FL-2018-000019

Neutral Citation Number: [2023] EWHC 2759 (Comm)

Case No: FL-2018-000019

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

7 Rolls Building
Fetter Lane
London,
EC4A 1NL

Before:

MRS JUSTICE COCKERILL

- -

Between:

LORELEY FINANCING (JERSEY) NO 30 LIMITED	**Claimant**
- and –	
(1) CREDIT SUISSE SECURITIES (EUROPE) LIMITED **(2) CREDIT SUISSE INTERNATIONAL** **(3) CREDIT SUISSE SECURITIES (USA) LLC** **(4) CREDIT SUISSE AG**	**Defendants**

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Tim Lord KC, Fred Hobson, Ben Woolgar and Andris Rudzitis (instructed by **Reynolds Porter Chamberlain LLP)** for the **Claimant**

Patrick Goodall KC, Adam Sher, Laurie Brock and Marcus Field (instructed by **Cahill Gordon & Reindel (UK) LLP**) for the **Defendants**

Hearing dates: 20,24,26,27 April 2023, 2,3,4,5,9,11,15,16,17,18,22,23,24,25 May 2023, 12,13,14,15 June 2023

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APPROVED JUDGMENT

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

This judgment was handed down remotely by the judge and circulated to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 3 November 2023 at 10:00am

Mrs Justice Cockerill:

INTRODUCTION

1. In late 2007, as clouds gathered in the sub-prime mortgage market, the Claimant ("L30") paid US$100m to the Defendants ("CS") for certain Notes ("the Notes"), rated AAA, which formed the basis of what is known as a synthetic CDO transaction. Such transactions are complicated – indeed some of the banking witnesses in this case struggled to explain the concepts themselves.

2. But the bottom line is this: the financial crisis hit, L30 lost its money in 2010 and seeks to claim that money back. It says that this was more than a bad deal. It says that in selling the transaction CS made representations about the business packaged within the CDO transaction, that the representations were false, made either negligently or deliberately, and that L30 would not have done this deal if the representations had not been made.

3. L30 has likened the transaction to a Russian doll; that analogy is apt; and it in part explains the complexity of the issues which have been raised and hence fall to be decided. The Notes were not self standing; they were linked via a credit default swap ("CDS") to the credit of a reference portfolio which comprised 100 residential mortgage-backed securities ("RMBS"). Each RMBS itself packaged a number of underlying individual mortgage transactions, in that it comprised rights to cash-flows arising from pools of underlying mortgage loans. Of those 100 RMBS, 7 RMBS were ones which had been packaged, securitised or underwritten by CS (or its affiliates) (the "CS RMBS[1]").

4. The bare essence of the claim is that:

    i) In relation to the CDO transaction CS represented that it was unaware of any conduct on its part which tainted the credit quality of the Notes or the CS RMBS or which otherwise undermined the reliance which could be placed by an investor in L30's position on the credit ratings ascribed both to the Notes and the CS RMBS;

    ii) However CS knew that the credit risk which L30 believed it was buying was not the credit risk it was actually buying; in that it knew that the CS RMBS embedded within the CDO transaction were either affected by or were exposed to a material risk of being affected by certain misconduct in the selling of the RMBS between 2005 and 2007. This is referred to as "the RMBS Misconduct";

    iii) Those allegations of misconduct are complicated – they comprised about 70 pages of pleading and (in schedule form) 5 pages of the List of Issues. At the centre of them however were allegations that CS had represented to

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[1] There were 12 such RMBS and the case was opened by L30 on the basis of "the Twelve CS RMBS". However of these 5 were third party transactions on which L30 advances no case. The case was then closed on the basis of "the Seven CS RMBS".

the CS RMBS investors certain things about the rigorousness of its compliance and due diligence processes and (in particular) that decisions as to loans were not "farmed out". It is said that these representations were, to the knowledge of CS and numerous people involved in the RMBS process, untrue.

5. The misrepresentation case therefore encapsulates a myriad of issues, some factual, some legal: was there any RMBS Misconduct in relation to the CS RMBS? Are there representations in relation to the CDO transaction – and if so what? With what intent and what knowledge were they made? Did they induce L30 to buy the Notes? This latter question includes legal issues as to the right test for what L30 needs to have known or understood or been aware of in relation to such representations.

6. There are also issues as to limitation. This claim was commenced in late 2018. No legally aware reader will have missed the elephant in the room: on the face of it, all of these claims are long since time barred. There are therefore questions as to whether L30 lacked, as it says it did, the requisite knowledge or information to start the limitation clock running.

7. Finally there are issues on negligence, as a backup if the fraud case does not work, but the other features of misrepresentation are present; and a rarity – an unlawful means conspiracy case which is a genuine alternative to the primary case.

8. These issues are dealt with in greater detail below, under the following headings:

   i) Factual Background

   ii) The Trial

   iii) Limitation

   iv) Were the CDO Representations made?

   v) Were the CDO Representations relied on?

   vi) Falsity: RMBS Misconduct (Summary)

   vii) Knowledge of Falsity

   viii) Other Issues

      a) Negligence

      b) Unlawful Means Conspiracy and Irish Law

   ix) Conclusion

   x) Appendices:

      a) Appendix 1: RMBS Misconduct (detailed findings)

b) Appendix 2A: CDO Representations (pleaded)

c) Appendix 2B: CDO Representations (revised for trial)

d) Appendix 3: RMBS Misconduct allegations

FACTUAL BACKGROUND

Agreed Background to the types of securities involved in the Transaction

9. As already stated, the Notes were a CDO, with the underlying reference assets being a portfolio of RMBS. The exposure to that portfolio of RMBS was synthetic, created through use of a CDS.

10. This overview, taken largely from a helpful document agreed by the parties, summarises the general features and characteristics including in respect of the specifics relevant to the Notes themselves, of:

i) RMBS;

ii) Collateralised debt obligations ("CDOs"); and

iii) CDS and their use in a synthetic CDO structure.

RMBS

11. An RMBS is a type of asset-backed security in which, as the name indicates, the securitized assets are residential mortgage loans. As with any asset-backed security, an RMBS is a structured financial instrument.

12. A single RMBS may be backed by thousands of individual mortgage loans. These loans are originated by companies offering mortgage finance to residential property owners. The originator may be connected with the sponsor entity, or may instead be a third party company which sells on loans it has originated to be securitised by a different financial institution.

13. The process of securitising an RMBS starts with the pooling of residential mortgages by a "sponsor" entity, which has originated or otherwise acquired those assets in order to pool them. This pooling of assets usually takes place in an entity related to the sponsor known as the depositor. The depositor then typically conveys the pool of loans to a special purpose securitisation trust, which then issues securities that are backed (or collateralised) by the assets and sells them into the market. The RMBS securities entitle investors to a periodic payment of interest, which flows primarily from the monthly revenue generated by the underlying mortgages, and a return of principal upon maturation of the securities.

14. RMBS securities are split into tranches to be sold to investors with different purchasing requirements. As such, RMBS generally consist of multiple tranches, which are typically differentiated by their risk profiles, and thus credit rating. No particular underlying mortgage is assigned to a particular tranche of the RMBS; rather, the mortgages as a pool collectively back all of the tranches in a particular

RMBS. In general, lower risk / higher credit-rated tranches (referred to as "senior" tranches) have lower yields than higher risk / lower credit-rated tranches ("mezzanine" and "junior" tranches). Cash flows in an RMBS are structured such that the senior tranches receive the first "cut" of principal / interest payments when those are made, before mezzanine and junior tranches; and generally any losses of principal or shortfalls of interest from the portfolio of loans as a whole are similarly borne starting from the most junior tranches and moving upwards to the senior tranches.

15. Purchasers of RMBS receive interest and principal amounts repaid by the original mortgage borrowers of the individual loans that were pooled into the RMBS, but are also exposed to the risk of those borrowers failing to keep up repayments or defaulting. As such, where a sufficient number of those underlying borrowers fail to make repayments, or (for example) default on their loans, this may ultimately lead to the RMBS suffering a loss. Such losses are felt first by the higher risk / lower credit-rated tranches (i.e. the junior tranches), are often referred to as "writedowns".

CDOs

16. A CDO is a financial instrument that is similar to an RMBS insofar as it pools a number of underlying assets (in this case debt instruments) into an investment vehicle that then issues new bonds or notes to investors. Like RMBS, the securities issued by the CDO are typically divided into tranches with varying interest rates and credit parameters. The assets held by a CDO can be any type of debt obligation, including, but not limited to, corporate debt, RMBS or even tranches of other CDOs.

17. As described in the context of RMBS above, tranches of a CDO will be categorised by risk profile. A CDO is generally divided into multiple tranches, with senior tranches generally the first to receive returns and last to suffer any loss. The point at which a tranche would start to suffer a loss is commonly described as the "attachment point" and expressed as a percentage of the value of the underlying pool of assets. The term "detachment point" is commonly used to describe the point at which a tranche would suffer a total loss.

18. CDOs may be "managed" or "static" in terms of their pools of underlying assets. "Managed" deals require a CDO manager, who, subject to the specific terms of the CDO and within stipulated investment parameters, "manages" the underlying collateral or assets during the life of the CDO by actively trading in the underlying assets – for example, by substituting out non-performing assets. By contrast, a "static" structure generally means that during the life of the CDO the pool of underlying assets is fixed from the outset. This removes the need for a CDO manager, although the initial selection of the portfolio is often made by, or with, the assistance of a manager.

19. It is not always necessary for a CDO to acquire the assets that form the basis of the CDO. Instead, it is possible to create exposure to the chosen assets without purchasing the actual assets via a derivative structure, typically by using a CDS. CDOs constructed in this manner are referred to as synthetic CDOs. The way a CDS works to create this exposure is described below.

CDS and Synthetic CDOs

20. Put simply, a standard CDS is a contract that transfers credit risk associated with a third party entity or asset from one party (the "Protection Buyer") to another (the "Protection Seller"). In consideration for the Protection Buyer paying the Protection Seller periodic premiums, the Protection Seller agrees to pay out an agreed sum contingent on the occurrence of certain defined credit events. If a credit event occurs, this will generally trigger payments from the Protection Seller to the Protection Buyer; this is the "swap" element, as the Protection Buyer has effectively swapped the risk of that credit event with the Protection Seller, such that the Seller has taken on that credit risk in respect of the underlying asset. In many ways, a typical CDS functions similarly to insurance, whereby the Protection Buyer pays an agreed upon premium and the Protection Seller provides a payment if the underlying third party entity or asset defaults, i.e. causes losses.

21. The definitions of credit events are critical parts of CDS documentation as they describe the circumstances in which payments may flow from the Protection Seller to the Protection Buyer and how settlement may occur. Standard RMBS credit events were defined by ISDA, with Protection Sellers making monthly floating payments equal to the incremental losses on the underlying reference assets reported in any given month.

22. In the context of a synthetic CDO, the CDS element is used to create exposure to an asset without the need to purchase the actual asset. Rather than the issuer of the CDO actually acquiring the asset (for example, the portfolio of RMBS), it becomes a Protection Seller, entering into a CDS with a counterparty (the Protection Buyer), which is usually an affiliate of the broker/dealer arranging the CDO. The Protection Seller then has a contractual exposure to the credit risks of the underlying reference asset without actually owning it, and receives compensation/premiums in return from the Protection Buyer. As such, where the reference asset is performing, the CDS counterparty (the Protection Buyer) will make regular payments to the CDO issuer (which, in turn, funds payments to the CDO investors). Following a credit event, however, the CDO issuer will be required to make payment(s) pursuant to the credit protection it has sold to the CDS counterparty (the Protection Buyer), which it funds from the investment made into the CDO by investors, reducing the principal amount of the bonds / notes held by those investors. At the transaction's maturity, the proceeds of the investments (if any) are used to repay the remaining principal amount of the bonds / notes to investors.

23. In order to fund the premiums which it needs to pay to the Issuer under the terms of the CDS, and to hedge its exposure, the counterparty will typically enter into hedging arrangements with other market participants, for example in the form of further CDSs (where the swap counterparty is the Protection Seller). The following section concerning the Notes addresses only the relationship between the Issuer and Noteholders and the Issuer and the swap counterparty and does not address any hedging transactions which took place between the counterparty and other market participants.

CS's RMBS business – a brief outline

24. The RMBS business and RMBS Misconduct allegations are considered discretely in one of the Appendices to this judgment. The key background information about it can be summarised thus.

25. The business model of CS' Structured Products group on the RMBS side (the "RMBS Group") during the Relevant Period was to acquire loans through various acquisition channels and then either to package these loans into RMBS, which Credit Suisse (USA) LLC ("CSSU") sold to investors, or to sell them as part of a portfolio of loans to other financial institutions through "whole loan sales".

