saini QC pointed out, it is clear that by 10 September 2008, Mr Goodwin had held discussions with the Non-RBS Banks concerning the credit spread since in an email that day at 4.32 pm, sent only to his colleagues at RBS, Mr Goodwin explained that he intended to resist Marme's calls for a tighter spread and added that he knew what credit spread the Non-RBS Banks were expecting to charge telling his colleagues that he knew for a fact that *"the other banks are all around the same spread and will be strongly against coming any lower"*. It is clear that Mr Goodwin was acting as something of a middleman.

453. The next exchange to mention took place at 8.47 pm on 10 September 2008 and entailed Mr Goodwin emailing Mr Williams (Bayern), Mr van Zon (ING), Mr Samhan (Caixa) and Mr Piggott (HSH) to tell them that Propinvest had "*called me by conference and really put the pressure on to reduce credit spread"*. He went on:

"They really played on the super senior ranking. They asked what my spread would be if not a stepped swap – I said 5 or 6 on top of execution. I said I'd get numbers run again but unlikely to come lower. They're talking about speaking to my lending guys if that's the case to ask them to view the credit on the structure in a more favourable manner with the aim of requiring less credit spread on the swap. My bankers won't entertain this. You guys should prepare to be asked the same thing. I'll leave you to your own decision/response but I'll be going back to say we won't be reducing our spread and in fact we should be charging more. As it stands we won't be changing our position on that."

454. The following day, 11 September 2008, at 7.40 am, Mr Goodwin emailed Mr Littlewood saying that he had spoken with his "*risk guys a couple of times last night"* and reporting as follows:

"The last time was them calling to say the model was done, but that Group Risk adjusted the volatilities recently so I should expect a larger number. I told them not to run it and that I'd ask credit if they can honour the original

numbers as we're so close to trading. Means I need to get that approved asap. It also means that at best, we'll be at the current spread."

Mr Littlewood forwarded this email to Mr Maud and Mr Frohnsdorff, prompting Mr Maud to ask *"What is the 'current spread'?"* and Mr Frohnsdorff, on being told by Mr Littlewood that Mr Goodwin *"has always talked about 13 bps credit + 2 execution"*, to describe what Mr Goodwin had had to say as being *"Classic, last minute bullshit"*.

455. Mr Littlewood, then, spoke to Mr Goodwin but not before Mr Goodwin had spoken at 8.25 am to Mr van der Nagel at ING, telling him about his conversation with Propinvest and saying "*we are 2 execution and 13 credit so 15 all in er I think a couple of banks may have been wider than that …*". Mr Goodwin, then, asked for ING's credit spread, saying that he had asked Propinvest:

"*do you want me to get everyone's credit spread and let you know what it is or do you want to contact directly? He hasn't said so far er, where you guys reckon you're going to be?*".

Mr van der Nagel's response to Mr Goodwin's question was "*16 to 18*", to which Mr Goodwin replied:

"Alright, fine. I think you should keep going with that … you might, you probably get chipped down a little bit but you won't be. You won't get made any worse than 13. Err, but go in certainly – I think you're right, I think we should have been a little bit higher so err, if I was you I would stand your ground on that."

456. As to the conversation between Mr Goodwin and Mr Littlewood which took place that morning after Mr Littlewood had received Mr Goodwin's 7.40 am email, this was at 9.38 am and entailed Mr Goodwin telling Mr Littlewood that RBS's credit spread was *"15 all in, er, 13 of that credit"*. Mr Littlewood went on to ask about the other banks' spreads, leading to these exchanges:

"Mr Goodwin: Mate I have heard, I have heard, two people that they are at a spread between 16 and 18 instead of 13.

Mr Littlewood: Fucking hell. We can't have that.

Mr Goodwin: So I don't know how you want to play it mate. Do you want me to do it? Or do you want to make individual calls?

Mr Littlewood: Well can you tell me, well do you want to confirm, and then come back to us?

Mr Goodwin: I'll come back and get everyone's spread.

Mr Littlewood: Yeah, because if they're over yours they're not getting it.

Mr Goodwin: Well mate.

Mr Littlewood: Mate, we'll make those calls.

Mr Goodwin: No mate that's not the way to play it. The way to play it is, you have to get ... you have to try and get them back down to mine, because there's no space to pass it at the moment. You're going to end up not being able to hedge this.

Mr Littlewood: Right, well okay, well do you just want to find out what the story is, and tell them that they'll get a call from Glen to you know whomever, Andrew Sutherland or Mike Worley straight away.

Mr Goodwin: Alright, well I'll get the spreads. I suggest then when we get them, if they're over, then I go back and I say look, 'I've spoken to Glen etc, my spreads here, guys you need to get there.' Do you want me to do it that way?

Mr Littlewood: Yeah, do it that way.

Mr Goodwin: That'll save Glen a lot of time, and save, because mate if you raise it ...

Mr Littlewood: Mate he'd go through the roof if he heard that. I'm not fucking joking.

Mr Goodwin: Yeah I know but mate, if you raise it too much at banks, especially here, and I'm guessing other banks are the same, you're gonna come across somebody in a wanky mood, well say fuck it, here's the real number, and you either do it there, or you're not doing it, and everyone's fucked mate.

Mr Littlewood: Well I'm not joking Sean, Glen will take that, I'm not saying I would, but Glen will, but yeah, he will fucking go ballistic!

Mr Goodwin: Let me see where they are, I'll come back. I guarantee some will be over, because there are people already saying to me that they're at 18, some of them.

Mr Littlewood: Right, honestly.

Mr Goodwin: I'll try and get them right down."

457. Pausing there, although Mr Saini QC suggested that this conversation demonstrates that Mr Goodwin was acting on behalf of the Non-RBS Banks in the negotiations, I am not persuaded that that is right since it seems to me that, in truth, he was doing no such thing. He was a point of contact certainly. He was a conduit certainly. However, it does not follow that he was negotiating on behalf of the Non-RBS Banks. Indeed, if that were what Mr Goodwin was doing, then, it is somewhat curious that, as Mr Howe QC pointed out in oral closing, nowhere in this call or in his subsequent calls with Mr Maud, did Mr Goodwin try to negotiate for a higher credit spread than that which RBS had itself thought was appropriate. On the contrary, as made clear in the last part of the passage quoted above, Mr Goodwin saw his task as going back to the

Non-RBS Banks and trying to *"get them right down"*. It is unnecessary to go so far as to decide that Mr Goodwin was acting as agent for Propinvest/Marme, and I do not so decide. I am clear, rather, that he was performing the co-ordination type of role described by Mr Feenstra and by the various textbook writers to which I have referred, collating responses from the Non-RBS Banks. He was, as such, acting, again, as a middleman. If he was doing anything more than that, then, it was to proffer Mr Littlewood advice on how to go about achieving an outcome which would be acceptable to Marme (and Propinvest), as demonstrated by his telling Mr Littlewood *"the way to play it"*. It should also be noted that Mr Littlewood's position was that, if necessary, Mr Maud would speak directly to the Non-RBS Banks, rather suggesting that it was appreciated by Mr Littlewood (and so Propinvest/Marme) that Mr Goodwin and RBS were not acting on behalf of the Non-RBS Banks in the negotiations concerning credit spread.

458. After this call, Mr Goodwin, then, telephoned the Non-RBS Banks. Thus, in a call at 10.13 am with Mr Samhan (Caixa), Mr Goodwin reported that Propinvest "*want each of you guys to let me know where your credit spread will be, and I've got to let them know, and they'll respond to that"*, adding that he thought that *"the average is anywhere between 15 and 18 at the moment, but I've seen from other places"* and asking *"Do you know where you guys would be?*". Mr Samhan's response was that Caixa would be at 15 bps (10 bps credit spread and 5 bps execution). Mr Goodwin, then, told Mr Samhan:

"*Yeah okay no problem I'll feed that back. I think the other guys are, on top of the two execution, are anywhere between fourteen and sixteen on top of that*."

He added:

"*I think once we've got all the credit spreads the client might come back and say I'm 13 and you're 13, well 15 from mid, I think the client might come back and say "can everyone do 15". And then everyone will be the same agreed spread*."

The reference to *"the client"* was clearly a reference not to any of the Non-RBS Banks but, instead, a reference to Propinvest.

459. A few minutes later, at 10.20 am, Mr Goodwin spoke to Mr Williams at Bayern, telling him about the credit spreads contemplated by ING and Caixa. Mr Williams told him that Bayern would "*go with fourteen*". Mr Goodwin confirmed that he would, therefore, "*take you as fourteen*" before adding:

"*I'm thirteen. [Caixa] thirteen. Tony and Edwin are wider I think than all of us …. You won't get the call I mean, it's the likes of Mike [Worley] that will get the call from Glen*."

This, then, was a reference to Mr Littlewood's view that, if necessary, Mr Maud would take what might be described as direct action.

460. Shortly after the call with Bayern, at 10.28 am, Mr Goodwin spoke to Mr Piggott at HSH, Mr Piggott asking him if Propinvest had agreed to Mr

Goodwin "*coming back with a common voice for all of us*?". Mr Goodwin's response was this:

"*Well they said I'll go back and if, with telling them where everyone's spread has agreed that and I said once you get that we can decide what to do but I suggest that what you do is, instead of getting Glen phoning everyone that's busy trying to get this deal closed, you come back to me and say, try and get them down to the cheapest if I can*."

After Mr Piggott asked whether Mr Goodwin required something in an email and was told that that was unnecessary, there was, then, this exchange:

"Mr Piggott: Say 15 for credit and 2 for execution and then … if they want you to negotiate it then make it change yeah?

Mr Goodwin: Yeah, yeah exactly.

Mr Piggott: But … I don't want to all come in at the same do we?

Mr Goodwin: Nah, we can't. Caixa come in at 13, we were 13. Just spoke to Russell he said 14.

…

Mr Goodwin: I'll see what ING say. I think they might be a bit higher … if it's looking too samey I might up you a little bit.

Mr Piggott: Yeah, I'm …

Mr Goodwin: I'll take it back to Phil but in the likelihood we'll all get cut to 13.

Mr Piggott: Yeah.