26. CS' business of acquiring loans onto its own book was known as the Conduit. The Conduit had four separate "channels", (1) the "Bulk Channel"; (2) the "Mini-Bulk Channel"; (3) the loan-by-loan channel ("LBL Channel"); and (4) the "Wholesale Channel".

27. In respect of loan pools in the Bulk and Mini-Bulk Channels, acquisition was processed by CSSU "Trading Desks". At points during the Relevant Period, the Co-Heads of Non-Agency Trading in the RMBS Group were Mr Daniel and Mr Schoen while Messrs Dodman (Subprime), Schoen (Scratch and Dent), Daniel (Fixed Rate), and Vibert (Adjustable-Rate Mortgage, or "ARM") all headed a desk.

28. The Trading Desk produced a bid price for the loan pool which was offered by the seller. If the bid was accepted by the seller, then CSSU carried out due diligence on the loan package. Sometimes sellers imposed stipulations (called "trade stips") on which the sale of the pool was conditional.

29. Following the due diligence results, CSSU and the seller agreed a final pool of loans it would purchase.

30. Through the LBL Channel, approved sellers could access an online CSSU portal whereby an automated process compared the seller's input loan characteristics with CSSU's acceptable loan parameters and automatically produced to the seller a denial or a purchase price for the loan.

31. The Wholesale Channel process was of CSSU originating its own loans. A broker inputted the prospective loan characteristics into an online portal which automatically issued either an initial approval (with or without conditions) or a denial. If the loan was approved, the broker would be instructed to send the full loan file to a Fulfilment Centre - a third party designated to underwrite CSSU's Wholesale loans subject to criteria given to them.

32. A critical part of the process for the purposes of this dispute was the due diligence ("DD") process, to ensure that loans being acquired and securitised were sufficiently good quality .

33. Other than the Wholesale Channel, where CSSU was the underwriter, CSSU performed pre-acquisition due diligence on loans (sometimes by way of sample

in relation to certain categories of loans). CSSU's due diligence process varied by acquisition channel.

34. Due diligence in the Bulk Channel was overseen by the Credit and Underwriting Group, headed by Mr Sacco, though it was principally "Bulk" due diligence managers such as Mr Nordyk of that group who supervised it. Due diligence in the LBL and Mini-Bulk channels (and underwriting in the case of the Wholesale Channel) was overseen by the Funding and Fulfilment Group, which supervised and was responsible for the Fulfilment Centers. The Head of this group was Mr Othman.

35. Due diligence reviews principally involved three main elements: (1) a credit review; (2) a compliance review; and (3) an appraisal review.

36. In the Bulk Channel, loans were allocated an "event level grade" referred to as EV1, EV2 and EV3 in respect of their credit and compliance review. The import of an EV grade is in issue between the parties.

37. CS operated a Quality Control ("QC") process on loans it acquired. This was run by the Credit and Underwriting Group. QC was a monthly process which involved subjecting a sample (usually 3%) of the total loan volume purchased through the Bulk, Mini-Bulk and LBL Channels and originated through the Wholesale Channel to a QC review.

38. The process of putting together an RMBS deal was a continuum. A part of the process – and generally what one might term an "early stage" part – involved the making of presentations, illustrated by Presentation Slides. To some extent these were put together to educate newcomers to the market or newcomers to business with CS. To some extent of course, since CS was in the business of putting together a successful product the Presentation Slides formed part of a sales effort. The Presentation Slides were not intended as contractual documents. Often it can be seen that points made in the Presentation Slides are summaries, or "jumping off points". The presentation would be oral and in large measure the Presentation Slides were intended to summarise or navigate what was being said. Any representations which came from a presentation would have to be representations which were the result of the oral and slide presentations. Those might coincide and the result might be that a presentation did result in a representation being made in the form of something which appears on a slide. However what was said/shown needs to be assessed against the full background of the presentations and the other documents which succeeded these early stage communications.

39. There were then Offering Documents – namely the Prospectus and the ProSupp. They provided information required by law about the offering of securities. The Prospectus (which has been described as covering a whole "shelf") set out general information, and often indicated a range of possible approaches which could be adopted in the ProSupp for any particular deal. The ProSupp (itself lengthy) "supplemented" that Prospectus with specific information for a particular deal as well as a good deal of material provided for a regulatory purpose in accordance with the SEC's Regulation AB. It provided detail about the structure and nature of the warranties being provided. For example it might explain that the Seller acquired loans from third parties and that, as part of the securitisation, it "*will*

make certain representations and warranties to the depositor and the trustee regarding the mortgage loans", and refer to the repurchase/substitution obligation. It would describe the contracts pursuant to which the RMBS were created - the Pooling and Servicing Agreements ("PSAs") - and summarise representations to be found in that document. It would also contain a number of sections upon which L30 relies indicating that it was a document upon which some reliance was intended to be placed (such as *"you should rely on information contained in this document…"*) and giving (for example) some information about the mortgage pool indicating that the information in the ProSupp was believed to be representative of the characteristics of the loans to be included in the mortgage pool.

40. The securitisation of loans and their offer to investors took place pursuant to a detailed contractual framework, with heavy legal involvement from specialist law firms working with market standard documentation. The relevant contractual (and other) documents for these arrangements extended to many hundreds of pages of carefully drafted text.

41. As just noted, the PSA is the contract pursuant to which the loans were transferred to the trust, and which sets out the terms on which they do so. As L30 submitted, the PSA does not necessarily affect whether representations were made elsewhere. However the PSA must form a part of the context against which the existence of such alleged representations is considered.

42. Each PSA contains a long list of representations and warranties. For example, taking the PSA for CSMC 2007-3, it is a document of nearly 300 pages (with schedules and exhibits). The following features are worthy of note:

    i) The parties were the Seller (DLJ, an affiliate of CSSU), the Depositor (Credit Suisse First Boston Mortgage Securities Corp, another affiliate of CSSU), the Servicers (Wells Fargo, SPS and others) and the Trustee (US Bank);

    ii) The Mortgage Loans were conveyed to the Trustee in trust for the benefit of Certificateholders by the Depositor (who had in turn been assigned the Mortgage Loans by the Seller under an Assignment and Assumption Agreement);

    iii) There is a discrete section which addresses representations and warranties given by the Seller, which are then set out in a series of schedules;

    iv) Under the agreement the Seller makes the representations and warranties applicable to the Mortgage Loans. 29 of these are listed in a schedule. Some are made to the Depositor and some to the Trustee and to others;

    v) These representations/warranties relate to an exceptionally wide range of matters including that:

        a) The Mortgage Loans are not 30 days or more delinquent and that there are no material defaults under their terms;

b) All taxes, insurance premiums, water, sewer and municipal charges which have become due had been paid;

c) Each Mortgage Loan at the time it was made complied in all material respects with applicable federal, state or local laws;

d) The Mortgage Loan complies with all the terms, conditions and requirements of the originator's underwriting standards in effect at the time of origination;

e) The Mortgage File contains each of the documents specified in the PSA;

f) Each Mortgage Loan has a loan-to-value ratio of 100% or less.

vi) The Depositor made only very limited representations concerning the conveyance of good title;

vii) There were no representations about the Seller or the Depositor's knowledge of the state of affairs, or about its procedures;

viii) There is a scheme which addresses the consequences of breach of representation/warranty – the existence of which suggests that the existence of some breaches was regarded as at the very least possible (though it has been described by the Court of Appeals of the Fifth Circuit in *Lone Star Fund v Barclays* as "inevitable"). In summary, upon discovery of any breach that "*materially and adversely affects the interests of the Certificateholders…in any Mortgage Loan*" the party discovering the breach is to give prompt notice of the same, with the Seller promising that within 90 days of such notification of a material and adverse breach, it will either cure the breach, substitute a compliant loan, or repurchase the Mortgage Loan;

ix) Under the terms of the PSA that is the sole remedy:

> "It is understood and agreed that the obligation under this Agreement of any Person to cure, repurchase or substitute any Mortgage Loan as to which a breach has occurred and is continuing shall constitute the sole remedy against such Persons respecting such breach available to Certificateholders, the Depositor, the Trustee or the Trust Administrator on their behalf."

x) The result is that under the PSA the risk of breaches was place on the Seller.

L30 and the Rhineland Programme

43. In 2002, a German bank, IKB Deutsche Industriebank AG ("IKB") established an asset-backed commercial paper conduit which became known as the Rhineland Programme. The Rhineland Programme consisted of a Delaware corporation (the Rhineland Funding Capital Corp or "RFCC") and a series of special purpose companies, most of which were registered in Jersey ("the Rhineland SPCs").

Bedell Trust Company (later known as Ocorian) provided administrative and operational support to the Rhineland Programme, and (along with a then associated law firm, Bedell Cristin), provided professional directors for the Rhineland SPCs. L30 became one of the Rhineland SPCs following its incorporation on 4 January 2007. RFCC issued short-term secured commercial paper and lent the money so raised on to the Rhineland SPCs for them to invest especially in CDOs.

44. At first, IKB itself was responsible for identifying potential investments for the Rhineland SPCs and advising those companies which investments they should purchase. However, in 2006 IKB incorporated a subsidiary called IKB Credit Asset Management GmbH ("IKB CAM") to take over this role, which was returned to IKB upon IKB CAM's dissolution in 2008.

45. The procedure that was followed when IKB CAM made a recommendation was documented in a Tradeable Securities Investment Advisory Agreement dated 21 December 2006 (the "TSIAA"). In summary, the TSIAA provided for IKB CAM to make a recommendation to the Rhineland Programme's Tradeable Securities Investment Committee (the "TSIC"), which would consider and approve the recommendation. The recommendation would then be sent on, together with the TSIC's approval, to a Rhineland SPC whose directors would consider and approve the acquisition of the investment. IKB CAM would then assist the Rhineland SPC to conclude the acquisition of the investment from the seller. Certain administrative tasks, such as the execution of any funding agreement required between the Rhineland SPC and RFCC, would be arranged by Société Générale, the Rhineland Programme's administrator.

46. In addition, IKB was a liquidity facility provider to the Rhineland SPCs. This meant that IKB was obliged to lend the Rhineland SPCs money in certain circumstances, including where a Rhineland SPC lacked the funds to make debt repayments to RFCC.

The Notes: structure

47. L30 purchased the Notes from the Third Defendant ("CSSU") acting through its agent Credit Suisse Securities (Europe) Limited ("CSSEL") for USD 100m in a transaction which was entered into on or around 13 July 2007.

48. The Notes were issued by Magnolia Finance II plc ("Magnolia") and were structured as a synthetic CDO. CSSEL and CSI were the arrangers of the Notes. The underlying reference assets for the CDO were 100 RMBS (described as the "Reference Obligations"). The Reference Obligations were set out in a Reference Obligation Schedule (the "Reference Portfolio") shown in Annex B of a Series Memorandum dated 25 July 2007 ("the Series Memorandum"). The Series Memorandum is a document 196 pages in length.

49. The Series Memorandum had been preceded by Termsheet (i.e. documents setting out draft indicative terms, subject to documentation, pricing, and relevant approvals). The Term Sheets for the proposed Notes sent on behalf of CSI and CSSU to IKB CAM were about 30 pages long. They recorded that the selection of the Reference Obligations for inclusion in the Reference Portfolio was the

responsibility of Principal Global Investors ("PGI"). The Reference Portfolio was (subject to certain adjustment rights) static, i.e. once fixed prior to the sale of the Notes, the Reference Obligations did not change. As such, L30, as the investor / purchaser of the Notes, was exposed to the performance of those 100 RMBS (and their underlying mortgage loans) for as long as it held the Notes.

50. The Notes therefore represented "long" exposure on the part of L30 to the Reference Obligations, in that they broadly simulated a scenario in which it was holding itself the Reference Obligations (subject to their weighting in the Reference Portfolio and to the attachment and detachment point provisions). The exposure to each Reference Obligation was weighted up / down (as appropriate) in the Reference Portfolio such that they each had a notional value of USD 10 million, despite the "original principal amount" of the individual Reference Obligations (which, broadly, reflected the value of each underlying RMBS) being of differing values. As a result of this weighting, the Reference Portfolio had a total notional value of USD 1 billion, reflecting the USD 10 million notional value of each of the 100 Reference Obligations.

51. So, for example, tranche "M5" of the RMBS "*JP Morgan Alternative Loan Trust, Series 2006-S4*" (row 56 of Annex B of the Series Memorandum) had an "original principal amount" of USD 4,375,000 and therefore was weighted upwards by approximately 228.57% to create the synthetic exposure to the notional amount of USD 10 million in the Reference Portfolio. But in respect of the Reference Obligation in the next row (i.e. row 57), its "original principal amount" of USD 43,279,000 needed to be weighted downwards by approximately 23.11% in order to create the USD 10 million notional value.