Mr Goodwin: Which is obviously still good but I think that's the way we need to play this one. I'll speak to ING now and then I'll go back to Phil, and I'll give you a shout, mate."

461. Very soon after that, the transcript actually giving the time as 10.28 am (as with the call to Mr Piggott), Mr Goodwin spoke to Mr van der Nagel at ING again, reporting on the other banks' spreads and telling him that he thought that what Propinvest *"might say is, the lowest is 13, and can everyone do that, on top of execution".* He went on to tell Mr van der Nagel that *"I think you might get 15 all in"* and that *"I'll feed it back and I'll give everyone a shout"*. It was Mr Saini QC's submission that by the time that this call ended, and so in advance of then speaking to Mr Maud at 11.05 am, Mr Goodwin had confirmed with each of the Non-RBS Banks that he could agree with Marme a credit spread of at least 13 bps, with RBS taking an additional 2 bps for the execution risk it would take on for executing the hedge in the market. A range, Mr Saini QC submitted, would be presented to Marme as the product of the banks independently pricing the credit spread, but this would be on the understanding that Mr Goodwin was authorised to agree a spread of 13 bps for

all the banks. It seems to me, however, that this is to read too much into Mr Goodwin's various exchanges, during which he was, in truth, doing no more than he agreed with Mr Littlewood that he would do in their call at 9.38 am. This was to *"find out what the story is"* (Mr Littlewood's words) and *"get the spreads"* (Mr Goodwin's words). He was simply collating the credit spreads to enable him to report back to Propinvest, *"the client"* as he described Propinvest in the call with Mr Samhan.

462. Having been emailed by Mr Maud with a request that he should call him urgently, Mr Goodwin, then, spoke to Mr Maud four times in quick succession - at 11.05 am, 11.11 am, 11.16 am and 11.18 am. It will be recalled that I have previously touched on these calls when dealing with certain criticisms levelled at Mr Maud's credibility. I do not repeat what I have previously had to say. Suffice it to say that in the first call at 11.05 am Mr Goodwin told Mr Maud this:

"*I've spoken to all the other banks, erm, I've spoken to Phil, and I said how do you want me to do it, do you want to go and do it, or do you want me to ask them where they are … Erm, and I've got the numbers, some, a couple are wide*."

These exchanges, then, followed:

"Mr Maud: Yeah well just tell him to fuck off. I mean look, you know, I mean, look. We're quite happy to go with what we've been working on, between eleven and two, but more than that, I'm telling you it could be a deal breaker because we can't do this.

Mr Goodwin: Fifteen all in it's always been.

Mr Maud: No, no, no. Its eleven and two.

Mr Goodwin: It isn't Glen. It's always been thirteen and two and always been fifteen from mid. And that's the tightest out of everyone. We're the tightest. Everyone's wider than us. Some … one is nineteen …

...

Mr Goodwin: Yeah, I know, but we're fifteen all in and I'm gonna struggle to get that any tighter, and someone is nineteen Glen. I think if you get fifteen, you've got a result to be honest."

It was Mr Howe QC's submission that there was nothing said in this call which suggested that RBS was representing the Non-RBS Banks. I agree. As can be seen from the passages quoted above, all that Mr Goodwin did, aside from resisting Mr Maud's insistence that the credit spread previously envisaged was *"eleven and two"*, was to tell him what the various banks' credit spreads were. As such, Mr Goodwin was performing a reporting function.

463. Mr Maud called Mr Goodwin a second time at 11.11 am, supposedly having in the meantime discussed matters with Mr Littlewood (although, as previously explained, that seems improbable). In that call, Mr Maud offered to *"split it down the middle"*, by which he meant agree 14 bps 'all in' (12 bps credit spread and 2bps execution). Specifically, this is what was said:

"Mr Maud: Yeah ... Sean, look I'll tell you what, look, we've been working for one or another reason on thirteen [bps] for this. Tell you what can we split it down the middle and then we're done and I can get these fucking notices served, because I've got enough things going on.

Mr Goodwin: I, I need to get approval on that mate which I'm willing to ask for, I need to get the other banks, because the other banks, us and [Caixa] are both at fifteen, everyone else is wider. One's at nineteen.

Mr Maud: I need, and I'm not joking and I'm not putting on pressure here but I've got to like serve these in the next five minutes.

Mr Goodwin: Err mate, I can't, let me speak to the other banks and my guys and I think, 1 mate, if you get fifteen you've done well, honestly, because one's at nineteen, one's at seventeen ...

Mr Maud: Well, are you saying to me that if I say fifteen, we are done and I can serve these notices?

Mr Goodwin: Err, I think so, I think you will be but let me quickly phone the two guys that are very wide and see if they will do that.

Mr Maud: Well, what I'm saying is, is that I want fourteen if you're going to phone the bastards. If you're saying to me fifteen, I need to serve this thing now.

Mr Goodwin: Ah, fucking hell mate, honestly don't then, I'm going to have to pay them.

Mr Maud: Yeah, you'll be alright, your making a bit of money out of it. You're going to make it back in fucking three months I'm telling you.

Mr Goodwin: Ah, fucking hell mate, I ...

Mr Maud: Course you can, fucking hell! You're a big man come on Sean do it!

Mr Goodwin: [Laughs] Fucking hell!

Mr Maud: Get it done!

Mr Goodwin: Mate!

Mr Maud: Come on! Let's get it done!

Mr Goodwin: You fucking ...

Mr Maud: I've got to serve these notices.

Mr Goodwin: How long have you got?

Mr Maud: I've literally, honestly, that's why I phoned you and that, that's why I sent you that email, lit, I, have ten minutes, you know.

Mr Goodwin: Yeah, but fucking hell mate you just said five minutes. [Laughs]

Mr Maud: Well I'm being metaphorical aren't I? You know, come on.

Mr Goodwin: Give me two minutes I'll phone you back on your mobile.

Mr Maud: Are you going to give me fourteen?

Mr Goodwin: Err no. Fifteen I'm going to ask the guys for. And then ...

Mr Maud: Well, I'm telling you, I'm telling you we're not going to serve it unless it's fifteen because that is like ...

Mr Goodwin: Right, right ...

Mr Maud: Two bids more I'm working on.

Mr Goodwin: Fine. Alright mate. Two minutes and I'll get them all to fifteen and I'll phone you back.

Mr Maud: Alright.

Mr Goodwin: Alright, see you mate."

464. In their written closing submissions, Mr Saini QC, Mr Tomson and Mr Rose summarised these exchanges as entailing Mr Maud making some further attempts to lower the credit spread before agreeing to an 'all-in' spread of 15 bps and as Mr Goodwin indicating that he would seek approval from the Non-RBS Banks, *"notwithstanding that (unknown to Mr Maud) he was already authorised by the Non-RBS Banks to agree that spread"*. I do not agree. As Mr Howe QC observed, the words in brackets would suggest that, far from thinking at the time that in the 11.11 am call Mr Goodwin already had authority from the Non-RBS Banks to agree the credit spread, Mr Maud had no such knowledge. Mr Saini QC, Mr Tomson and Mr Rose went on, however, to highlight how, in answer to a question from me, Mr Maud confirmed that he *"took it as a bluff when [Mr Goodwin] said he had to go back to the other banks"* because he (Mr Maud) *"thought he didn't"*. It was highlighted also how previously, when it was put to him that, if Mr Goodwin had authority from the Non-RBS Banks, he could have agreed 15 bps on this call, Mr Maud had stated as follows:

"Well, he – actually he was able to do it. He said he wasn't; he was using that as an excuse because I was trying to get the rates down. And he was saying – as always with Sean, he was like, 'Oh it's going to cost me money, I've got to speak to somebody, it's not my decision' et cetera, et cetera, et cetera. This is

just normal –this is what happens when you're dealing with a trader; there's always a reason why they can't. And actually at the end of the day he could, and it's proven by this call."

On this basis, it was suggested, Mr Maud should be treated as having been under the impression that Mr Goodwin already had the requisite authority to agree 15 bps. The difficulty with this, however, is that, if Mr Maud really did think *at the time* that Mr Goodwin was bluffing and, in fact, already had such authority, then, it is most curious that Mr Maud did not say this to Mr Goodwin. It would have been a simple thing for Mr Maud to have told Mr Goodwin that, as far as he was concerned, he already had authority from the Non-RBS Banks to agree the credit spread. The fact that he did not do this significantly undermines Marme's case. The more so, given that Mr Maud had every opportunity to challenge Mr Goodwin given that Mr Goodwin told him on no fewer than three occasions that he needed to obtain approval. Why, if Mr Maud really did think that Mr Goodwin was making this up, he did not say so is hard to understand.

465. In the third call between Mr Goodwin and Mr Maud, just a few minutes later at 11.16 am, Mr Goodwin told Mr Maud that he could not contact the Non-RBS Banks, despite the fact that he almost certainly did not even try to do so. Mr Maud's response was to say "*I can't just go; I got to know if it's 15*", to which Mr Goodwin replied saying "*Mate it's 15*" and agreeing to confirm this in an email. It was Mr Saini QC's submission that this demonstrates that Mr Goodwin did not need to go back to the other banks as he had already agreed the 15 bps with them and was in a position, as their agent, to agree that with Mr Maud/Propinvest. As Mr Howe QC submitted, however, the reality is that nothing had changed since the call just a few minutes earlier. Specifically, Mr Goodwin made it clear that he had not spoken to the other banks. It follows that he had no more authority than he had done before, and that Mr Maud and anybody else in his position could not have thought otherwise. It would not be right, in such circumstances, especially having regard to the approach described in ***UBS v KWL***, simply to assume that Mr Goodwin (and RBS) must have had authority from the Non-RBS Banks. A more likely explanation, as suggested by Mr Howe QC, is that, under intense pressure from Mr Maud and without having spoken to the other banks, Mr Goodwin confirmed to Mr Maud that the credit spread would be 15 bps not because he was in a position to agree this on the Non-RBS Banks' behalf but because he knew, based on his exchanges with the Non-RBS Banks, that in all probability they would be willing to agree a 15 bps credit spread with Marme and so there would be no difficulty as far as RBS is concerned, but that, if one of the Non-RBS Banks did not, in the event, agree, then, RBS would do what he told Mr Maud in the 11.11 am call, which was to *"pay them"* and so compensate them as necessary. It is, indeed, telling in the context of this further call at 11.16 am that, whilst Mr Maud explained in cross-examination that he took Mr Goodwin to have been *"agreeing on behalf of the other banks without speaking to them"*, in some of his answers he was rather less clear, as demonstrated by these exchanges with Mr Howe QC during which he appeared to give contradictory responses:

"Q. You'd left it with him at the end of the previous call that he would try and speak to the other banks and get their agreements to 15?