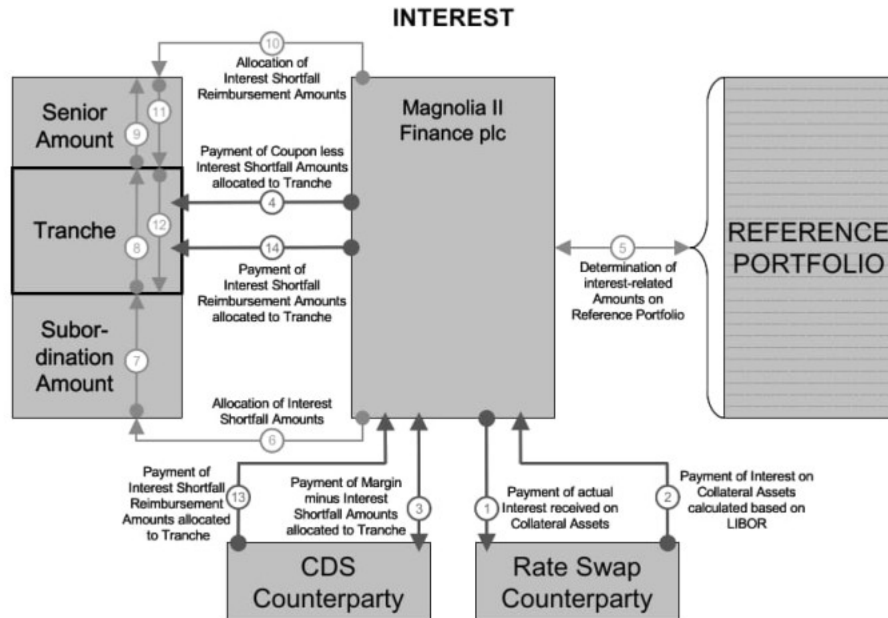
52. The Notes were linked to a tranche of the CDO that had an attachment point of 9% and detachment point of 19%. This meant that the principal value of L30's investment would not be diminished by any negative performance of the Reference Obligations until notional losses on the Reference Portfolio reached USD 90 million (i.e. 9% of USD 1 billion). L30 would suffer a total loss on its investment if the notional losses reached (and stayed at) USD 190 million or more (i.e. 19% of USD 1 billion).

53. The CDO's synthetic exposure to the Reference Obligations was created through an embedded CDS (described in the Series Memorandum as the "Credit Swap Transaction"). The parties to that Credit Swap Transaction were Magnolia (for the CDO, effectively as the Protection Seller) and the Fourth Defendant ("CSAG") acting through its Cayman Islands Branch, as the swap counterparty/Protection Buyer. For this reason, the Notes are sometimes referred to as "the Magnolia Notes".

54. Under the terms of the Credit Swap Transaction, CSAG (acting through its Cayman Islands Branch) would be obliged to make certain fixed payments to Magnolia – and L30 was, in turn, entitled as holder of the Notes to certain payments from Magnolia. In certain circumstances (broadly, those that would amount to a credit event in respect of the Reference Obligations), Magnolia would make payments to CSAG (through its Cayman Islands Branch) to reflect settlement for such credit events in the Reference Portfolio. These processes were complex, and are described in detail in the Series Memorandum – but, in essence,

if the RMBS performed, L30 would receive the equivalent of interest payments and repayments of principal, while if the RMBS did not perform, then such payments would not be received (or would be received in reduced amounts), and the value of L30's principal investment (described in the Series Memorandum as "Aggregated Outstanding Principal Amount") in the Notes would also fall.

55. The structure of the Notes can be summarised in graphic form thus (a diagram to which L30 frequently made reference as highlighting the exposure of L30 to the credit risk of the RMBS):



The CDO Transaction: proposal and discussions

56. Prior to the CDO Transaction which forms the basis of these proceedings, IKB and IKB CAM had worked frequently with CS in relation to synthetic CDO transactions. Loreley special purpose vehicles purchased more than 150 CDOs before this transaction.

57. Following a meeting with CS employees in December 2006 during which Mr Volker de Haan of IKB CAM expressed interest in investing in further CDO transactions, Mr Bernard Stroobandt (of CSSEL) provided various indicative proposals during the early months of 2007. IKB CAM in turn provided its feedback on these proposals. To give context, the bundle of documents relating to the CDO runs to 991 documents.

58. By May 2007, CS had formulated outline terms of a new synthetic CDO to be issued with the involvement of PGI, which would act as manager (if the tranches were to be managed, which was at that stage still to be determined). PGI was also intending to purchase certain junior notes in the proposed CDO for its own account and/or accounts managed by it.

59. On 16 May 2007, Mr Stroobandt sent Mr Jörg Zimmermann of IKB CAM an email with an initial proposal for a bespoke synthetic CDO, with the pool either selected by PGI (in static format) or managed by PGI (in managed format). The 16 May email explained that the tranche being offered was:

> "USD 105,000,000 Aaa/AAA (Moody's, S&P) tranche. No investment in AA required.
>
> Spread: 1.40% in managed format or at **1.60% in static format**
>
> Pool. Min Rating A2"

60. Attached to the 16 May email was a term sheet (the "16 May Termsheet") and a spreadsheet with a list of the proposed constituents of the Reference Portfolio entitled "PGI Pool.xls" (the "RMBS Spreadsheet").

61. The 16 May Termsheet Stated on its front page that:

    i) The proposed CDO would be managed by PGI;

    ii) It would have a "*Reference Obligation Notional Amount*" of US$1 billion;

    iii) The issuer would be Magnolia;

    iv) The Notes would have an attachment point of 8.5% and a detachment point of 19% (and therefore a principal amount of US$105 million);

    v) The initial Reference Portfolio would consist of the 100 RMBS listed in the appendix to the document (92% subprime, 8% Alt-A), all of which were assigned a credit rating of "A2/A or higher"; and

    vi) The rating of the Notes would be "Aaa/AAA" ("*[s]ubject to change due to continuing data integrity checks related to the characteristics of the Reference Portfolio and pending feedback from the rating agencies*").

62. It then contained a page entitled "Important Notices" and consisting of various disclaimers (see page 4 of the 16 May Termsheet). This:

    i) Set out information about PGI, the proposed portfolio and the proposed Credit Default Swap embedded in the Notes;

    ii) Contained, in Section III (entitled "Portfolio Manager"), the subheadings "Disciplined Portfolio Construction" and "Credit Analysis", under the latter of which appeared the bullet point "*Fundamental analysis with internal ratings*";

    iii) Set out in Section VI (entitled "Certain Risk Factors") various risk warnings beneath the statement: "*Before making an investment decision, prospective investors in the Notes should consider carefully, in the light of their own financial circumstances and investment objectives, all the information set forth in the Series Memorandum and the final transaction documents, including the risk factors described therein*";

iv) Included the following description of "risk factors":

"**Risky Investment:**	Investing in the Notes involves substantial risks and is suitable only for sophisticated investors who have the knowledge and experience in financial and business matters necessary to enable them to evaluate the risks and the merits of an investment in the Notes. The Notes will not be principal protected and investors in the Notes are exposed to full loss of principal. Only prospective investors who can withstand the loss of their entire investment should buy the Notes.
[…]	
Asset Backed Securities Market:	The Reference Obligations will consist of asset backed securities, which are subject to a variety of risks that may adversely affect creditworthiness and/or performance of the Issuer and that could adversely affect demand for the Notes generally. Each prospective investor must make its own independent determination of the value and credit quality of the Reference Obligations.
Reference Portfolio Composition and Portfolio Considerations:	Any illustrative calculations and note breakeven information herein, or in a supplement hereto, is based on a hypothetical profile of the Reference Portfolio constructed on the basis of securities which could be representative of the Reference Portfolio to which the Issuer has exposure. The profile of the final Reference Portfolio is likely to be different, perhaps materially, from that included in the hypothetical profile used for modeling purposes. The Reference Portfolio will generally be made up of mezzanine grade residential mortgage-backed securities.

Residential Mortgage-Backed Securities:	On the Closing Date, the Reference Portfolio will consist predominantly of asset-backed securities that are residential mortgage-backed securities. Residential mortgage-backed securities represent interests in pools of residential mortgage loans secured by one- to four-family residential mortgage loans, including second lien mortgage loans. Residential mortgage loans are obligations of the borrowers thereunder only and are not typically insured or guaranteed by any other person or entity. The rate of defaults and losses on residential mortgage-backed securities will be affected by factors affecting the underlying residential mortgages, including general economic conditions and those in the area where the related mortgaged property is located, the borrower's equity in the mortgaged property and the financial circumstances of the borrower.
[…]	
Credit Ratings:	Credit ratings of debt securities represent the rating agencies' opinions regarding their credit quality and are not a guarantee of quality. Rating agencies attempt to evaluate the safety of principal and interest payments and do not evaluate the risks of fluctuations in market value and, therefore, credit ratings may not fully reflect the true risks of an investment. Also, rating agencies may fail to make timely changes in credit ratings in response to subsequent events, so that an issuer's current financial condition may be better or worse than a rating indicates. Consequently, credit ratings of the reference obligations will be used only as a preliminary indicator of investment quality".

v) It also explained that the terms set out in the 16 May Termsheet were draft indicative terms which would be superseded by the Series Memorandum, Programme Memorandum and other documentation with respect to the Notes.

63. The proposed Reference Portfolio set out in the 16 May Termsheet (and attached in the RMBS Spreadsheet) comprised the same 100 RMBS as ultimately made up the Reference Portfolio for the CDO Transaction (i.e. the Reference Obligations). The Reference Obligations included 7 RMBS in the securitisation of which the Defendants or their affiliates had played some role (i.e. the CS RMBS).

64. The RMBS Spreadsheet provided details of 100 Reference Obligations and indicated that each such Reference Obligation carried a Moody's credit rating of A2 or higher and a Standard & Poor's credit rating of A or higher. It also set out information regarding the characteristics of the underlying pools of mortgage loans contained within each of the 100 RMBS, including in relation to: (i) FICO score (a form of credit score), (ii) loan to value ratios ("LTVs"), (iii) occupancy, (iv) property type, and (v) delinquency performance. The first tab of the RMBS Spreadsheet, entitled "*Important Notices and Disclaimers*", contained *inter alia* the words:

> "Information and opinions presented in this material have been obtained or derived from sources believed by Credit Suisse to be reliable, but Credit Suisse makes no representation as to their accuracy or completeness. Credit Suisse accepts no liability for loss arising from the use of this material. Nothing in this material constitutes investment, legal, accounting or tax advice, or a representation that any investment or strategy is suitable or appropriate to your individual circumstances".

65. On or around 29 May 2007, Mr Zimmermann confirmed that IKB CAM wished to proceed in relation to the "AAA" tranche in the prospective CDO Transaction only. He also said that it preferred a static, rather than managed, format. He asked that the 16 May Termsheet be updated to reflect those changes and to give IKB CAM the right to substitute alternative RMBS for the Reference Obligations, provided that the substitutions did not affect the mark-to-market value of the portfolio. This led to the preparation of a revised termsheet which was sent to Mr Zimmermann by Mr Stroobandt on 30 May 2007 (the "30 May Termsheet"). Amongst other changes, the 30 May Termsheet no longer addressed Series B or C notes (since it was now clear that IKB CAM was not interested in these) and the former Section III ("Portfolio Manager") was replaced with two new sections entitled "Portfolio Selection" and "Noteholders' Removal and Substitution Rights" respectively (as the transaction was no longer to be managed). No change was made to the risk factors and disclaimers quoted above.

<u>IKB CAM's evaluation of the CDO transaction</u>

66. Meanwhile, following provision of the proposed Reference Obligations with the 16 May Termsheet, IKB CAM had begun its analysis of the proposed transaction. One of L30's main witnesses, Dr Bauknecht described how this included feeding

data provided by CS in relation to the Reference Obligations into the "CDOROM" software provided by Moody's Investors Service Limited ("Moody's"). This software was a risk modelling tool, to evaluate the credit risk of the proposed transaction. One of the purposes of this exercise was to determine the likely impact of raising the attachment point from 8.5% to 9%, which IKB CAM was contemplating. CS also provided IKB CAM with access to its proprietary analytics platform called "Locus", which provided some information as to the characteristics of the underlying pools of mortgage loans for the Reference Obligations, including the distribution of FICO score, LTVs and second liens.

67. IKB CAM also requested, and CSSEL provided, various additional information regarding the Reference Obligations. In particular:

    i) On or about 16 May 2007, Mr de Haan asked about the proportion of the loans securitised into each Reference Obligation which were secured by a second lien mortgage. Relevant data was provided to him by Mr Stroobandt on 18 May 2007;

    ii) On 22 May 2007, Mr Zimmermann asked Mr Stroobandt to provide, for each Reference Obligation, the Moody's rating for its servicer and its current CDS spread. Mr Stroobandt sent him this information on 23 May 2007;

    iii) On 29 May 2007, Mr Zimmermann asked Mr Stroobandt to provide "cash flow runs" for the Notes. These were sent to him by Mr Stroobandt on 30 May 2007;

    iv) On 31 May 2007, Mr Zimmermann asked Mr Stroobandt to provide "write ups" (i.e. short descriptions of an RMBS) for eight of the Reference Obligations. Mr Stroobandt provided these later that day.