A. That's what – I didn't – I didn't – I didn't agree to that. What – all he said is that's what he's going to do. I was interested that he was going to come back and confirm the 15 bps.

Q. Suggesting that, if necessary, he could pay any difference out of RBS's own pocket in order to get them to that number?

A. I don't know. I don't know.

Q. That's what you were suggesting?

A. Frankly I don't care. It's not my concern. All I was concerned at that moment was that at least the purpose of my calling Sean Goodwin had been achieved, which was to make sure he did not, on behalf of himself and on behalf of the other banks, move the margin higher than 15 bps. At that point I'd achieved what I set out to do.

Q. Whatever you say you understood was agreed on this call, it was not agreed on behalf of the second to fifth defendants, my clients.

A. I don't know. I've no idea.

Q. You didn't understand that?

A. All I know – all I know is what happened –

Q. Because –

A. – what I know has happened. There was no – as far I'm concerned, unless you can show me an evidence to the contrary, there was no further discussion on the margin. It was 15 bps, which had been in the model, and that's what we executed on.

Q. So your position is that you thought at this call that if any of the second to fifth defendants had said, 'No, I'm sorry, I don't agree to 15', when Mr Goodwin had managed to contact them, you could say, 'Sorry, you've been bound by Mr Goodwin'?

A. Didn't happen. I don't know.

Q. Is that what you understood at the time?

A. I've no – I – look, you're putting me in a hypothetical situation. I'm trying to – trying to answer questions based on what happened and my direct knowledge, because I was involved directly. As opposed to previous matters. I was dealing directly with this. All I know is that on this call I insisted, 'I've got to know. I've got to know, 15?' and he said, 'Mate it's 15', it's agreed. And I said, 'Send me a quick email [confirming 15]", and he did that, as I understand."

466. The 11.16 am call was followed by the confirmatory email to Mr Maud which Mr Goodwin had told him that he would send, saying "*To confirm 100% of IRS will be traded at 15bp all-in from mid, made up of 2bp execution and 13bp credit & capital …*". Mr Goodwin, then, emailed the Non-RBS Banks at 11.18 am saying that he had "*nailed confirmation of agreement on the IRS spreads from Propinvest/Marme. All-in spread from mid of 15bp made up of execution 2bp & credit 13bp. Can you please confirm your agreement*." Confirmations of their respective agreements to 15 bps swiftly followed from each of the Non-RBS Banks – although not quite as swiftly as Mr Saini QC suggested since, allowing for time differences, it is apparent that the first of the various confirmations came through about an hour after the 11.16 am call. That this is the case is demonstrated by the fact that Mr Goodwin spoke to Mr Littlewood in a call recorded as being at 12.11 pm, telling him that he had spoken to Mr Maud but that "*I haven't got other banks to agree yet*". This is, of course, consistent with the Non-RBS Banks' case. So, too, is the fact that Mr Littlewood's response was not to express any surprise at what Mr Goodwin was saying but, on the contrary, merely to say *"Yeah, well, no no we'll sort it out"*, to which Mr Goodwin replied *"Nah, I'll sort them out. I'll give them a call"*.

467. It seems that Mr Goodwin had, in the meantime, made calls to certain of the Non-RBS Banks (there are transcripts in relation to HSH and ING) since at 12.21 pm, Mr Goodwin spoke to Mr Maud, as follows:

> *"Mr Goodwin: Er, and that how it's gonna be, I, erm, I've just spoken to the last bank so we've done it at 15. Well we've done it at 15 anyway!*
>
> *Mr Maud: Well we're done now anyway; we're done and confirmed Sean!*
>
> *Mr Goodwin: I know, well I wasn't. I fucking; well I am now, so I've just spoken to the last one, so that's sorted anyway."*

Mr Goodwin was here confirming to Mr Maud that he had finally heard from the last bank and they had all agreed. Although it is not entirely clear what Mr Maud's response should be taken as meaning since, whereas the first part might suggest that until this call there was something still outstanding, the second part might suggest the opposite, what is undoubtedly clear is that, as far as Mr Goodwin was concerned, until he had obtained all of the other banks' approvals, he was not *"done"* but, on the contrary, was taking the risk that he/RBS might have to *"pay"* the Non-RBS Banks.

RBS's sole execution role

468. Turning to the second aspect of Marme's case concerning RBS's role as regards execution, I should make it clear that I do not propose to address the so-called 'Full Notional Swap' case which Mr Howe QC somewhat uncharitably (although accurately) described in closing as having *"born and died during the course of this trial"*. The present focus is, rather, on the fact that, having agreed with the Non-RBS Banks that it would perform sole execution of the Swaps, RBS proceeded with the execution call in the absence of any representatives from the Non-RBS Banks. Specifically, the execution

call took place at 9.39 am on 12 September 2008. Present on the call were Mr Goodwin, Nick Goodman (an RBS trader), Mr Littlewood and representatives of Santander. As suggested by calls earlier that morning between Mr Goodwin and Mr Littlewood, Propinvest was watching the market on trading screens at this time. In the substantive part of the call, Mr Goodwin said "*So we've got Prop Invest, us and Santander. At the moment I can do err, three eighty five is a floor a start rate of three point three zero three. And Uplifts of point two, two eight nine*." Mr Littlewood and Mr Goodman confirmed that this "*Works for the model*" and a Santander representative said "*Works for us*". Mr Goodwin, then, asked "*Yeah are we done there then, Phil?*" to which Mr Littlewood replied "*Yeah*". The transcript of the call, then, records Mr Goodwin as "*executing that with the trader*" and then confirming that "*we are a floor of three eighty five err a start rate of three point three zero three and an uplift of point two, two eight nine*." The call lasted in total for just over 2 minutes.

469. Just after the call, at 9.44am, Mr Goodwin emailed Mr Williams (Bayern), Mr Piggott (HSH), Mr Samhan (Caixa) and Mr van der Nagel (ING), copied to Mr Littlewood, Mr Frohnsdorff and Mr Maud, with the subject line "*Marme is now executed*" and saying "*Gents – I'll email you all details of your hedge asap*." Mr Goodwin then, as promised, sent emails to the individual banks with details of their hedges attached, telling each of them that "*You need to add 13bp to these rates with client trade"*, except in relation to HSH and Bayern, where he informed them they "*need to add 14 bps*" (as an extra bp had been passed to them by RBS as a "*favour*"). The Non-RBS Banks subsequently sent through their swap confirmations between 12 and 24 October 2008. These recorded the first rate as variously 3.173 (ING and Caixa) and 3.163 (HSH and Bayern), with each uplift as 0.2289 – so reflecting the figures agreed in the call. The 3.303 starting point in the call was "*all in*" in that it reflected the starting fixed rate plus the credit spread. The difference between 3.173 and 3.163 shown on the different banks' swap confirmations is explained by the fact that some of them were given a credit spread of 13 bps, but HSH and Bayern were given a credit spread of 14 bps.

470. It was Mr Saini QC's submission in oral closing that the fact that none of the Non-RBS Banks were present is *"very significant"* because *"the financial parameters of the transaction are fixed on that call"*. For this reason, he suggested, it was to be expected that the Non-RBS Banks would be *"on the call"*. This is a quite hopeless contention for several reasons which I propose, in the circumstances, to state quite shortly.

471. First, what happened in the present case is wholly unexceptional. That this is the case was made clear by Mr Feenstra in the following exchange with Mr Saini QC:

"Q. Now, I know that you were not involved in this particular swap transaction, but would you find it surprising that representatives of ING were not involved in the execution call between Marme and RBS at which the pricing for all of the swaps was agreed? Is that not rather surprising?

A. No, for this call was actually -- what I say as a property financier -- a 'push the button' call. So all conditions, talks, pricings, issues, were all on an individual basis agreed, and somebody had to push the button and it had to be in one go, for else, otherwise, you disrupt the market. If there are more banks than one go and find for asking swaps, that's no good for the trade."

472. Secondly, it is apparent that Mr Maud understood what was involved as regards execution since he explained in his second witness statement that he was told by Mr Goodwin that:

"... RBS taking charge of the execution process ultimately meant that RBS took all the necessary steps required in the market to finalise the Swaps, which was a three-stage process. First, RBS would go out into the market place and execute a swap or swaps to the required value (€1.575 billion) with as many market counterparties as required. That would effectively fix the price of the Swaps. RBS would then execute a swap with the other hedging banks, in effect parcelling out their portion of the swaps. Finally, Marme would execute its Swap with each of the hedging banks."

Mr Maud did not seek here to suggest that the sole execution role performed by RBS was regarded by him as having any particular (still less relevant) significance.

473. On the contrary, and thirdly, whatever Mr Maud might now say, it is clear that at the time he saw nothing exceptional about RBS having sole execution of the market risk and so that RBS should alone attend on execution - along with Marme and Santander but without representation from the Non-RBS Banks. Indeed, as Mr Howe QC pointed out, Mr Maud confirmed in cross-examination more than once that, until shortly before execution, his understanding was that all three MLAs would jointly execute the market risk, and that he and Marme had no difficulty with that. In truth, he explained, he was not very interested in the interactions on this issue between RBS and the Non-RBS Banks, confirming that *"we weren't that bothered about it"* and that *"it didn't make a lot of difference to us"* since Marme's concern was *"trying to get this transaction over the line"*. Nor, he added, when asked a question relating to the back-to-back swaps between RBS and the Non-RBS Banks, was he *"particularly interested"*.

474. Fourthly and following on from the last point, Mr Maud plainly understood that sole execution of the market risk was something which RBS could not simply decide to do itself. As he put it when he was shown a document indicating that HSH wanted to be involved on execution, *"we were reluctant participants in persuading the other banks"* that RBS should undertake sole execution. His position and that of Marme was that:

"If RBS could persuade the banks, we were quite happy with that and, as I say, we had no objection; indeed, we probably thought it was preferable to have single execution. But it wasn't something that we were fixated about."

It follows that sole execution required the specific approval and agreement of the Non-RBS Banks. It further follows that, as Mr Howe QC put it, far from

supporting some general holding out of RBS by the Non-RBS Banks as able to act on their behalf, RBS needed to obtain specific authorisation from the Non-RBS Banks to perform the sole execution role. This makes it very difficult to see how it can be suggested on Marme's behalf that by allowing RBS to do what it did in relation to execution the Non-RBS Banks should be treated as holding RBS out to make the EURIBOR Representations.

475. Fifthly and similarly following on from this, there is the fundamental point that, as Mr Howe QC submitted, nothing that RBS did on execution was done as agent for the Non-RBS Banks since none of the three steps identified in Mr Maud's second witness statement entailed any such agency role. Thus, as for the first stage, the execution of the market risk, this was a step which RBS undertook as principal and facing not Marme but the market. As for the second step, entry by RBS into a series of back-to-back swaps with each of the Non-RBS Banks by which RBS, in effect, provided those banks with their hedge, this involved exclusively principal-to-principal transactions in which Marme had no role. Similarly, as regards the third step, this entailed each of the Banks entering into the Swaps with Marme, each of which was a bilateral principal-to-principal swap.

476. Sixthly and, perhaps, most importantly of all, Mr Saini QC was quite wrong to suggest, as at least by implication he did, that the execution call had significant (or even *"very significant"*) financial implications for the Non-RBS Banks. This is for a straightforward reason: the Non-RBS Banks were insulated from what was determined during the execution call concerning the 'mid-market' price because RBS, then, provided them each with a hedge. It is for this reason that they did not need to be in attendance – in contrast to Marme, Santander and RBS which all had direct interests in attending.

477. That it was the 'mid-market' price which was determined is not in dispute. Mr Goodwin was clear about that, describing the execution call as setting *"the base price as the market hedge for the other banks"* and so, too, was Mr Maud who explained that his understanding was that the 'mid-market price' was a *"price on screen"*. Mr Feenstra agreed, as this exchange with Mr Saini QC demonstrates:

> *"Q. Are you aware, Mr Feenstra, that the price at which the swap was going to be executed was fixed on the execution call? Were you aware of that?*
>
> *A. On the execution call, the pricing -- so the 15 basis points spread, et cetera, that is what I call pricing, the rate at which the swap goes on the market, that depends on market rates at that time, and that normally I hear we take mid-market pricings. So that is a kind of objective rate that you cannot disagree with, for that's on the screen."*

478. It was not in dispute that the difference between, on the one hand, the level of the fixed rates payable by Marme to the relevant Non-RBS Bank under the relevant Swap and, on the other hand, the fixed rates payable by the relevant Non-RBS Bank to RBS under the back-to-back swap represented the 'credit spread' for that bank, namely effectively the 'margin' for the bank. Crucially, as Mr Howe QC explained, the precise level at which the 'mid-market' price

was set was not of particular interest or importance to the Non-RBS Banks because their 'margin' was fixed by reference to the pre-agreed credit spread, namely the difference between the rates in their Swap with Marme and their back-to-back swap with RBS. In other words, a change in the 'mid-market' price would result in an equal change in both the back-to-back swap and the Swap with Marme, leaving the relevant bank effectively insulated from any change in the mid-market price and thus indifferent to it. That is why Mr Goodwin explained that the 'mid-market' price *"won't affect"* the Non-RBS Banks given that:

"They've got 15 basis points on top of a hedge, so they are indifferent. They've got an equal and opposite swap."

It is also why, when it was put to Mr Feenstra by Mr Saini QC in cross-examination that "*ING were happy to trust RBS to make sure that they got an accurate mid-market price on the execution call*", Mr Feenstra's response was that:

"*It's not a matter of trust, so – and I don't have any idea whether or not ING would have liked to be on the call. But what I consider is that mid-market is not: you get a mid-market price and the person next to you gets a different mid-market price. It is the mid-market price, and it only depends on the moment you are doing the call and do the execution*."

Mr Saini QC, then, asked:

"*But it's a matter which is capable of being the subject of disagreement isn't it? Because it may depend on which screen you're looking at*."

Mr Feenstra replied:

"*I haven't heard of any disagreement on that. But again, I'm in property lending, and I only heard about financial markets and the swaps they did from them in their experience, so ... but I have never heard that you can disagree on mid-market rates*."

It is clear, therefore, that the 'mid-market' price was not something about which the Non-RBS Banks needed to be concerned.

479. For all these reasons, I cannot accept Mr Saini QC's submissions on the execution point. I am quite clear that there was no relevant holding out and, furthermore, even if there were a holding out as suggested, it is impossible to see that it would extend to the making of the EURIBOR Representations. Nor can there have been any reliance on the holding out – the topic to which I now turn.

Reliance

480. It will be appreciated that, in the circumstances, without the requisite holding out, Marme's apparent authority case cannot succeed. It follows that it is

unnecessary to go on and consider whether Marme has made out its reliance case. It is, nonetheless, obviously appropriate that I should do so.

481. Mr Howe QC readily acknowledged that in many cases reliance will be easily established, citing the example of a third party entering into a contract with a party under the impression that that party was acting as an agent for somebody else. The present case, however, Mr Howe QC submitted, is rather different since Marme has adduced no evidence of any kind to suggest that, in fact, it entered into the Swaps as a consequence of its alleged understanding of RBS's authority to make the EURIBOR Representations on the Non-RBS Banks' behalf.

482. I am clear that Mr Howe QC was right about this. In particular, asked by Mr Howe QC in cross-examination whether he would have done anything differently if he had been told by the Non-RBS Banks that Mr Goodwin was not speaking for them or making any representations on their behalf, Mr Maud's answer was this:

"*Well, I have no idea. I mean, what you're saying is something that in actuality didn't happen. None of the banks came back to us on the swaps; they all allowed RBS to negotiate the swaps with us. That is what happened. There's no point talking about a hypothetical in this instance because we know what happened. The bank –and frankly, I would imagine that if one of the banks had come back to me, the first port of call would have been back to Sean."*

Mr Howe QC, then, asked Mr Maud this:

"So if the bank had come back to you, there's a flow of information from Sean to the banks and they respond, if the banks had said to you, 'You do understand Mr Goodwin is not representing anything on our behalf; we're just passing our answers back to you', your first port of call would have been to have gone to Mr Goodwin?"

Mr Maud answered:

"Yeah, and said, 'Can you go back and find out what's going on?' Because, you know, as far as we were concerned, in terms of the swap, we were dealing with Sean Goodwin on behalf of Royal Bank of Scotland, who was acting -- who was an employee of Royal Bank of Scotland, who was, as far as we were concerned, negotiating and discussing and agreeing the terms of the swap with us on behalf of the other banks. So I would have been surprised to have received a call from one of the other banks, and as you know, it didn't actually happen; and I would have probably -- I mean, you know, we're looking at a hypothetical world because obviously it didn't happen -- I would have probably gone back to Sean and said, 'Sorry, you know, are -- Bayern, HSH, are they now part of these discussions, do we join them in?' But that didn't happen."

483. This followed an exchange the previous day between Mr Maud and Mr Quest QC, as follows:

"Q. So when you said -- and I'm sorry, I do need to press you on this, because we do need to be clear exactly what your evidence is as to your understanding at the time. When you said, 'When we agreed anything, we agreed it with RBS' –

A. That's right.

Q. -- you mean to say that at the time, as far as you were concerned, agreeing something with RBS would be agreeing that matter with the non-RBS banks as well, so as to bind them, without having to agree with them directly?

A. No, I'm not suggesting that. I'm not suggesting that we said something to RBS and they said, 'Yes, that's agreed', right? I'm not suggesting that. I'm suggesting that the final agreement was -- we were only talking effectively to RBS. So if we were trying to agree something with them, whether it was a document, whether it was a margin, whatever it was, we agreed it with RBS. I don't know what happened behind the scenes; that's something for this court to investigate, right? I don't know. All I'm saying to you is: from my position, apparently RBS had full authority from the banks to negotiate and they did negotiate. What happened when we finally reached agreement on any point we were discussing was that we agreed it with RBS. But what happened prior to that, behind the scenes, I don't know because I wasn't involved in it.

Q. I'm sorry, Mr Maud, but that is a very unclear answer.

A. Well, I'm sorry, I think that's perfectly clear."

Mr Saini QC suggested in closing that this exchange demonstrates that, as far as Mr Maud was concerned, RBS was representing the Non-RBS Banks in negotiations, particularly in relation to the Swaps. Mr Saini QC may well be right about this but, if reliance is going to be made out, that does not go far enough since what Marme would need to show is that Mr Maud (and Marme) would not have carried on negotiations with RBS (and ultimately concluded the Swaps with RBS and the Non-RBS Banks) had it been known that RBS lacked authority to negotiate on the Non-RBS Banks' behalf. Unless that can be established, there cannot have been the requisite reliance. That is why the exchange the following day between Mr Maud and Mr Howe QC is rather more on point. So, too, is a subsequent exchange during Mr Howe QC's cross-examination, in fact at the very end of that cross-examination, when Mr Maud was asked to consider a scenario which involved the Non-RBS Banks telling him at the *"signing meeting"* on 12 September 2008 that they wanted to *"make it clear that whatever RBS may have said or done, you're not entitled to rely on any of that as against us because RBS isn't acting on our behalf*". Mr Howe QC asked Mr Maud whether he would "*have done anything differently in those circumstances, other than complete the deal"*, to which Mr Maud replied:

"At that – at the point of completion, probably not."

Mr Howe QC, then, asked:

"A day before completion?"

Mr Maud's answer was:

"A day before completion, probably not. Other times, maybe I'd have gone – if it had been earlier than that, maybe I would have gone back to resolve any issues that we needed resolving vis-à-vis RBS and the other banks. But that's not actually what happened, Mr Howe."