68. Mr Zimmermann and his colleague Mr Hubert Langer (who was a credit analyst) then prepared a document entitled "*INVESTMENT PROPOSAL for 'Magnolia II CDO' to Rhineland Funding Capital Corp.*" dated 31 May 2007 (the "Investment Proposal"). The Investment Proposal provided an overview of the proposed transaction and set out the results of IKB CAM's analysis of the Reference Obligations and its evaluation of the CDO structure. The Investment Proposal set out IKB CAM's analysis of the expected losses and loss coverage ratios for all 59 bonds for which CS had provided information and statistical data through its "Locus" platform, which included some but not all of the Twelve CS RMBS.

69. Having considered the risks, IKB CAM recommended an investment of US$100 million in the Notes. The recommendation was said to be based on: "*the good risk-return-profile for the Class [A] (Aaa/AAA) yielding up to 150bps*" and "*the underlying portfolio constraints (minimum rating of A2)*", i.e. the fact that each of the 100 RMBS in the proposed Reference Portfolio was assigned a credit rating of A2 or higher. A strength of the proposed transaction was identified as: "*Rating levels of underlying assets (min. A2/A rating)*". Two conditions were identified, namely: "*1. Subject to Documentation (Legal Department of IKB CAM). 2. Rating*

Agency Confirmation for the proposed Ratings on the Notes by Moody's and S&P".

70. On 5 June 2007, the proposed investment was presented to IKB CAM's Investment Committee, which comprised Messrs Frank Braunsfeld, Frank Lehrbass and Claus-Dieter Wagner, with Messrs Zimmermann and Langer also present. The IKB CAM Investment Committee decided to recommend that (subject to the same two conditions mentioned above) one of the Rhineland SPCs (which was not at that stage identified) should purchase US$100 million of Notes, as recorded in IKB CAM's Record of Recommendation. The decision was communicated to CSSEL that day by Mr Zimmermann, who informed CS that the purchase had been recommended to a Rhineland SPC.

71. On or by 11 June 2007, the recommendation of IKB CAM's Investment Committee was approved by three members of IKB CAM's Advisory Board (Mr Ortseifen, Mr Braunsfeld and Mr Wagner).

<u>Credit Suisse hedging arrangements</u>

72. As had been explained in an email from CSSU's Mr Roland Jawurek on 17 May 2007, which was forwarded to Mr Zimmermann on the same day by Mr Martin Rudolph, CSSU stated that it planned to hedge the short exposure to the CDO tranches under the CDS embedded in the CDO.

73. On 6 and 7 June 2007 and following IKB CAM's communication of its recommendation in relation to the CDO Transaction, Mr Jean Francois Dreyfus of CS's Correlation Trading (US) desk acting on behalf of CS AG Cayman branch entered into delta hedges with Mr David Higgs' Hedge Trading (EUR/US) desk acting on behalf of CSI in relation to the CDO to reflect the anticipated sale of the Notes.

<u>L30's approval of the purchase of the Notes</u>

74. By 11 June 2007, IKB CAM had identified L30 as the appropriate Rhineland SPC to purchase the Notes. On that date, it wrote to L30, Société Générale (which was responsible for administering the Rhineland SPCs), Wilmington Trust SP Services Ltd and RFCC recommending the CDO Transaction, enclosing a copy of IKB CAM's Investment Proposal and Record of Recommendation, and asking that the prospective investment be considered by the TSIC.

75. On 11 June 2007, three officers of the TSIC (Messrs Mark Filer, Wolfgang Güth and Andrew Watt) wrote to L30 confirming that they had considered the recommendation and were satisfied that the CDO Transaction: (1) fell within the applicable credit and investment policy; and (2) would be in L30's best interests. This letter stated that any decision to invest "*shall solely be a decision of [Loreley 30]*".

76. On 15 June 2007, short notice was given that a board meeting of L30 would be held to consider and, if deemed fit, approve the CDO Transaction. The meeting, attended by Mr Paul Anderson (as alternate for Mr Alan Dart) and Ms Rebecca Bates (as alternate for Mr Edward Buckland), both professional directors

provided by Bedell Cristin Trust Company, took place the same day and entry into the CDO Transaction was approved. According to the minutes of this meeting:

i) The Chairman "*tabled a letter plus enclosures dated 11 June 2007… from the Investment Adviser*", namely the letter (and enclosures) referred to above;

ii) The Chairman "*tabled a Notification of review dated 11 June 2007… from the duly delegated members of the Investment Committee*";

iii) The board approved the intended purchase of the Notes, "[a]*fter full consideration of*" the documents referred to "*and noting in particular, (i) the good risk-return profile for the Class A (Aaa/AAA) yielding up to 150 bps [and] (ii) the underlying portfolio constraints (minimum rating of A2)*".

The negotiation of the transaction documentation

77. On 25 June 2007, CSSU's Mr Fiachra O'Driscoll sent Mr Zimmermann a draft of the Series Memorandum for the CDO Transaction ("the 25 June Draft"). The 25 June Draft was marked as a draft, "*Subject to completion dated […] June 2007 PRELIMINARY SERIES MEMORANDUM*" and bore, in red letters, the following warning:

> "The information in this preliminary prospectus is not complete and may be changed. This preliminary prospectus is not an offer to sell these securities, and it is not soliciting an offer to buy these securities, nor shall there be any sale of these securities in any jurisdiction where the offer or sale thereof is not permitted, nor has it been approved by the Irish Stock Exchange or the Irish Financial Services Regulatory Authority".

78. The 25 June Draft also:

i) Stated on page 2 (square brackets in the original):

> "It is expected that, on the relevant Issue Date, each of the Series [3A1] Notes will be rated "Aaa" by Moody's Investors Service Limited or any successor to its credit ratings business ("Moody's") and "AAA" by Standard & Poor's Rating Services, a division of The McGraw-Hill Companies, Inc. or any successor to its credit ratings business ("S&P")".

ii) Stated on page 4:

> "Save as provided below, the Issuer [i.e. Magnolia] has taken all reasonable care to ensure that the information contained in this Series Memorandum is true and accurate in all material respects and that in the context of the issue of the Notes, there are no other material facts which would make misleading any statement herein or in the Programme Memorandum.

> The Issuer accepts responsibility for the information contained in this Series Memorandum (save for the section entitled "*Information Relating to Counterparty*") and to the best of the knowledge and belief of the Issuer (which has taken all reasonable care to ensure that such is the case), the information contained in this Series Memorandum is in accordance with the facts and does not omit anything likely to affect the import of such information".

iii) Had a heading "*Investor Suitability*" on page 18, beneath which it stated:

> "…Before making an investment decision, prospective purchasers of, or investors in, any Series of Notes should conduct such independent investigation and analysis regarding the Issuer, such Notes, each of the Reference Obligations (as defined in Appendix A to the section of this Series Memorandum entitled "Credit Swap Transaction" herein), each obligor in relation to the Charged Assets (as defined herein) securing such Notes (including the Investment Provider and the Custodian), the Counterparty under the related Charged Agreements and all other relevant persons and such market and economic factors as they deem appropriate to evaluate the merits and risks of an investment in such Notes. As part of such independent investigation and analysis, prospective purchasers of, or investors in a Series of Notes should consider carefully all the information set out in this Series Memorandum, including the considerations set out below, and the Programme Memorandum.
>
> Investment in a Series of Notes is only suitable for investors who have the knowledge and experience in financial and business matters necessary to enable them to evaluate the information contained in this Series Memorandum and the merits and risks of an investment in such Notes in the context of the investor's own financial, tax and regulatory circumstances and investment objectives".

iv) Contained a section entitled "RISK FACTORS", which started on page 19, and contained a number of statements, some of which are set out below;

v) Under the heading "The Arrangers' and the Counterparty's business activities may create conflicts of interest between them and you" on page 22, stated:

> "Certain of the Reference Obligations (including the underlying real estate obligations backing the Reference Obligations) may comprise or consist of obligations of issuers or obligors, or obligations sponsored or serviced by companies, for which the Arrangers, the Counterparty or one of their affiliates have acted as underwriter, agent, placement agent or dealer or for which one of their affiliates has acted as lender or provided other commercial or investment banking services. In

addition, the Arrangers, the Counterparty or one of their affiliates may act as Auction Agent (as defined herein) in an Auction (as defined herein). The Arrangers, the Counterparty or one of their affiliates may act as placement agent and/or initial purchaser in other transactions involving issues of collateralised debt obligations or other investment funds with assets similar to those of the Issuer, which may have an adverse effect on the Notes.

[…]

The Counterparty and its affiliates may deal in any obligations or other securities of any Reference Entity (including, but not limited to, any Reference Obligations) or any borrower or issuer of the underlying real estate obligations backing the Reference Obligations (an "Underlying Obligor"), may enter into other credit derivatives involving entities that may include the Reference Entities, Underlying Obligors or their affiliates or sponsors (including credit derivatives to hedge its obligations under a Credit Swap Transaction), may accept deposits from, make loans or otherwise extend credit to, and generally engage in any kind of commercial or investment banking or other business with, any Reference Entity, Underlying Obligor, any affiliate or sponsor of any Reference Entity, Underlying Obligor or any other person or other entity having obligations relating to any Reference Entity, the Underlying Obligor or affiliate or sponsor of such Reference Entity or Underlying Obligor, and may act with respect to such business in the same manner as if such Credit Swap Transaction did not exist, regardless of whether any such relationship or action might have an adverse effect on any Reference Obligation (including, without limitation, any action which might constitute or give rise to a Credit Event), or on the position of the Issuer, the related Noteholders or any other party described herein or otherwise. The Counterparty and its affiliates may, whether by reason of the types of relationships described herein or otherwise, on the date hereof or at any time hereafter, be in possession of information in relation to any Underlying Obligor, Reference Obligation, Reference Entity or any of such Reference Entity's sponsors or affiliates, that is or may be material in the context of the Credit Swap Transactions and the other Transaction Documents and that may or may not be publicly available or known to the other parties to the Transaction Documents and which information the Counterparty or such affiliates may be prohibited from using for the benefit of the Issuer. A Credit Swap Transaction and the other Transaction Documents do not create any obligation on the part of the Counterparty and its affiliates to disclose to any other such party any such information (whether or not confidential)".

vi) Under the heading "You have no rights in the Reference Obligations or any Charged Assets" on page 24, stated:

> "…This Series Memorandum is not intended to and does not provide any financial or other information with respect to any Reference Entity or any obligor of any of the Charged Assets or any financial or other risks relating to the business or operations of any Reference Entity or obligor of any of the Charged Assets in general, or to the obligations of any Reference Entity or obligor of any of the Charged Assets in particular.
>
> None of Magnolia, the Arrangers nor any of their respective affiliates assumes any responsibility for the adequacy or accuracy of any information about any Reference Entity or obligor of any of the Charged Assets (including any Investment Provider) contained in any publicly available filings of the Reference Entity or obligors (including any Investment Provider) of any Charged Assets".

vii) Under the heading "No provision of information in relation to the Reference Obligations or any obligor of any Charged Assets" on page 25, stated:

> "Other than as explicitly set out in this Series Memorandum and the Programme Memorandum, neither Magnolia nor the Counterparty nor any of their respective affiliates (i) has provided or will provide prospective investors in any Series of Notes with any information or advice with respect to any Reference Obligation, any Charged Assets or their obligor(s) or itself or Investment Provider or the Custodian or (ii) makes any representation as to the credit quality of any Reference Obligation, any Charged Assets or their obligor(s) or itself or any Investment Provider or the Custodian. Further, Magnolia and either of the Arrangers, the Counterparty or any of their respective affiliates may have acquired, or during the term of the Notes may acquire, information (public and non-public) with respect to any Reference Obligation, any Charged Assets or their obligor(s) or itself or any Investment Provider or the Custodian which will not be disclosed to you".

viii) Under the heading "Credit Ratings" on page 28, stated:

> "Credit ratings of debt securities represent the rating agencies' opinions regarding their credit quality and are not a guarantee of quality. Rating agencies attempt to evaluate the safety of principal and interest payments and do not evaluate the risks of fluctuations in market value; therefore, credit ratings do not fully reflect the true risks of an investment. Also, rating agencies may fail to make timely changes in credit ratings in response to subsequent events, so that an issuer's current financial condition may be better or worse than a credit rating indicates".

ix) Under the heading "RMBS Securities" on page 29, stated:

> "The Reference Obligations will consist of residential mortgage-backed securities ("RMBS Securities") backed by subprime, midprime and prime mortgage loans, which are subject to a variety of risks that may adversely affect creditworthiness and/or performance of the Issuer that in turn could adversely affect demand for the Notes generally. Each prospective investor must make its own independent determination of the value and credit quality of the Reference Obligations".

x) Contained (starting at page 34) a section entitled "TERMS AND CONDITIONS" under which it was stated that "*The following are the terms and conditions (the "Conditions") of each Series of Notes in the form in which they will be set out in the Constituting Instrument (as defined below) applicable to such Series of Notes and endorsed on the Notes of such Series in definitive registered form (if any);*"

xi) Contained, in Section 1(e) of the Terms and Conditions (on page 39), certain representations which were deemed to have been made and agreed by each purchaser of Notes including:

> "(1) it has such knowledge and experience in financial and business matters that it is capable of evaluating the merits, risks and suitability (including for tax, legal, regulatory, accounting and other financial purposes) of its prospective investment in such Notes and/or has consulted with its own legal, regulatory, tax, business, investment, financial and accounting advisers to the extent it has deemed necessary;
>
> (2) it has made its own investment decisions based upon its own judgment and upon any advice from such advisers as it has deemed necessary and has determined that an investment in such Notes is suitable and appropriate for it;
>
> […]
>
> (4) it is able to bear any loss in connection with such Notes (including loss of the entirety of its original principal investment) and is otherwise capable and willing to assume such risks;
>
> (5) in making such investment it is not relying on the advice or recommendations of or any view expressed by the Issuer or the Arrangers or any of their affiliates (or any representative or agent of any of the foregoing);
>
> (6) it has received and read the Programme Memorandum and this Series Memorandum and/or has been given the opportunity to review all such documentation and all other documentation relating to such Notes (including, without limitation, the

> documentation comprising the related Charged Agreements, the related Constituting Instrument and all documentation incorporated by reference therein) at the offices of the Arrangers and it understands all such documentation read by it including in particular, but without limitation, the sections of this Series Memorandum headed "Investor Suitability" and "Risk Factors"".

79. On 5 July 2007 and 7 July 2007, Mr Thomas Schirmer, an in-house lawyer employed by IKB CAM, provided CS with detailed comments on the drafting of the 25 June Draft.

80. On 9 July 2007, Mr Zimmermann informed Mr Stroobandt that the Rhineland SPC which would purchase the Notes would be L30. That same day Mr Jawurek responded to Mr Schirmer setting out CSSU's responses to Mr Schirmer's comments on the 25 June Draft, which included suggestions for changes to that document. Mr Schirmer replied with some further comments on 10 July 2007. These exchanges led CSSU to prepare a further draft of the Series Memorandum, which Mr Jawurek sent to Messrs Schirmer and Zimmermann on 11 July 2007 ("the 11 July Draft"). The 11 July Draft again contained (inter alia) the statements quoted at paragraph 78 above, save that the passage corresponding to that quoted from page 2 of the 25 June Draft omitted the words "*It is expected that*".

81. Some limited changes were made to the 11 July Draft on 12 July 2007 and 13 July 2007 following further discussions between Messrs Jawurek, Schirmer and Zimmermann, including to reflect the fact that Standard & Poor's Rating Services ("S&P") would rate the Notes "*AAA/watch negative*" on the issue date rather than "AAA".

82. On 13 July 2007, Mr Jawurek sent Mr Zimmermann (and others) what his email described as "*the final, black Series Memorandum*".

83. The definitive version of the Series Memorandum, as filed with the Irish Stock Exchange, was dated 25 July 2007.

<u>Interactions with the rating agencies</u>

84. Meanwhile, in parallel with its interactions with IKB CAM, CS was in contact with Moody's and S&P in relation to their provision of ratings for the CDO Transaction.

85. As far back as 27 April 2007, Mr Yale Chang had individually informed S&P's Mr Christopher Meyer and Moody's Ms Min Xu that what would become the CDO Transaction was expected to proceed. His emails to each were in closely similar form, outlining the capital structure of the proposed CDO Transaction, explaining that the expected closing date was 22 May 2007 and attaching some analysis of the transaction in spreadsheet form. However, the spreadsheet attached to the email to Mr Meyer had been generated using S&P's "CDO Evaluator" software, whilst that attached to the email to Ms Xu made use of Moody's equivalent, CDOROM.

86. Ms Xu quickly responded, requesting the CUSIPs (unique identifying numbers assigned to securities) for the Reference Obligations. These were provided by Mr Chang the same day.

87. Having analysed the portfolio, Mr Meyer provided S&P's preliminary feedback on the Reference Obligations on 1 May 2007 in the form of five spreadsheets. In later exchanges on 11 June 2007, Mr Meyer confirmed that the results had not changed because there had been no "rating migration" affecting the Reference Obligations since early May.

88. The next material interaction with the rating agencies took place at the time of the 25 June Draft, when Mr Meyer and Ms Xu provided input into the drafting of the Series Memorandum. In particular, on 25 June 2007 Mr Meyer asked that a notice of any "Adjustment" (as defined) should be required to be sent to a specified S&P email address, whilst Ms Xu provided various comments on rating-related aspects of the drafting. These comments were reflected in the 11 July Draft. Ms Xu then provided further drafting comments on the 11 July Draft on 12 July 2007, which were again reflected in subsequent versions of the Series Memorandum.

Final ratings and L30's purchase of the Notes

89. On 12 July 2007, Moody's provided a signed rating letter to be held in escrow whilst S&P sent CS a draft rating letter for the CDO Transaction.

90. The CDO Transaction was entered into during a telephone call between Mr Jawurek and Ms Inna Ivanova of Société Générale, which took place at approximately 2pm UTC on 12 July 2007, with a settlement date of 13 July 2007. A written confirmation of the trade was faxed to IKB and L30 at 3.02pm on 12 July 2007. As reflected in the trade confirmation, L30 purchased the Notes from CSSU, which acted through its agent, CSSEL.

91. Finally, on 13 July 2007:

    i) The board of Magnolia (Mr Michael Whelan and Ms Jennifer Coyne, professional directors supplied by Deutsche International Corporate Services (Ireland) Limited as the administrator of Magnolia) voted to approve the issuance of the Notes, with an issue date of 13 July 2007. The minutes of this meeting record inter alia that the board of Magnolia accepted a proposal from CSI to issue the Notes, that the board of Magnolia had thereby approved on behalf of Magnolia the documents presented to them including the Series Memorandum, and that CSI was "*authorised to distribute copies of the Programme Memorandum relating to the Programme and Series Memorandum and to offer the Notes for sale on behalf of the Company in accordance with the terms thereof*";

    ii) Moody's released its letter assigning the Notes a rating of "Aaa";

    iii) S&P issued a finalised rating letter which gave the Notes a rating of "AAA/Watch Neg"; and

iv) The transaction documents were executed, the Notes being issued to CSSU and then transferred to L30 pursuant to the trade confirmation.

92. In light of S&P's decision to impose the "watch negative" on its rating, Mr Jawurek agreed with Mr Zimmermann immediately prior to closing that the attachment point of the Notes would be increased if, following S&P's review, that action was necessary to raise the S&P credit rating to "AAA". However, S&P's review resulted in the removal of the "watch negative" and the affirmation of its "AAA" rating on 24 July 2007 without the need for any such step.

<u>The rescue of the Rhineland Programme by KfW</u>

93. From 27 to 29 July 2007, less than a fortnight after the conclusion of the CDO Transaction, IKB experienced what it later described as a "crisis weekend". There were doubts about IKB's liquidity situation and, to stabilise the situation, the German public sector banking institution Kreditanstalt für Wiederaufbau ("KfW") assumed (inter alia) IKB's liquidity commitments to the Rhineland Programme, amounting to €8.1 billion. Four of IKB's board members left the bank as a consequence of this crisis. PricewaterhouseCoopers was instructed to undertake a special review of IKB's business and made findings critical inter alia of the Rhineland Programme's risk management, portfolio monitoring and excessive concentration on subprime investments.

94. As a result of the rescue and its assumption of IKB's obligations, KfW became a liquidity facility provider to the Rhineland SPCs, including L30, and their largest creditor.

95. Following a subsequent restructuring of the Rhineland Programme in 2012, KfW became the sole liquidity provider and sole substantial creditor to the Rhineland SPCs.

<u>The performance and redemption of the Notes</u>

96. According to notices issued to the Noteholders by Magnolia, between about the beginning of October 2008 and the end of April 2009 CSAG delivered to Magnolia a series of Floating Amount ("Writedown") Notices relating to (inter alia) certain of the Reference Obligations.

97. Between L30's purchase of the Notes and 28 April 2010, certain Writedowns (i.e. realised losses in view of the non-performance of the Reference Obligations, as defined in page 144 of the Series Memorandum dated 25 July 2007) occurred in respect of Reference Obligations. These resulted in the triggering of CDS credit events. Consequently, Magnolia, as Protection Seller, was obliged to make payments to CSAG (through its Cayman Islands Branch) as Protection Buyer, with the result that the Aggregated Outstanding Principal Amount of the Notes held by L30 was reduced. As a result of the performance failures amongst the 100 Reference Obligations, that Aggregated Outstanding Principal Amount reached zero in March 2009, at which point the original USD 100 million principal value had been paid to CSAG under the CDS.

98. By the end of April 2009, therefore the "*Aggregate Outstanding Principal Amount*" of the Notes (as defined in Condition 7(d) of the Notes) had been reduced to zero, at which it remained thereafter. On 26 April 2010, CSAG delivered to Magnolia a Notice of Redemption, notifying it that the Notes had been redeemed without payment. The Notes were delisted from the Irish Stock Exchange with effect from 28 April 2010, as it was a mandatory redemption condition of the Notes that they would be redeemed without payment in these circumstances (see Condition 7(b)(4) of the Notes in the Series Memorandum).

99. In 2008, KfW put in place a press monitoring and/or alert system "*to capture information on developments relating to the financial crisis"*. As will be explained further below, from 2008 onwards it also instructed both UK and US lawyers to, as Mr Bulgrin put it, *"provide advice on potential legal avenues in both jurisdictions including what potential claims may be available at a general level in connection with SPC assets"*, and later to provide updates on litigation relating to the financial crisis.

The US Department of Justice Settlement

100. From about 2009 the US Department of Justice ("DoJ") began to take an interest in deals involving RMBS, setting up an RMBS Working Group. In due course the investigations encompassed CS.

101. In January 2017 the DoJ announced a $5.28 billion settlement with CS, related to CS's conduct in the packaging, securitization, issuance, marketing and sale of RMBS between 2005 and 2007.

102. That settlement and the press release which accompanied it ("the 2017 Press Release"), formed an important plank of L30's case. It might indeed be said to be a foundational document for L30, with its case in closing starting with another detailed look at the document. L30 says that the Statement of Facts ("SoF") which accompanied the settlement contains admissions of fraud. It takes the DoJ Settlement and those alleged admissions as its starting point. It says that "*CS' protestations of innocence ring hollow in light of that settlement.*". The contents of those documents are therefore of some moment.

103. The 2017 Press Release, dated 18 January 2017, said this:

> "Credit Suisse Agrees to Pay $5.28 Billion in Connection with its Sale of Residential Mortgage-Backed Securities
>
> The Justice Department announced today a $5.28 billion settlement with CS related to CS's conduct in the packaging, securitization, issuance, marketing and sale of residential mortgage-backed securities ("RMBS") between 2005 and 2007. The resolution announced today requires CS to pay $2.48 billion as a civil penalty under the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA").
>
> Today's settlement underscores that the Department of Justice will hold accountable the institutions responsible for the financial crisis of 2008" said Attorney General Loretta E

> Lynch. "Credit Suisse made false and irresponsible representations about residential mortgage-backed securities, which resulted in the loss of billions of dollars of wealth and took a painful toll on the lives of ordinary Americans.
>
> Credit Suisse claimed its mortgaged backed securities were sound, but in the settlement announced today the bank concedes that it knew it was peddling investments containing loans that were unlikely to fail" said Principal Deputy Associate Attorney General Bill Baer. "That behavior is unacceptable. Today's $5.3 billion resolution is another step towards holding financial institutions accountable for misleading investors and the American public.
>
> This settlement includes a statement of facts which CS has agreed. That statement of facts describes how CS made false and misleading representations to prospective investors about the characteristics of the mortgage loans it securitized".