These exchanges underline the fact that Mr Maud (and Marme) would not have acted any differently had it been known that RBS lacked the authority to negotiate (and so to make the EURIBOR Representations) which it is now suggested that it appeared to Mr Maud (and Marme) that RBS had.

484. There is, however, a further difficulty which lies in the way of Marme's reliance case. This is that, as Mr Howe QC pointed out, if Marme were to have discovered that RBS lacked the authority which it appeared to have and then sought to deal directly with the Non-RBS Banks rather than through RBS, then, applying the logic which underlies Marme's case, the Non-RBS Banks should presumably be regarded as themselves impliedly making the EURIBOR Representations (albeit in respect of their *own* knowledge and conduct). In such circumstances, RBS can hardly have been making those same representations (the EURIBOR Representations) about its *own* conduct on the Non-RBS Banks' behalf. Put differently and more simply, Marme cannot have relied on the alleged holding out since, even assuming that there was such a holding out, Marme would plainly still have gone ahead with the Transaction (and each of the Swaps) regardless.

Conclusion

485. In the circumstances, Marme's agency case, and so its case as against the Non-RBS Banks, must be rejected since there was no relevant holding out of RBS by the Non-RBS Banks. Even if there had been, however, I am quite clear that any apparent authority thereby created was of insufficient scope to encompass the making of the EURIBOR Representations. Furthermore and in any event, there was no reliance by Marme upon any alleged holding-out of RBS as having authority to make those representations in entering into the Swaps.

The Defendants' claims for declaratory relief

486. The declaratory relief sought by RBS and the Non-RBS Banks is, in substance, the same: that the Swaps were validly terminated in November 2014 and sums are due to each Defendant bank upon termination of their respective Swaps. The only difference is that, whilst RBS puts forward its claim by way of Claim Form, the Non-RBS Banks do so in the form of a Counterclaim.

487. The Banks rely upon Marme's failure to pay, on 20 May 2014, sums due under their respective Swaps, as follows:

€5,318,495 due to RBS under the RBS Swap;

€4,710,971.56 due to HSH under the HSH Swap;

€3,026,959.10 due to Bayern under the Bayern Swap;

€2,131,661.34 due to Caixa under the Caixa Swap;

€1,598.746.00 due to ING under the ING Swap.

Each of the Non-RBS Banks sent letters notifying Marme of non-payment and reserving their rights on or about 21 May 2014 (and in the case of ING, again on 10 June 2014) and again on 12 August 2014. RBS sent a notice on 12 August 2014 requesting payment and reserving its rights. The Banks submit that Marme did not remedy its failure to pay by the sixtieth business day following 21 May 2014 or 12 August 2014 (as the case may be) with the result that, pursuant to Clause 5(a)(i) of the ISDA Master Agreements (as varied by Clause 5(b)(iii) of the Schedule to the ISDA Master Agreements), an Event of Default has occurred. Specifically, Clause 5(a)(i) of the ISDA Master Agreement provides that an Event of Default will include:

"*(i)* ***Failure to Pay or Deliver.*** *Failure by the party to make, when due, any payment under this Agreement or delivery under Section 2(a)(i) or 2(e) required to be made by it if such failure is not remedied on or before the third Local Business Day after notice of such failure is given to the party;*"

Clause 5(b)(iii) of the Schedule provides that:

"*(iii) With respect to Party B only, Section 5(a)(i) (Failure to Pay or Deliver) will be amended by deleting the reference to "third" in the final sentence and replacing it with "sixtieth"*."

488. The Banks thereafter served notices that they were terminating their respective swaps pursuant to section 6(a) of the ISDA Master Agreements, which provides that:

"***Right to Terminate Following Event of Default.*** *If at any time an Event of Default with respect to a party (the "Defaulting Party") has occurred and is then continuing, the other party (the "Non-defaulting Party") may, by not more than 20 days notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions…*"

489. These Termination Notices were served as follows: by RBS on 11 November 2014, designating 12 November 2014 as the Early Termination Date (as defined in the ISDA Master Agreement); by HSH on 11 November 2014, designating 13 November 2014 as the Early Termination Date; by ING on 19 November 2014, designating 20 November 2014 as the Early Termination Date; by Bayern on 25 November 2014, designating 26 November 2014 as the Early Termination Date; and by Caixa on 25 November 2014, designating 27 November 2014 as the Early Termination Date. Each of these Termination Notices also stated that, under Clause 6(c)(ii) of the ISDA Master Agreements, the consequence of the effective designation of an Early Termination Date is

that: (i) no further payments or deliveries under Clauses 2(a)(i) or 2(e) of the ISDA Master Agreement would be required to be made, but without prejudice to the other provisions of the ISDA Master Agreement; and (ii) that the amount if any payable in respect of the Early Termination Date would be determined pursuant to Clause 6(e) of the ISDA Master Agreement.

490. The Banks, next, served notices notifying Marme of the amounts due to them following termination of the Swaps pursuant to Clause 6(d)(i) of the ISDA Master Agreements, which provides:

"*(d)* ***Calculations.***

(i) ***Statement.*** *On or as soon as reasonably practicable following the occurrence of an Early Termination Date, each party will make the calculations on its part, if any, contemplated by Section 6(e) and will provide to the other party a statement (1) showing, in reasonable detail, such calculations (including all relevant quotations and specifying any amount payable under Section 6(e)) and (2) giving details of the relevant account to which any amount payable to it is to be paid. In the absence of written confirmation from the source of a quotation obtained in determining a Market Quotation, the records of the party obtaining such quotation will be conclusive evidence of the existence and accuracy of such quotation.*

(ii) ***Payment Date.*** *An amount calculated as being due in respect of any Early Termination Date under Section 6(e) will be payable on the day that the notice of the amount payable is effective (in the case of an Early Termination Date which is designated or occurs as a result of an Event of Default) and on the day which is two Local Business Days after the day on which notice of the amount payable is effective (in the case of an Early Termination Date which is designated as a result of a Termination Event). Such amount will be paid together with (to the extent permitted under applicable law) interest thereon (before as well as after judgment) in the Termination Currency, from (and including) the relevant Early Termination Date to (but excluding) the date such amount is paid, at the Applicable Rate. Such interest will be calculated on the basis of daily compounding and the actual number of days elapsed*."

Those notices were served as follows: by RBS on 17 November 2014, specifying the sum due as being €223,721,576; by HSH on 20 November 2014, specifying the sum due as being €199,249,545.25; by ING on 26 November 2014, specifying the sum due as being €67,294,554.15; by Bayern on 1 December 2014, specifying the sum due as being €129,049,794.94; and by Caixa on 3 December 2014, specifying the sum due as being €91,375,814.79. The notices also stated that the Banks claimed an indemnity for their reasonable out-of-pocket expenses, including legal fees incurred by reason of the enforcement and protection of their rights and/or by reason of the early termination of the Swaps.

491. Marme has not made any payments following either the Termination Notices or the Clause 6(d)(i) Notices. As a result, pursuant to Clause 6(d)(ii), the sums became due from Marme on the effective dates set out in the respective notices - together with interest from and including the relevant termination

date at the Default Rate as defined in Clause 5(c) of the Schedule to each of the ISDA Master Agreements. RBS, accordingly, seeks declarations, first, that "*The RBS Swap was validly terminated on 12 November 2014 in accordance with its terms by the notice of termination dated 11 November 2014*" and, secondly, that "*The amount payable by Marme in accordance with the RBS ISDA Master Agreement is €223,721,576 together with interest at the Default Rate of 3.796% per annum and an indemnity as regards RBS's costs, as set out in the 17 November letter"*. The Non-RBS Banks, for their part, seek declarations that:

"*(1) The HSH Swap was validly terminated on 13 November 2014 in accordance with its terms by the Termination Notice dated 11 November 2014.*

(2) The sum due to HSH upon termination of the HSH Swap is €199,249,545.25 plus interest in the terms set out above at paragraph 82, along with an indemnity as regards its costs.

(3) The ING Swap was validly terminated on 20 November 2014 in accordance with its terms by the Termination Notice dated 19 November 2014.

(4) The sum due to ING upon termination of the ING Swap is €67,294,554.15 plus interest in the terms set out above at paragraph 82, along with an indemnity as regards its costs.

(5) The BayernLB Swap was validly terminated on 26 November 2014 in accordance with its terms by the Termination Notice dated 25 November 2014.

(6) The sum due to BayernLB upon termination of the BayernLB Swap is €129,049,794.94 plus interest in the terms set out above at paragraph 82, along with an indemnity as regards its costs.

(7) The La Caixa Swap was validly terminated on 27 November 2014 in accordance with its terms by the Termination Notice dated 25 November 2014.

(8) The sum due to La Caixa upon termination of the La Caixa Swap is €91,375,814.79 plus interest in the terms set out above at paragraph 82, along with an indemnity as regards its costs."

492. As previously explained, Marme defends the declaration claims on the same basis as it seeks rescission of the Swaps – in other words on the basis that, since it entered into the Swaps on the basis of fraudulent or negligent misrepresentations, the Swaps have been or should be rescinded. In view of my earlier conclusions, those defences plainly do not assist Marme. As far as the Non-RBS Banks are concerned, therefore, Marme has no defence to the declarations which those banks seek.

493. As to RBS, however, Marme has a subsidiary defence, namely that certain terms should be treated as having been implied into the RBS Swap and that Marme accepted RBS's repudiatory breaches of those terms, so bringing the RBS Swap to an end, before RBS served its Termination Notice. In consequence, Mr Saini QC submitted (albeit only very briefly in the shape of

four short paragraphs in the written closing submissions which he prepared along with Mr Tomson and Mr Rose, as well as briefly in reply) that RBS is not entitled to the declaratory relief sought.

494. I cannot agree with Mr Saini QC about this for reasons which I shall now explain. In summary, however, the implied terms/repudiatory breach case fails at every stage. Thus, I am not persuaded that the terms said by Marme to have been implied were actually implied. Nor am I persuaded that, even if those terms were implied, Marme has shown that the terms were breached. Nor, in any event, was Marme entitled to bring the RBS Swap to an end on the grounds of repudiatory breach. Furthermore, even if there were such an entitlement, it was an entitlement either which was lost since Marme is to be regarded as having affirmed the RBS Swap or which was not exercised by the time that RBS came to serve its Termination Notice (and so does not avail Marme). It follows, Mr Saini QC having abandoned in closing a further defence that the same conduct relied upon in relation to the repudiatory breach case amounted to an Event of Default under the Swaps, that Marme has no defence to RBS's declaration claim either.

495. Although Marme originally relied upon three alleged implied terms, Mr Saini QC explained in opening that the first of the implied terms put forward by Marme was not pursued. He maintained that two (rather than three) terms should be implied into the RBS Swap, namely: first, that "*RBS would not seek, either on its own or together with any EURIBOR-setting panel member or members, or any other person, to manipulate in any way the setting of EURIBOR by which the parties' liabilities to each other under the terms of the Swaps were set such that it represented anything other than a genuine average of the estimated interest rate at which Euro interbank term deposits are offered by one prime bank to another within the Euro zone, calculated at 11:00 am (CET) for spot value T=2) and/or had otherwise acted to undermine the integrity of the EURIBOR rate*" ('EURIBOR Implied Term 2'); and secondly, that "*RBS would behave honestly in relation to the setting of EURIBOR."* ('EURIBOR Implied Term 3').

496. There is no issue as to the applicable legal principles. I was referred, in particular, to ***Marks and Spencer plc v BNP Paribas Services Trust Co (Jersey) Ltd and anor*** [2015] UKSC 72, [2016] AC 742, and Lord Neuberger's observations at [21] (adjusting the formatting slightly for ease of comprehension):

"*…It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in the BP Refinery case 180 CLR 266, 283 as extended by Bingham MR in the Philips case [1995] EMLR 472 and exemplified in The APJ Priti [1987] 2 Lloyd's Rep 37.*

First, in Equitable Life Assurance Society v Hyman [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was 'not critically dependent on proof of an actual intention of the parties' when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer

of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting.

Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term.

However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable.

Fourthly, as Lord Hoffmann I think suggested in Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied.

Fifthly, if one approaches the issue by reference to the officious bystander, it is 'vital to formulate the question to be posed by [him] with the utmost care', to quote from Lewison, The Interpretation of Contracts 5th ed (2011), p 300, para 6.09.

Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of 'absolute necessity', not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

Whereas Mr Saini QC emphasised in his written closing submissions (he did not address the implied terms issue in his oral submissions) the first part of the sixth of these observations (that the test is not one of absolute necessity), Miss John emphasised the second observation (that a term will not be implied merely because it appears fair or would have been agreed) and the last part of the sixth observation (that a term will be implied only if, without it, the contract would lack commercial or practical coherence). Miss John also submitted that a term should not be implied if it is *"not capable of clear expression"*, relying upon Hamblen J's comment to that effect in ***Cassa di Risparmio*** at [544].

497. Mr Saini QC submitted that both EURIBOR Implied Terms fulfil both tests in that they are necessary to give commercial efficacy to the RBS Swap and they are so obvious that they go without saying. It was his submission that the essential question is whether a swap counterparty such as Marme would, in the absence of an express contractual right, assume that, if its bank counterparty was involved in the attempted manipulation of EURIBOR, it would be entitled

to terminate the contract. He submitted that the same considerations apply as in relation to the EURIBOR Representations, namely as to the relevance of EURIBOR to the economics of the Transaction and the importance of honesty. Mr Saini QC submitted that the involvement of a bank in the manipulation of a benchmark inevitably means that the counterparty (here, Marme) is exposed to risks for which it has not bargained and that to have no remedy would be contrary to the reasonable expectations of honest men.

498. I reject these submissions for essentially the reasons advanced by Miss John. EURIBOR Implied Term 2 is vague. The reference to RBS seeking to manipulate, in particular, seems to contemplate something more than actual manipulation or attempted manipulation, yet it is not altogether clear what conduct would be covered. It is similarly not altogether clear what is meant by acting to "*undermine the integrity of the EURIBOR rate*". These are, of course, matters which I have previously considered in the context of the implied representation case, my conclusion in that context being that what was alleged by Marme was neither clear nor obvious. The same applies at this stage of the analysis when implied terms (as opposed to implied representations) are under consideration. The more so, given that, as Miss John pointed out, the alleged implied term apparently extends to *any* conduct intended to influence EURIBOR regardless of whether it actually had that effect and, indeed, even if it did not lead to the making of any false submissions. It appears also to extend to the conduct of *any* RBS employee, including somebody, at least on the face of things, who has nothing to do with the EURIBOR-setting process.

499. I cannot, in these circumstances, accept that EURIBOR Implied Term 2 falls to be implied in this case. That said, I do not agree with Miss John when she made the point that, as formulated, there could be a breach of the alleged implied term in relation not to 3-month EURIBOR but some other tenor which would have no effect on Marme at all since the wording refers to "*EURIBOR by which the parties' liabilities to each other under the terms of the Swaps were set*" and, as such, ought surely to be treated as referring only to the 3-month EURIBOR tenor applicable to the RBS Swap. Miss John's broader vagueness submissions are, however, in my view, well-founded.

500. Before coming on to consider EURIBOR Implied Term 3, I should just explain that the fact that RBS accepted in opening that a modified form of EURIBOR Implied Term 2 (to the effect that RBS would not dishonestly manipulate 3-month EURIBOR so as to cause loss to Marme) would fall to be implied does not assist Marme. This is because not only is that not the implied term which Marme has alleged but also (and this is, no doubt, why Marme has not alleged it) there is no evidence that such a term has been breached. It is worth briefly noting in this context that RBS accepted that a similar term fell to be implied before Asplin J in ***PAG*** when faced with a case that a term similar to EURIBOR Implied Term 2 should be implied, namely that:

"*RBS would not make false or misleading LIBOR submissions to the BBA and/or engage in any practice of attempting to manipulate LIBOR such that it deviated from the rate as defined by the BBA (viz a rate measured at least in*

part by reference to choices made by panel banks as to the rate that would best suit them in their dealings with third parties)".

In that case, Mr Handyside QC, counsel for RBS, having criticised this as being too vague, Asplin J stated this at [414]:

"*I agree that it is very widely framed and that it is vague and therefore, fails the test for implication. Had it been formulated in the way suggested by Mr Handyside I would have taken a different view".*

Mr Handyside QC's formulation mirrored that accepted by RBS in the present case.

501. As to EURIBOR Implied Term 3, again, I consider that this is too wide and vague to warrant its being implied. There is, as Christopher Clarke J put it in ***Raiffeisen*** in the implied representation context, an *"elasticity of possible meaning"* about the words "*honesty in relation to the setting of EURIBOR*" which makes implication problematic. It is not a term which is so obvious that it goes without saying. The range of conduct which it seems to cover is not clear; it would seem, indeed, to cover conduct which could have no impact upon Marme's position under the RBS Swap. I consider that it goes well beyond what would be necessary to give business efficacy or commercial coherence to the RBS Swap. Had the term been framed more narrowly to target conduct that would cause loss to Marme, I might have been more minded to accept that such term would be implied. However, no such term has been put forward by Marme – probably because, had it been, the term would likely resemble the modified version of EURIBOR Implied Term 2 which RBS has accepted but in relation to which Marme would be unable to establish breach.

502. It is unnecessary, in the circumstances, to go on and consider the question of breach. It is clear, however, that Marme's case on this issue, likewise, cannot be accepted.

503. Three matters were ultimately relied upon by Marme in Mr Saini QC, Mr Tomson and Mr Rose's written closing submissions. The first is the Bloomberg 'chat' on 16 October 2008 between Mr Moryoussef and Mr Bittar to which I have previously referred when dealing with the question of falsity in the implied representations context. It will be recalled that this starts at 11.03 am, a few minutes after the EURIBOR fixing was published that day, and that Mr Moryoussef asked Mr Bittar "*how is it that you are the lowest on the panel? Properly screwed*". Mr Bittar replied saying "*very long in the stub*" to which Mr Moryoussef responded: "*I'm going to break. That makes me want to puke. Why did you put it low, seriously*? *The biggest [?] of my life is there nobody who will clean my stub? I would prefer to get out*". Mr Bittar replied "*nobody will do anything mate*". Mr Saini QC submitted that this is evidence of Mr Moryoussef and Mr Bittar sharing knowledge of rates being artificially low, with Mr Bittar explaining, in effect, that Deutsche Bank had put the lowest EURIBOR panel submission in *because* Mr Bittar was "*very long in the stub*". He also submitted that the fact that Mr Moryoussef asked Mr Bittar at all suggests that he was aware that Mr Bittar would know of the reasons for

the Deutsche Bank submission and that he had special contact with the submitters. Mr Saini QC submitted that this is evidence that Mr Moryoussef remained involved in Mr Bittar's efforts to align Deutsche Bank's submissions with his trading position. As I have previously observed, however, in truth, what the exchange was about is unclear. Even if Mr Saini QC were right to suggest that it shows Mr Moryoussef continuing to be involved in attempted manipulation by Mr Bittar, this does not mean that there would thereby be a breach of the EURIBOR Implied Terms since the exchange does not evidence wrongdoing on *Mr Moryoussef's* (and so *RBS's*) part. More specifically, there is nothing in the exchange which shows Mr Moryoussef manipulating the setting of the EURIBOR rate for that day or doing anything else to cause the rate to be anything other than genuine. Indeed, as Miss John pointed out in her oral closing submissions, Marme has advanced no positive case that any tenor of EURIBOR was not, in fact, a genuine estimate, whether for 16 October 2008 or, indeed, at all. What Mr Moryoussef is shown in this exchange to be doing is simply expressing dissatisfaction with the Deutsche Bank submission and asking if anybody will 'clean his stub' – something which, in and of itself, is unobjectionable. He was complaining but that hardly amounts to a breach. It would be wrong, in the circumstances, to conclude on the basis of these exchanges, and without more, that Mr Moryoussef was seeking to manipulate EURIBOR or acting to undermine the integrity of the EURIBOR rate (EURIBOR Implied Term 2) or that he was acting dishonestly in relation to the setting of EURIBOR (EURIBOR Implied Term 3).