104. The SoF accompanying the announcement, agreed by CS, contains the following passages[2]:

> "[1] From May 2005 through 2007, Credit Suisse Securities (USA) LLC, itself and through certain of its U.S affiliates (collectively "Credit Suisse", securitized hundreds of thousands of residential mortgage loans into residential mortgage-backed securities ("RMBS"). It sold these RMBS for tens of billions of dollars to investors. In marketing and selling its RMBS, Credit Suisse made numerous representations about the quality and characteristics of the underlying loans. These representations were made to RMBS investors and potential investors, ratings agencies and others. As described below, in the diligence process, Credit Suisse repeatedly received information indicating that many of the loans reviewed did not conform to the representation that would be made by Credit Suisse to investors about the loans to be securitized. …
>
> *II. Credit Suisse's Representation to Investors*
>
> [4] In connection with its RMBS offerings on principal transactions, Credit Suisse made representations about the loans it securitized. Those representations often varied from securitization to securitization. Credit Suisse made representations that, among other things:
>
> 1. The loans were originated generally in accordance with applicable underwriting guidelines, with exceptions to

[2] The full text is available at:

https://www.justice.gov/d9/press-releases/attachments/2017/01/18/annex_1_-_statement_of_facts.pdf

those guidelines being made when sufficient compensating factors were demonstrated by a prospective borrower.

2. For each loan, a determination had been made by the originator that the borrower had the ability to repay the monthly obligations on the loan and other debts.

3. Beginning in early 2006, Credit Suisse modified its representation in certain offering documents to state that each Correspondent loan was "in fact" originated in accordance with Credit Suisse's underwriting guidelines or guidelines that did not vary materially from such guidelines and that Credit Suisse "*employed…certain quality assurance procedures designed*" to ensure that such loans were originated in accordance with the underwriting guidelines.

4. Each loan had been originated in compliance with all federal, state and local laws and regulations, including all predatory and abusive lending laws.

5. For each loan, the adequacy of the mortgaged property as security for repayment generally had been determined by an appraisal in accordance with pre-established appraisal procedure guidelines for appraisals established by or acceptable by the originator.

6. The loans had various characteristics, including certain loan-to-value (LTV) ratios disclosed to the trustee in Mortgage Loan Schedules for each loan. The distribution of these LTVs in five-to-ten percent bands was also included in prospectus supplements. Other characteristics, such as borrower FICO scores, were disclosed as well. Credit Suisse represented to the trustee that these characteristics about the loans were complete, true and correct for the loans as of the cut-off date for the securitization.

7. None of the loans had a loan-to value ratio or, with respect to second lien mortgages, a combined loan-to-value ratio, in excess of 100 (i.e., none of the loans were "underwater").

8. Credit Suisse 'will not include any mortgage loan in [the RMBS] if anything had come to [its] attention that would cause it to believe that the representations and warranties of a seller will not be accurate and complete in all material respects in respect of the related mortgage loan'.

[5] Credit Suisse also represented that if it later learned that any loan RMBS breached its representations in a material respect, it would cure the breach or repurchase or substitute that loan from the RMBS.

[6] In various marketing materials, Credit Suisse made additional representations about the loans it securitized into RMBS, and its process for reviewing loans before it selected them to securitization. In these marketing materials, Credit Suisse told investors and others, among other things:

1. Credit Suisse conducted a 'rigorous due diligence process' for reviewing loans;

2. All final loan decisions were made by Credit Suisse senior underwriters, not third-party contractors.

3. Credit Suisse conducted 'quality control' reviews on its loans after purchasing or originating them.

[7] As Credit Suisse employees discussed internally, Credit Suisse made these representations in order to 'convince investors and insurers that [its] disciplined approach to underwriting [its] multi-layered origination process, and an eligibility matrix that utilize[d] a more layered risk of performance will result in an acceptable level of delinquencies for [its] products'. …

III Credit Suisse's RMBS Business

[8] …The senior traders reported that a number of the loans had gone delinquent or into foreclosure within a few months after Credit Suisse sold the RMBS to investors. The Co-Head of the Structured Products Group responded, 'of course we would like higher quality loans. That's never been the identity of our conduit, and we're becoming less and less competitive in that space". Around the same time, one of the senior traders described his situation in a Bloomberg message: "I figure I could just capitulate… and keep buying all [these] crappy loans, but that would be suicide. And we still have almost $2.5B of conduit garbage to still distribute.

[9] In October 2005, Credit Suisse's Head of Credit and Underwriting wrote to two senior Credit Suisse traders and others, 'we are selling and securitizing loans with missing docs all the time through the other desks' (Missing documents included borrower credit reports, verifications of borrower income and assets, property appraisals and legal compliance documents such as HUD-1 statements and Truth in Lending Act disclosures.) The Head of Credit and Underwriting continued: 'it only becomes an issue when we are asked to

repurchase the loan or we receive a complaint from a customer'.

[10] In April 2007, Credit Suisse's Co-Head of Transaction Management wrote to the Head of Credit and Underwriting and two senior traders that loans with potential defects 'pile up in inventory and they won't be put back to originators (we are disproportionately the originator) So my theory is: we own the risk, 1 way or another, I don't want to securitize the loans that are obviously Section 32 cost, Georgia Fair Lending disasters with unlimited assignee liability and criminal sanctions. But I am inclined to securitize loans that are close calls or marginally non-compliant and take the risk that we'll have to repurchase if we can't put them back, rather than adding to sludge in inventory. I think when we review the first month report, we'll see how it shakes out in actual practice'. One of the senior traders responded, 'agree'. …

IV. Credit Suisse's Credit and Compliance Review of Bulk Loans

…

[15] Credit Suisse told investors and rating agencies that it used a propriety risk analysis model in its sampling process to identify high-risk loans in Bulk pools. The purpose of this model was to flag these high-risk loans for inclusion in due diligence samples. In many instances, however, Credit Suisse excluded loans that its own model has flagged as high risk from its samples. Through this practice, Credit Suisse approved some of these flagged loans without any credit or compliance due diligence review. Credit Suisse did not disclose this practice to investors.

Examples:

[16] 1. In December 2006, Credit Suisse bid on a Bulk pool of approximately 10,000 loans originated by Countrywide Home Loans ("Countrywide"). Before the bid, the senior Credit Suisse trader bidding on the pool wrote in an email, 'amazing that 8% of the pool is already delinquent after 10 months, when a large part of it is Jumbo A!!!'. He stated that the pool was 'obviously plugged with the worst paper'. The senior trader then bid to purchase this pool and, when he was informed that Credit Suisse was the winning bidder, wrote in an email, 'I'm ecstatic' with this trade.

[17] Credit Suisse selected fewer than 10 percent of these loans for due diligence review. Reports from Credit Suisse's due diligence vendors showed that approximately 85 percent of the loans in this sample violated Countrywide's underwriting guidelines and/or applicable law. These loans included, for

example, loans whose borrowers had debt-to-income ratios that were more than 10 percent higher than the amount allowed by underwriting guidelines; loans that were missing appraisal documents and loans flagged for 'potential fraud'. The Credit Suisse due diligence manager overseeing this review reported that Credit Suisse's vendor 'has found a number of guideline exceptions (fico score exceptions LTV [loan-to-value] exceptions, Program exceptions) [.] However, I am not rejecting for these items'. The Co- Head of Credit Suisse's Transaction Management department wrote to the due diligence manager 'thanks for working thru this mess. If it helps, it looks like we will make a killing on this trade'.

[18] Credit Suisse securitized over half of these loans into various RMBS it then sold to investors. Credit Suisse additionally securitized an additional $1.5 billion worth of unsampled – and therefore unreviewed – loans from this pool into various RMBS it then sold to investors.

[19] In October 2005, Credit Suisse bid on a Bulk pool of approximately 4000 loans from Wells Fargo Bank. Credit Suisse's risk analysis model flagged approximately 2900 loans in the pool for heightened due diligence due to their risks. Among other things, Credit Suisse's risk analysis model estimated that approximately 2000 loans in this pool had a greater-than-5 percent likelihood that the borrowers would miss three or more monthly payments in a row within their first twelve months and flagged these loans for heightened due diligence. Credit Suisse represented to ratings agencies. 'To choose the sample from the Wells pool, the loans first were run through our propriety due diligence sampling model, which identifies loans for review based on credit characteristics, compliance (via location of subject loan) and soft market/fraud areas. Those chosen for full credit and compliance review consisted generally of those loans which the model found displaying the most risky characteristics'.

[20] But Credit Suisse wrote to Wells Fargo that 'We are working to reduce this due diligence sample" and "We have worked to reduce this sample further' and sent its vendor a list of over 1,500 loans – over 58 percent of its sample – with the instructions 'REMOVE from sample'. Over 2,900 of the loans in this pool were flagged by its model, but Credit Suisse excluded approximately 60 percent from the due diligence sample it sent to its vendor. Credit Suisse's Head of Credit and Underwriting wrote in an email that these removed loans 'would not receive a credit, compliance, and in-file appraisal review [.]'….

V. Credit Suisse's Credit and Compliance Review of Conduit Loans

[22] Credit Suisse did not review Conduit loans in the same way that it reviewed Bulk loans. Instead of using Bulk due diligence vendors, Credit Suisse contracted with different third-party vendors known as "fulfillment centres" to conduct this review. CS designed the Conduit such that these fulfilment centres had the ability and authority to approve loans for purchase. When fulfillment centres approved loans, Credit or Underwriting employees rarely reviewed the loans or the approvals.

Credit Suisse represented to investors, ratings agencies and others that 'Credit Suisse senior underwriters make loan decisions, not contracted due diligence firms'. For Conduit loans, these representations were false. As Credit Suisse employees discussed in internal emails, the loan review and approval process for Conduit loans was "virtually unmonitored". Fulfillment centres often cleaned loans that were not subsequently reviewed by Credit Suisse senior underwriters prior to Credit Suisse purchasing the loans.

A March 2006 evaluation by Credit Suisse of one of its fulfillment centres similarly reported that 'There are serious concerns as to compliance[.]'. A senior Credit Suisse trader described the Conduit in a November 2006 email: 'we make these underwritings exceptions and then we have liability down the road when the loans go bad and people point out that we violated our own guidelines…. The fulfillment process is a joke'. …

VI. Credit Suisse's Valuation Review of Loans

[29] Credit Suisse reported property values in its offering documents, as part of a ratio called the loan-to-value (LTV) ratio. This ratio reflected the size of a loan compared to the 'value' of the underlying property. For purchase transactions, the "value" was established by using the lower of the appraisal or the purchase price at the time of origination. For refinance transactions, the value was established by an appraisal.

…

[32] During this period, Credit Suisse employees were aware that the LTVs may have been calculated using appraisals with values that were inflated, and that Credit Suisse's approach could lead to the acceptance of inflated appraisals. As Credit Suisse's Head of Credit and Underwriting wrote in a November 2006 email 'originators can get away with potential appraisal inflation as long as it stays within 15%'.

[33] Credit Suisse employees expressed concern that loans with inflated appraisals were being approved as within its tolerance. For example, in August 2006, Credit Suisse's Head of Credit

and Underwriting emailed two CS senior traders in connection with loans Credit Suisse was buying from Accredited Home Lenders. He wrote, '20+% of their loans have value issues >20% off – that is unheard of. [Accredited] is acknowledging that their values are inflated. There should be a 0% variance from an originator['s] standpoint. [Accredited] is saying that [it] knows and is okay with [its] values being off by up to 15%. Some would say this is predatory and criminal. How would investors react if we say that 20% of the pool have values off by 15%? If we are comfortable buying these loans, we should be comfortable telling investors.*'*

[34] From May 2005 through 2007, Credit Suisse received reports from vendors that it might have been acquiring and securitizing loans with inflated appraisals. During this period, despite those reports, Credit Suisse chose to continue to apply for a 10-15 percent tolerance. In early 2007, Credit Suisse's Head of Credit and Underwriting wrote an email proposing to tighten Credit Suisse's variance 'tolerances' to 10 percent for loans with LTVs below 75, and to 5 percent for loans with LTVs above 75, to 'address the issues of inflated appraisal values and one of the issues that create the high severity numbers we are seeing today'. His boss, the Head of the Conduit group, responded in an email by writing, 'I'd like to see what % of our current production would be effected [sic] by the new guidelines versus the old guidelines. Also would like to see statistics on BPO variances over the last 6 months and values we ultimately used. I'm trying to gauge the volume impact and level of customer interaction that will be required with these changes'. Credit Suisse's internal analysis showed that 30-40 percent of the loans it reviewed and approved in the prior six months would have been rejected if it had used a 5 percent tolerance. Credit Suisse then did not implement any tolerance changes for two months. It then reduced tolerances only for loans with LTVs over 90 to 10 percent, but still left other tolerances at 15 percent.

VII. Credit Suisse's Whole Loan Business

[35] On occasion, Credit Suisse sold pools of mortgage loans to other banks. Unlike RMBS investors, which generally were, as a practical matter, not able to conduct due diligence on the loans being securitized, these other banks conducted their own due diligence on the Credit Suisse loans before buying them. Those other banks found that loans that Credit Suisse marketed for sale violated underwriting guidelines or applicable law and refused to buy them.