504. Secondly, Mr Saini QC invited the Court to draw "*common sense inferences*" concerning Mr Moryoussef's conduct. Specifically, it was suggested that the Court should draw such inferences based on what Mr Saini QC described as the *"well-evidenced wrongdoing"* by Mr Moryoussef up to and after the making of the Swaps. Mr Saini QC submitted that the Court should assume, in the circumstances, that Mr Moryoussef continued in his unlawful activities concerning EURIBOR manipulation until he left RBS in September 2009 and so after the RBS Swap had been entered into. As Mr Saini QC put it, there is no reason for the Court to infer that *"a thoroughly dishonest person suddenly saw the light"*. Again, however, I cannot agree with Mr Saini QC. Whilst it is obviously the case that Mr Moryoussef did act dishonestly whilst he was employed by Barclays, the evidence as to his conduct after leaving Barclays and joining RBS is of a different hue. This is evidence which I have already considered in some depth. However, in summary, aside from some limited exchanges in September/October 2007 (about a year before the RBS Swap was entered into) which do show Mr Moryoussef continuing to behave as he had done before, there is no evidence of any conduct on his part which would justify a conclusion that the EURIBOR Implied Terms (were they to be found to exist) were breached. In such circumstances, there can be no justification for the inference which Mr Saini QC urged the Court to draw since it would be an inference which would be inconsistent with the positive evidence which was before the Court at trial and which does not support a conclusion that Mr Moryoussef continued at RBS to act as he had done before when employed by Barclays. Furthermore, as Miss John explained, RBS's case is not that Mr Moryoussef *"suddenly saw the light"* as Mr Saini QC suggested. RBS's case, rather, is that, when Mr Moryoussef moved to RBS, he was no longer in a

position to continue behaving in the way that he had done at Barclays because he had no influence over the ABN AMRO submitters in the Netherlands. It was for this reason, Miss John submitted, that Mr Moryoussef ceased to do what he had done before, not because he underwent any Damascene-type conversion. I agree with Miss John about this. I see no justification for drawing the inference suggested by Mr Saini QC given the evidence which was before the Court, as a result of the extensive disclosure exercise carried out by RBS, which provides no support for Marme's case that Mr Moryoussef continued as he had acted at Barclays post-entry into the RBS Swap.

505. This leaves the third matter relied upon by Mr Saini QC, namely Mr Moryoussef's conviction. The submission made, as before, was that the Court should proceed on the basis that Mr Moryoussef has been convicted not only in relation to his activities whilst employed by Barclays but also in relation to his time at RBS and so after the RBS Swap had been entered into. For reasons which I have previously given, however, I cannot accept this submission. It follows from this, and my rejection of Mr Saini QC's other submissions concerning breach, that breach has not been established in this case – even assuming that the EURIBOR Implied Terms are, in any event, relevant. It follows, further, that there can be no question of there having been any repudiatory breach. As a result, Marme's case on repudiatory breach cannot succeed. However, even if there were a repudiatory breach, still that case would fail for other reasons. First, consistent with my earlier decision in relation to affirmation, Marme affirmed the contract by paying the amounts due under the RBS Swap in February 2014, having full knowledge of the matters which it alleges amount to RBS's repudiatory breach. Secondly, even if there was a repudiatory breach which was not affirmed, it is clear that this was a repudiatory breach which Marme never accepted. Specifically, although Mr Saini QC submitted that Marme should be treated as having accepted in September 2014 when Marme issued its Claim Form, I do not agree with him about this since that Claim Form made no reference to any contractual claim at all until it was amended in August 2017 and by that time RBS had already terminated the RBS Swap by serving its Termination Notice on 11 November 2014.

506. Lastly, I should mention a further argument which was put forward by Miss John on RBS's behalf. This is the point that the termination provisions within the ISDA Master Agreement provide a comprehensive code for termination, namely the Event of Default regime, and so it would not have been open to Marme to have sought to bring the RBS Swap to an end by acceptance of any repudiatory breach on RBS's part. This is what was decided, in effect, in ***Deutsche Bank v Sebastian Holdings Inc*** [2013] EWHC 3463 (Comm), a case concerning forex trading which went wrong when the 2008 financial crisis started, in which, at [1553], Cooke J cited with approval a passage from *Simon Firth, Derivatives Law and Practice* as support for the proposition that it *"is generally recognised that the provisions in the ISDA agreements on close out are intended to represent a complete code on termination of such Master Agreements",* as follows:

"In the context of the 1992 ISDA Master Agreement, it is submitted that the provisions setting out the circumstances in which termination is permitted, and the consequences of such a termination are intended to be comprehensive, especially as regards matters falling within the scope of the termination provisions. The contrary view would mean that … the methodology prescribed for calculating the termination payment due on a contractual close-out would be inapplicable and the parties' choice of the 'Second Method' for this purpose (so that a payment is due to the Defaulting Party if the termination results in the Non-defaulting Party making a gain) would be fruitless. It is difficult to believe that this would be the parties' intention, as the Second Method is designed to impose an obligation on the Non-defaulting Party to account for such a gain. This is an obligation that it would not have following a common law termination. If it were able to choose between a contractual and a common law termination, this obligation could easily be circumvented and the objective of the close-out provisions defeated …

… it would seem illogical to conclude that, while the contractual methodology must be used where a party fails to perform its obligations, if that party merely states that it will not perform, the other party's common law remedies are preserved.

The better view, therefore, is that the statement that the rights, powers, remedies and privileges set out in the Agreement are not exclusive of those provided by law [in clause 9(d)] is intended to preserve rights of set-off, remedies such as specific performance and similar matters rather than conferring an additional right to terminate on grounds falling outside the express terms of the Agreement. Rights of termination should therefore be regarded as falling within the words "except as provided in this Agreement" so that they are implicitly excluded by the fact that the Agreement contains a detailed code governing the circumstances in which termination is permissible, as well as its consequences."

Cooke J continued at [1554] by referring to the facts of the case before him:

"*It is SHI's case that it was DBAG's breaches of contract which led to the close out and the termination of the Agreements, including the FX ISDA which was only terminated recently. It is also SHI's case that DBAG's terminations were wrongful. Breaches were alleged of the FXPBA , which refers to the FX ISDA, of the FX ISDA itself, of the Equities PBA and the Equities ISDA (as well as the oral agreements and the Listed F&O Agreement). It is hard to see how SHI could claim damages at large in respect of the Prime Broker Agreements and the FX ISDA and Equities ISDA, without reference to the provisions in them and the Master Netting Agreement . There are express terms in the Master ISDA Agreements about calculation of loss on the occurrence of Events of Default, Early Termination, designation of a Termination Date or Master Termination Date. The ISDA Agreements each provided for payment on early termination under Clause 6(e) on the basis of 'Loss' and the 'Second Method'."*

He, then, made this observation at [1555]:

"Where close out occurs in the context of an agreement, as opposed to forced close out as the result of an Event of Default or Early Termination, it is difficult to see how a party's position can be improved as against the position where the other party is in breach."

This was followed by [1556] in which he set out the relevant ISDA provisions:

"Moreover, each of the FX ISDA, the Equities ISDA, the Equities PBA and the Listed F&O Agreement contained provisions which exclude DBAG's liability in circumstances which obtain for many of the claims. The FX ISDA and Equities ISDA contain provisions as set out in Annex 1 . The Equities PBA has an exclusion Clause in paragraph 13.4 in respect of 'special, indirect and consequential damages arising as a result of any breach by the Prime Broker of any provision of this Agreement'. The Listed F&O Agreement in Clause 16.1 again excludes 'direct or indirect losses, damages, costs or expenses … unless arising directly from … gross negligence, wilful default or fraud' as well as excluding liability for 'consequential or special damage or for loss of profits'."

Cooke J was clear that, in the circumstances, those provisions should operate, saying this at [1557]:

"There is no reason why these Clauses should not be given their full effect."

507. By way of completeness, Miss John drew my attention to the updated version of *Firth* and specifically paragraph 11.122 which was cited by Cooke J in ***Sebastian Holdings*** which reads, in part (citing, indeed, amongst other authorities, ***Sebastian Holdings*** itself), as follows:

"What remains unclear, however, is whether a common law right to terminate for an anticipatory breach of contract exists alongside the express contractual provisions and, if it does, what remedies follow from the exercise of such a right. Under the 1992 ISDA Master Agreement, none of the Events of Default cover anticipatory breach. It is therefore arguable that the innocent party's common law remedies in this respect are preserved, especially in view of the fact that, in construing a contract 'one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption'.

On that basis, if a party disables itself from performing, or makes it clear that it intends not to perform, the Agreement in a fundamental respect, the other party would have an immediate right to terminate. At least on a strict reading of the Agreement, the methodology prescribed for calculating the amount due on a contractual termination would then be inapplicable, as it is triggered by the designation or occurrence of an 'Early Termination Date', which depends on the existence of an Event Default or a Termination Event. This would mean that, even if the parties had selected the 'Second Method' (so that a payment would normally be due to the Defending Party where the Non-defaulting Party makes a gain from a termination), the innocent party would not have to

account for any gain it makes, as there is no obligation to do so at common law.

It cannot, however, be right to say that, while contractual methodology must be used where a party fails to perform its obligations, if that party merely states that is will not perform, a completely different set of remedies applies. It would also be curious if the making of such statement gave rise to an immediate right to terminate while an actual failure to perform requires notice to be given and a grace period to elapse before such a right arises. The better view, therefore, is that a right to terminate for anticipatory breach is not available. Although the Agreement states that, 'except as and not exclusive of those provided by law, this is probably intended to preserve rights set-off, remedies such as specific performance and similar matters, rather than preserving an additional right to terminate on ground falling outside the express terms of the Agreement. Termination for this Agreement', so that it is implicitly excluded by the fact that the Agreement contains a detailed code governing the circumstances in which termination is permissible, as well as its consequences."