[36] Credit Suisse employees discussed these rejections by other banks. For example, in October 2006, a senior CS trader, wrote to the Co-Head of Credit Suisse's Structured Products

Group; ‘ Our fulfilment process is a major problem. [The other bank] again came back with an embarrassing number of diligence kicks this month. You’ll remember that last month they pointed out the loan file with 3 different applications, with 3 different stated incomes (amazingly, not the first time this has happened). This month’s kicks include an employment verification kickout where the borrower never had a job, but rather had a letter stating his intent to get a job. Another employment verification kick where the employment letter stated the borrowers’ employment would be terminated in July. Another kick where the borrower had large deposits to meet reserve requirements but no one could verify the source of funds. You get the idea. The point is that [the bank] is (a) our best customer (b) only scratches the surface of our conduit via a 20% sample. If their results are in any way representative of our compliance with our reps and warrants, we have major problems’. But rather than holding those loans in its own inventory, Credit Suisse securitized certain of these loans into its RMBS.

…

VIII. Credit Suisse’s Quality Control

[39] Credit Suisse informed various investors and ratings agencies that it conducted a “quality control” review on a 3-5 percent sample of the loans it acquired for securitization. Credit Suisse contracted with vendors to provide it with quality control (QC) reports on a monthly basis. From May 2005 throughout 2007, Credit Suisse’s vendors reported, overall, that more than 25 percent of the loans that they had reviewed for quality control were designed “ineligible” because of credit, compliance and/or property defects.

[40] Credit Suisse employees observed in emails that quality control results showed problems with the loans. A senior Credit Suisse trader wrote in a January 2007 email to one of the Co-Head of the Structured Products Group, regarding Correspondent channel loans; when we have a competent QC firm do an underwriting review, they flag all kinds of errors that our fulfilment [sic] centers did not catch. Moreover, our very own underwriting group agrees with the QC firm rather than our fullfillment [sic] center. I think a lot of the problems stem from the fact that our conduit and underwriting group send mixed messages. One [sic] on the one hand they profess horror that our deals are defaulting like banana republics, but on the other hand every time we try to tighten up our underwriting processes they push back claiming it makes us uncompetitive. Here are our takeaways: 1) Our fullfillment [sic] process is broken. Either they don’t know how to do their jobs, or they don’t report defects because the conduit doesn’t

> want them to create waves. 2) Our underwriting group needs independence. 3) Our conduit needs to spend less time marketing to sales, and more time looking at the gross operation defects of our business'.
>
> [41] In emails Credit Suisse's Co-Head of Transaction Management expressed concern that the quality control results could serve as written record of defects, and sought to avoid documented confirmation of these defects. As Credit Suisse's Co-Head of Transaction wrote in a January 2007 email: 'I am concerned that we have so many piecemeal QC/DD processes, internally and externally, that some of these reports could serve as no more than a written record of some potential defect that would require a repurchase [of loans] from a [RMBS] deal, but we do not have sufficient resources to verify the information or complete the repurchase. This is one of the concerns we've always had w/[or vendor]'s role in the deals – we want to leverage your resources to improve the performance of our deals and improve our business, but not receive so much haphazard information that we do no more than create a record of potential problems'."

<u>The implications of the SoF</u>

105. I have quoted the SoF at very great length because it was a central plank of L30's case (see in opening: "*L30's case in relation to the RMBS Misconduct takes as its starting-point the admissions made in the SOF*", or in oral closing its description of the SoF as being of "foundational significance") and because its status was hotly in issue. L30 says that it follows that the RMBS Misconduct which it alleges "*plainly did not happen accidentally*". It says that in the light of what it sees as admissions it is remarkable that CS continues to deny the making of actionable representations or falsity. CS says that the suggestion that there were admissions is misconceived.

106. Despite the characterisation of CS's position on the SoF as "remarkable" L30's written submissions did not press the status of the SoF with any vigour, and rightly so. Two points need to be made. The first is that there was a tendency to elide the SoF with the press release which accompanied it. The 2017 Press Release was not a document authored by CS, nor agreed to by CS. Its contents cannot lie at CS's door. The 2017 Press Release has to be treated with some caution. While emanating from the US Department of Justice it is designed to report success in a digestible and easily reportable form. It is commentary from one side; it is not fact. It is also perhaps worthy of note that however scathing The 2017 Press Release was about CS's business it did not use the language of fraud. In this an interesting distinction can be noted between this press release and the one which the DoJ issued the day before in relation to the business of Deutsche Bank which said in terms:

> "'In the Statement of Facts accompanying this settlement, Deutsche Bank admits making false representations and omitting material information from disclosures to investors

> about the loans included in RMBS securities sold by the Bank. This misconduct, combined with that of the other banks we have already settled with, hurt our economy and threatened the banking system,…
>
> Deutsche Bank knowingly and intentionally securitized loans originated based on unsupported and fraudulent appraisals. Deutsche Bank knew that mortgage originators were 'giving' appraisers the value they want[ed]' and expecting the resulting appraisals to meet the originators' desired value, regardless of the actual value of the property. Deutsche Bank concealed its knowledge of pervasive and consistent appraisal fraud, instead representing to investors home valuation metrics based on appraisals it knew to be fraudulent. Deutsche Bank misrepresented to investors the value of the properties securing the loans securitized in its RMBS and concealed from investors that it knew that the value of the properties securing the loans was far below the value reflected by the originator's appraisal….
>
> Deutsche Bank will also provide $4.1 billion in the form of relief to aid consumers harmed by its unlawful conduct."

107. The second point is that the SoF is also not a CS production and that CS's agreement goes only to the facts in the SoF. So when emails are quoted, CS is not admitting the truth of the contents of the email, it is admitting the truth of the fact of the sending of an email which said that. Nor are the facts admitted to have English law legal consequences; because of course a word may mean one thing in a US context, but mean something entirely different in an English law context. So just because the SoF says that representations were made does not mean that as a matter of English law actionable representations were made.

108. As one scrolls through the SoF it is possible to see that what CS has admitted via the SoF is – save in one respect – not anything which amounts in law to an actionable representation. That one respect is that CS has agreed that there is an admission that a representation was made that all final loan decisions were made by CS senior underwriters, not third party contractors (the "Approval Representation") and that that representation was false.

109. Therefore save in that one respect the SoF, though interesting, has no legal consequences. L30 cannot make good a misrepresentation case by reliance on it. Nor (even if falsity were demonstrated by the examples) can it be inferred that because there are examples of certain things within the SoF there are further instances which support L30's case of systemic or serial falsity. The SoF shows what it on analysis shows and no more.

110. At the same time it is clear from the text of the SoF, from the documents quoted within it – and from the events from 2008 onwards – that there were problems with CS's RMBS business. The issues as to RMBS Misconduct hinge on the seriousness of those problems and CS's treatment of them and are considered further in due course.

2017-2018: progress to the Letter Before Action

111. The SoF was published in 2017. It was Mr Bulgrin's evidence that it was alerted to L30 as a part of the ongoing monitoring by its lawyers. It does not appear that it was considered a matter of huge urgency. Indeed the fact that Mr Bulgrin and Mr Hollywood both gave evidence that they only read it a year or so later suggests that there were no meetings or discussions of it for some time.

112. The evidence was that they were prompted to read it by an advance which was made by either or both of David Doble of David Doble Law and Reynolds Porter Chamberlain LLP ("RPC").

113. It may or may not be of some significance that on 2 March 2018 the Court of Appeal handed down its judgment in *Property Alliance Group v Royal Bank of Scotland* [2018] 1 WLR 3529. That judgment upheld the possibility of a limited implied representation in the context of complex banking offer documents, albeit in the context of swaps, not CDOs.

114. By July 2018 RPC and David Doble Law had prepared a case overview for a claim by L30. That was provided by Mr Doble to Mr Bulgrin and was later referred to the L30 Board. The document was prepared in contemplation of litigation and privilege was claimed over it on that basis. It formed the basis for the claim originally brought. At this stage RPC were not instructed; it was prepared "*as a preliminary step which led to the retainer of RPC*". RPC were not paid for it.

115. Following discussions by KfW the possibility of a claim and the funding of a claim, the advice memo was referred to the L30 Board in November 2018. There was an unminuted oral discussion on 5 November, which was alluded to in the minutes. The result was a decision either to enter into a standstill or to issue proceedings. There appears to have been a draft claim form available as Mr Hollywood signed off on the statement of truth.

116. On 12 November 2018 RPC were engaged by L30. A claim form was issued on 15 November 2018.

117. On 21 December 2018 L30 sent a Letter before Action. It stated (inter alia):

> "On 18 January 2017, the US Department of Justice ("DOJ") and CSUSA entered into a settlement (the "DOJ Settlement" - enclosed), in which CSUSA acknowledged the facts set out in a statement annexed to the DOJ Settlement at Annex 1 (the "Statement of Facts")
>
> The Statement of Facts sets out representations made by CSUSA to its RMBS investors in respect of the Covered Conduct, and facts which demonstrate that CSUSA knew at the time those representations were made that they were false, and therefore fraudulent (the "RMBS Fraud"). Put simply, CSUSA was (i) packaging residential mortgages in RMBS and selling those securities to investors, and (ii) knowingly making false

representations about the quality and characteristics of those mortgage loans to RMBS investors. This was a systematic and serious fraud conducted by the bank.

The relationship between the DOJ Settlement and the Magnolia Notes

Seven of the Credit Suisse originated RMBS included in Annex 3 to the DOJ Settlement as the subject of RMBS Fraud admissions were subsequently included in the Magnolia Notes' reference portfolio. The Magnolia Notes therefore included as part of its reference portfolio the very RMBSs to which Credit Suisse's RMBS Fraud in part related.

The fact that these seven RMBS were known by CSUSA to have been the subject of its now admitted fraudulent activities was not disclosed in the Series Memorandum for the Magnolia Notes, nor was it otherwise disclosed to Loreley 30 or its investment advisor, IKB Credit Asset Management GmbH ("IKB-CAM") which dealt with Credit Suisse in relation to the Magnolia Notes on behalf of Loreley 30.

The admission by CSUSA of the facts set out in the Statement of Facts is incontrovertible evidence that the Defendants knew at the time the Magnolia Notes were being arranged and marketed that it was not conducting itself honestly in relation to the underlying subject matter of the transactions (namely the pooling, structuring, arranging, formation, packaging, marketing, underwriting, sale or issuance of the RMBS listed in Annex 3 and included within the Magnolia Notes reference portfolio).

There can be no question that the RMBS Fraud (which CSUSA has admitted was knowingly dishonest) was known to the [Credit Suisse Structured Credit Group] and to the corporate entities used to carry out the business of the [Credit Suisse Structured Credit Group].

Moreover, the Defendants could only have procured the necessary AAA rating for the Magnolia Notes from S&P and Moody's by concealing its RMBS Fraud from the credit ratings agencies and without that, Loreley 30 would not have purchased the Magnolia Notes.

Loreley 30's Claim

In brief outline, we summarise below the principal basis on which these claims arise.

Fraudulent misrepresentation

Loreley 30 purchased the Magnolia Notes in reliance upon representations made by CS Europe and/or CSI and/or CSUSA

relating to the quality and characteristics of the RMBS securities that comprised the Magnolia Notes' reference portfolio. In particular, in putting forward the transaction that was structured and arranged the relevant Credit Suisse Defendants made implied representations including (among other matters and in broad summary) that:

(i) They had no reason to believe that the reference portfolio would contain any RMBS that was known by Credit Suisse to contain underlying loans that failed to conform with the relevant offer documents or underwriting criteria;

(ii) In respect of any RMBS contained in the reference portfolio that Credit Suisse had itself structured or distributed, Credit Suisse had acted honestly in structuring and distributing the RMBS and was not engaged in the practice of knowingly securitising loans that failed to conform with offer documents or underwriting criteria;

(iii) In respect of the ratings of both the Magnolia Notes, and the RMBS contained in the reference portfolio for which Credit Suisse had itself procured ratings, that Credit Suisse had acted honestly in procuring the relevant ratings from the credit rating agencies".