It can be seen that this passage is dealing with the question of whether a common law right to terminate for *anticipatory* breach exists alongside the express contractual provisions contained in the ISDA 1992 Master Agreement. It is instructive, however, to have regard to what is stated in *Firth* in the preceding passages since it appears that the position as regards *actual* breaches is clearer still. *Firth* starts by identifying the question under consideration:

"At common law, in the absence of agreement to the contrary, a party to a contract may terminate the contract if the other party has breached his obligations under the contract in some essential respect or, through his words or conduct, he has unequivocally shown that he intends to do so (i.e. he commits an 'anticipatory breach' of the contract). This could involve either a refusal to perform the contract or the doing of an act which makes performance impossible. The question that arises, therefore, is whether such a breach constitutes an additional ground on which the transactions may be terminated."

He, then, sets out certain authorities, as follows:

"A similar issue arose in Dalkia Utilities Services Plc v Celtech International Ltd in which a company repeatedly failed to pay a series of invoices issued under an energy supply contract on time, so that about £332,450 was outstanding. The contract gave the claimant the right to terminate it if (amongst other things) the company was in material breach of its payment obligations, and prescribed the termination payment that became due in these circumstances. The claimant therefore served a notice of termination, which was held to be a valid exercise of the express termination rights. Christopher Clarke J went on to say, however, that, if the breach had amounted to a repudiation of the contract, the claimant would also have been able to terminate the contract at common law, in which case damages would be assessed at common law rather than in accordance with the contractual termination provisions. The existence of the express termination rights did not

exclude the claimant's common law remedies, even though the contract provided that the termination consequences prescribed by it represented "the full extent of the parties' rights and remedies arising out of any termination". This simply meant that they represented the full extent of the rights and remedies where termination took place pursuant to the express terms of the contract. The fact that the consequences of a common law termination would have been radically different from those prescribed by the contract was not regarded as an obstacle to this conclusion.

Another case in which the remedies available following a repudiatory breach were held to be available notwithstanding the existence of a contractual termination provision is Stocznia Gdynia SA v Gearbulk Holdings Ltd. In this case, a company entered into a contract for the construction of certain vessels. The contract provided that, if the vessels were not delivered on time or the seller failed to proceed with their construction, the contract could be terminated by the buyer. The buyer would then be entitled to the return of any instalments that had been paid, but not to the liquidated damages provided by the contract for delayed delivery. When the seller failed to commence construction, the purchaser terminated the contract and claimed damages for loss of bargain. The seller argued that existence of the contractual termination provisions was inconsistent with a right to terminate at common law and, in any event, the contract excluded any claim for damages.

Both these arguments were rejected. The contractual termination provision, which identified situations that went to the root of the contract, did not oust the common law mechanism but embodied it within the express terms of the contract. In this instance, the contractual right to terminate and the right to terminate for a repudiatory breach were one and the same. The exercise of the right to terminate gave rise to the normal common law remedies since, as a matter of construction, they had not been effectively excluded. It was not credible that the parties had intended the seller's remedies to be limited to the return of any instalments paid: the liquidated damages exclusion simply made it clear that this provision had no further effect once the contract had been terminated."

He goes on, however, to say this:

"It is not always the case, however, that a right to terminate at common law will co-exist with a contractual termination provision. In Lockland Builders Ltd v Rickwood a building contract contained a clause which provided that the contract could be terminated by one of the parties following certain types of breach by the other, but only after an independent architect or surveyor had upheld the complaint and the defaulting party had failed to remedy the defects. This clause was held implicitly to exclude the innocent party's right to terminate for repudiatory breach, on the facts of the case, because it provided a machinery for the determination of the very type of dispute that arose. The position in relation to a dispute that did not fall within the scope of the clause (such as the builder walking off the site when the works were still substantially incomplete) may have been different.

There is therefore no universally applicable rule governing this issue. As Moore-Bick LJ pointed out in Stocznia Gdynia SA v Gearbulk Holdings Ltd:

'Whenever one party to a contract is given the right to terminate it in the event of a breach by the other it is necessary to examine carefully what the parties were intending to achieve and in particular what importance they intended to attach to the underlying obligation and the nature of the breach. The answer will turn on the language of the clause in question understood in the context of the contract as a whole and its commercial background. Sometimes, as in Lockland Builders v Rickwood, the parties will have intended to give a remedy of a limited nature for breaches of a certain kind; in other cases the terms of the contract may reflect an intention to treat the breach as going to the root of the contract with the usual consequences, however important or unimportant it might otherwise appear to be.'"

Firth, then, adds:

"In BNP Paribas v Wockhardt EU Operations (Swiss) AG, Christopher Clarke J considered these issues in the context of the 2002 ISDA Master Agreement. He held that the parties' obligations to make the prescribed payments and deliveries are conditions of the contract, given that a failure to perform that is not remedied by the end of the first business day after notice of the failure has been given entitles the Non-defaulting Party to terminate the contract. The Events of Default that are triggered by non-performance therefore embody within the express terms of the contract the common law right to terminate for a repudiatory breach based on non-performance. At the same time, the contract implicitly varies the remedies that are available where that right is exercised because, by prescribing the method of calculation of the sum to be paid on a termination, the parties have 'spelt out the consequences which result from a breach of condition'. This reasoning would apply equally to the 1992 ISDA Master Agreement, and to breaches of the Agreement that do not involve payment or delivery obligations.

As well as varying the remedies that follow from such a breach of condition, it appears that the contract also varies the steps that must be taken to terminate on the basis of the breach. As was pointed out in the BNP Paribas case, the parties have specified the consequences that follow from such a breach, 'both as to entitlement to terminate and measure of recovery'. Whereas at common law, the innocent party can terminate on notice, under the ISDA Master Agreement notice of termination can be given only if the Defaulting Party has been notified of the default and the default is continuing after the period prescribed by the Agreement has elapsed. There should therefore be no room for an argument that a failure to perform that goes to the root of the contract entitles the innocent party to terminate at common law immediately, with the normal common law remedies applying in such an event."

508. Taking account of the above, the position as regards *actual* breaches of the 1992 ISDA Master Agreement and to breaches of the Agreement that do not involve payment or delivery obligations, and so the breaches involved in the present case, seems to me to be clear. Moreover, as Miss John submitted, approaching the ISDA Master Agreement in this manner, and so as providing

an exclusive code regulating each party's entitlement to terminate, achieves the certainty and predictability which parties are entitled to expect when contracting on its terms. As Briggs J (as he then was) put it in ***Lomas v JFB Firth Rixson*** [2011] 2 BCLC 120 at [53]:

"It is necessary to begin with some preliminary observations about the correct approach to construction. The ISDA master agreement is one of the most widely used forms of agreement in the world. It is probably the most important standard market agreement used in the financial world. English law is one of the two systems of law most commonly chosen for the interpretation of the master agreement, the other being New York law. It is axiomatic that it should, as far as possible, be interpreted in a way that achieves the objectives of clarity, certainty and predictability, so that the very large number of parties using it know where they stand."

509. Mr Saini QC's response was to make the straightforward point that nowhere in the ISDA Master Agreement is there any provision which states that a party cannot avail itself of a common law right to accept its counterpart's repudiatory breach. He highlighted that, on the contrary, Clause 9(d) suggests that the parties should be regarded as holding the opposite intention since this provides that:

"*(d)* ***Remedies Cumulative.*** *Except as provided in this Agreement, the rights, powers, remedies and privileges provided in this Agreement are cumulative and not exclusive of any rights, powers, remedies and privileges provided by law."*

I need not, in the circumstances, reach a final view on this issue given my conclusions on the questions of implication of terms and breach. Had it been necessary, however, particularly given Clause 9(d), I would have been inclined to conclude that the correct position, as a matter of analysis, is not that there is an ouster of a party's right to complain that there has been a repudiatory breach but, instead, that, if it wishes to raise such a complaint and bring its contract to an end whether in accordance with the agreement itself or as a matter of the general law, that party is under an obligation to follow the ISDA Master Agreement procedure for termination with the agreed consequences under those provisions. If I am right about this, and it is to be noted that RBS accepts, indeed, that a breach of agreement may amount to an Event of Default under Clause 5(a)(ii), then, in order to terminate, Marme would have to give appropriate contractual notice and allow for the agreed grace period. That was not, of course, done in this case.

Conclusion

510. I, therefore, conclude that Marme has no defence either to RBS's claim or to the Non-RBS Banks' claim, and that RBS and the Non-RBS Banks are entitled to the declarations sought. More specifically, and drawing together the conclusions which have been set out above, I decide as follows:

(1) I conclude that, although the EURIBOR Representations would have been materially falsified by the direct evidence, such representations do not fall

to be implied. For this reason, Marme's action must fail. Although I do not consider that any of the EURIBOR Representations as pleaded can be implied in this case, nonetheless I do consider that RBS's conduct in going along with the Swaps was sufficient for the implication of a much narrower representation, namely that RBS was not itself manipulating, and did not intend to manipulate or attempt to manipulate, EURIBOR. That representation has not, however, been shown to be false.

(2) Had it been necessary:

(a) I would have concluded that fraud had been made out by Marme in that Mr Moryoussef's knowledge would, for these purposes, have been sufficient and it is not necessary that other people within RBS also had the relevant knowledge.

(b) I would have decided that Marme's case on reliance has not been established - whether in relation to Marme's fraudulent misrepresentation case or as regards its case under section 2(1) of the 1967 Act.

(c) I would have concluded that rescission is barred both on the ground of affirmation and on the basis that rescission is not permissible because of the rule against partial rescission.

(d) Marme's case on damages would also have failed since, even had the truth been known, the terms of the Transaction would have remained unchanged.

(3) As for Marme's claim against the Non-RBS Banks, there was no relevant holding out of RBS by the Non-RBS Banks and, even if there had been any such holding out, the apparent authority thereby created was not of sufficient scope to encompass the making of the EURIBOR Representations. In any event, Marme has not established that it relied upon any alleged holding out of RBS as having authority to make those representations in entering into the Swaps.

(4) It follows, for the reasons just stated and my having rejected the various defences raised by Marme (including its repudiatory breach case), that RBS and the Non-RBS Banks are entitled to the declaratory relief which they have sought.

511. I would like to conclude by thanking all counsel, and the solicitors instructing them, for the assistance which they gave me during the course of the trial. This was a very substantial case which, through their diligence and industry, was able to be tried with great efficiency.