The structure of the arguments as ultimately advanced

118. Ultimately at trial all of this played out into a claim which was not entirely straightforward. To flesh out slightly the skeletal account given in the Introduction to the judgment:

i) Two layers of fraud were alleged: CDO and RMBS.

ii) The first (direct) fraud alleged was in relation to the CDO Transaction and involved the CDO Representations. The overall thrust of the representations is said to be that CS was unaware of any conduct on its part which tainted the credit quality of the Notes.

a) There were 20 representations originally pleaded in Categories A-D (see Appendix 2B) :Express representations arising from Termsheets and RMBS Spreadsheet, Implied Representations arising from Termsheets and RMBS Spreadsheet, Implied representations arising from the proposal of sale of the notes/the express representations and Representations allegedly arising from the draft Series Memoranda;

b) These were harmonized for trial into four groups (Appendix 2B):

(i) Core representations of honesty (C10-12);

(ii) Representations regarding credit rating (B7, A2, C13-14);

(iii) Representations regarding the ability to make an informed determination of credit rating (B8);

(iv) Series Memoranda good faith (D20);

iii) The second (indirect) fraud alleged was in relation to the securitization of the RMBS (specifically the CS RMBS) between 2005-2007. There were thirteen representations alleged, which were then grouped into groups (Appendix 3):

a) Loan Compliance Representations:

(i) Applicable Laws Representation

(ii) Underwriting Standards Representation

(iii) Rigorous DD Representation

(iv) Compliance Process Representation;

b) Due Diligence Representations:

(i) Rigorous DD Representation

(ii) 100% Subprime Representation

(iii) 100% HEAT Representation

(iv) Variable Sample Size Representation

(v) Model Representation

(vi) Model Threshold Representation

c) Approval Representations

d) Fulfillment Centres Representations:

(i) Underwriting Standards Representation

(ii) Applicable Laws Representation

(iii) Compliance Process Representation

(iv) Rigorous DD Representation

e) Valuation Diligence Representations:

(i) Rigorous DD Representation

(ii) LTV Representation

(iii) ≤ 100 LTV Representation

(iv) Accurate Appraisal Value Representation

f) QC Representation.

119. L30 seeks to establish one or more elements of the RMBS Misconduct. That misconduct is then said to falsify one or more of the CDO Representations.

THE TRIAL

120. Some impression of the scale of the trial is perhaps worth giving. The Trial Bundles were electronic. They ran between Bundle AA and Bundles V (V1-6). About 120 English authorities were cited. There were 991 tabs of CDO documents (Bundle H) and over 2000 RMBS documents (Bundle J). There were 28 bundles of deposition documents (P1-28).

121. In terms of written submissions, I was assisted by hugely detailed written submissions, to which I cannot begin to do justice in this judgment. Written openings ran to 400 pages. Written Closings ran to 300 pages. All were liberally footnoted, and included detailed summaries of materials which could easily, if expanded, have added more hundreds of pages to the material before me. This judgment is therefore very much a process of concentrating on the determinative issues and key facts.

122. While the trial was not always conducted in the most co-operative of spirits inter se there was key and useful co-operation to assist the court in a number of places, for which I am duly grateful. I have already mentioned the factual summaries provided by the parties. There was also very sensible co-operation on the subject of Irish Law, leading first to the agreement that such issues of Irish Law as remained could be decided on the basis of submissions without the need for the experts to be called (in line with Commercial Court Guide paragraph H3), and later to a further narrowing of those issues for decision.

123. I am particularly pleased to say that (following a certain amount of judicial encouragement at the PTR) the parties found it to be possible to divide the oral advocacy so that nearly all members of the counsel teams on both sides conducted meaningful advocacy. For L30 Mr Hobson dealt with limitation and Mr Woolgar with conspiracy and Irish Law. Mr Rudzitis was acknowledged to have provided key help in the written documents. For CS Mr Sher cross-examined a number of the witnesses and dealt with understanding/reliance in relation to misrepresentations, Mr Brock dealt with RMBS Misconduct 5 and 6 and Mr Field with negligence and unlawful means conspiracy.

124. As will be apparent from the comments below on those topics it was clear that a number of these areas very much benefitted from the full and detailed consideration and laser focus which the junior counsel responsible were able to give them.

The Claimant's Witnesses

125. Dr Bauknecht, the Chief Economist of IKB, spoke predominantly to understanding of the alleged representations and reliance. He was, in his written evidence, realistic about his recollections, though he tended to slip into reconstruction in places. Orally he attempted to be more optimistic about his recollections. But he was generally a reliable witness, who although careful was prepared to make concessions where appropriate.

126. There were problems which were not of his making with his statement. His statement was one of those where (because it was not originally produced as a trial witness statement) the PD57AC process was not followed and it rapidly became apparent that his statement had been produced by sending him material which he had not previously seen. The result was that his witness statement did not record his "unrefreshed" evidence, and also did not record evidence based on his own knowledge. In addition it was apparent that at least at some points the draft was "lawyer-side" drafting, with an identical passage appearing in another witness's evidence. It became apparent that he had not given unrefreshed evidence in preparation of the drafting of his witness statement and it was established in evidence that there was no conversation with his legal team about his recollection of the transaction, before he had seen and reviewed around 100-150 pages of documentation in relation to it. As a result there was a significant challenge to his recollection, which I will consider further below.

127. Mr Shane Hollywood, a qualified Jersey lawyer, was a director of L30 as well as a number of other Loreley companies. He spoke to the management of L30, its relationship with KfW and the way in which L30 made decisions. He also dealt with the question of knowledge for the purposes of limitation. There was an issue as to whether, in dealing with the issue whether L30 reasonably could have discovered sufficient information to start the limitation clock, his statement waived privilege in two paragraphs of the served statement. It fairly plainly did do so and an agreement was reached that his evidence as tendered should omit those portions of his evidence. Mr Hollywood had a calm and thoughtful demeanour. As is probably to be expected of a lawyer he was careful in his answers. In broad terms earnest and helpful, he avoided overstating his knowledge and he frequently gave evidence that he had no recall of matters which were put to him. He was also prepared to make concessions after due thought. At the same time, while never unreasonable, he was reticent to make concessions which were not in L30's interests. An example was in relation to a passage of his witness statement which neglected to mention a fact he knew and which put a rather different complexion on his knowledge. He required considerable pressure to be applied before he accepted (even with a degree of qualification) that his evidence was in that respect misleading.

128. Mr Thomas Schirmer, a German qualified lawyer was IKB CAM's Legal Counsel at the time when the transaction was entered into. He therefore spoke to reliance, in the period 15 June to 12 July 2007, particularly in relation to the Category C and D representations. His statement did not comply with PD57AC because of the stage at which it was submitted (it having been drafted at an interlocutory stage of the dispute) and like that of Dr Bauknecht strayed into reconstruction. While at that stage it was not necessary for it to comply with PD57AC it is

regrettable that the evidence of a witness who spoke to reliance should have been polluted by that process, which involved showing him various documents he had not seen at the time. Mr Schirmer was a frank and believable witness and while allowance fell to be made for him giving evidence in English, he was so clear that this was barely necessary. While (like the other witnesses) being clear about the limits of his actual recollection, he was very diligent in trying to make clear what he did recall or understand.

129. Mr Bulgrin, the Senior Legal Counsel at KfW was involved in the Rhineland programme from 2007. He has been responsible for the legal aspects stemming from KfW's role as main creditor to the Rhineland Programme. His evidence was directed towards the roles of IKB and KfW and the steps taken post 2007. As such he gave evidence relevant to the limitation issues. Mr Bulgrin was a very serious and careful witness, who took time to consider questions before giving answers and making scrupulous distinctions (perhaps based in the caution coming from one giving evidence in his second language) where he saw them as relevant, which on occasion made his answers somewhat lengthy. It was clear that he took his duty towards KfW and the German government very seriously. Again his was a statement not prepared in accordance with PD57AC, with the consequent issues about what was recollection and what was "refreshment".

130. Mrs Jean Lawrence was a Trust Director at Bedell Trust and an alternate director of L30 between November 2010 and 4 April 2012. Like Mr Anderson she emphasised the fact that Mr Hollywood was the day to day person dealing with L30. Her evidence addressed limitation issues. She was cross-examined by Mr Sher. As a witness she was quietly spoken and clear about the limits of her recollection and also about the fact that she may not have read everything that she was sent, in circumstances where a somewhat maximalist approach to the copying in of personnel seems to have been taken.

131. Mr Alasdair Hunter, an English qualified solicitor who was a partner at Bedell Cristin and director of L30 from November 2010 until August 2016. Like other witnesses he emphasised that the lead person at Bedell Cristin was Mr Hollywood, and said that his role was limited to attending Board Meetings. His evidence was primarily directed to the question of knowledge for limitation purposes. He was cross-examined by Mr Sher.

132. Mr Paul Anderson was also a director of L30. He spoke to reliance in particular as regards rating, as well as giving some general evidence about L30's processes for approvals and board meetings. He was frank about his lack of recollection of specific events and his evidence tended to suggest that his memory for the routines was also less than perfect.

133. Mr Andrew Nowotny, Legal Counsel at IKB is an US qualified attorney who manages IKB's litigation in the US and UK including in relation to RMBS. As such he gave evidence as to knowledge for the purposes of limitation as well as the relationship between IKB, the Loreley companies and KfW – in particular as to the lack of sharing of information.

134. Mr Alan Dart, formerly an English qualified barrister, but later a partner at Bedell Cristin was a director of L30 from January 2007 to February 2012. He gave a

statement as to how L30 was run – consistent with that of the other witnesses in identifying Mr Hollywood as the prime mover. Otherwise his evidence was directed to the question of knowledge. His evidence essentially replicated other evidence being given and so he was not called. Similarly a witness statement was provided from Mr Butel.

The Defendants' Witnesses

135. Mr O'Driscoll worked on the CDO side of the business from 2003 to 2009 as Co-Head of CDO Structuring, Americas. He put together this transaction. He reported to Mr Kareem Serageldin (of CSI, based primarily in London), who was head of the CDO Group but had no direct involvement in the transaction, although he was kept periodically informed of its progress. Mr O'Driscoll and Mr Serageldin are both accused of dishonesty, with L30 claiming that they knew the alleged CDO Representations were false due to the RMBS Misconduct. Mr O'Driscoll gave evidence as to the structure of the CDO Group, what it did and its strategy in the relevant period, as well as his specific interactions with the RMBS Group in the relevant period, structuring of CDOs generally and the transaction in this case. Mr O'Driscoll was a firm, intelligent and fluent witness; while his evidence was given with a dash of warmth and humour he did not hesitate to take the fight back to Mr Lord or to criticise some of CS's own practices. He was an impressive witness, whose evidence I accept. L30's case that he was dishonest was realistically not actively pursued in closing.

136. Mr Kaiserman was one of the individuals against whom L30 alleged fraud (RMBS Loan Compliance and QC representations). He was until recently a Managing Director in Non-Agency RMBS Trading at CS. It appears that, shortly after signing his witness statement, Mr Kaiserman left CS for Apollo Global, as part of Apollo's acquisition of CS' securitised products business. Mr Kaiserman was at the relevant time the Co-Head (with Mr Peter Sack) of the "Transaction Management Group" ("TMG"), which was a largely administrative group within the RMBS business, which co-ordinated different parts of the business. Mr Kaiserman was more focussed on the acquisition side of the RMBS business than any other relevant aspect; in particular he had little knowledge of CDO business generally. He gave evidence as to the business of the RMBS Group and its processes, as well as his dealings with investors and rating agencies. Mr Kaiserman was another impressive witness, demonstrating keen concentration and great clarity in his evidence. His evidence was for the most part given with a quiet and calm confidence; the odd occasion when his delivery was more hesitant was noticeable for being a variation from this.

137. Mr Sacco was the third live witness against whom fraud was alleged and I have been asked to find that he was an untruthful witness. He was Head of the Credit Policy and Underwriting Group within the RMBS Group between 2003 and 2008. This included managing due diligence in respect of loans from the Bulk Channel, compliance (although compliance stopped reporting to Mr Sacco in 2006-7), and addressing post-closing quality control. He gave evidence as to bulk DD, quality control and interactions with rating agencies as well as the process of presenting risks via the presentations.

138. Mr Sacco was initially a more hesitant and defensive witness though he gained confidence as the process continued. His recollection was less fluent than that of the earlier witnesses evincing a lack of familiarity with a number of the underlying documents and on occasion with details in his statement. However his recollection of systems and what his team actually did prompted him to greater fluency and while he engaged good-temperedly with a very long (2.5 days) cross-examination, he resisted answering questions which he felt were put unfairly. L30 said it was incredible that he would not have read the SoF (for which he was deposed); I cannot agree with that. It was entirely credible that having been deposed, and knowing the outcome he would rather not wallow in the detail. I was entirely unpersuaded that he was dishonest.

139. Mr Sacco's evidence gave rise to one of the most contentious passages of the trial. There was an issue raised as to whether Mr Sacco had spoken to his own lawyer during the course of his evidence, which ran over three days. A member of the Claimant's team was sure that they had heard Mr Sacco's lawyer telling him that a particular answer had been wrong. That would obviously have been in breach of the purdah warning given by me before the break and potentially a contempt of court.

140. The matter was dealt with, following discussion with counsel, by my asking a series of questions, the substance of which had been agreed. Mr Sacco denied making any such statement and stated that his conversation with his lawyer had been limited to the kinds of domestic/logistical matters as are entirely proper. His lawyer, Mr Zelenko, also (separately) denied any discussion of evidence both in oral questioning and in a witness statement which I asked him to lodge. That evidence was not accepted by L30, who submitted that Mr Zelenko's account accepts that he did have a discussion with Mr Sacco outside Court and that I should treat the denial of any relevant or improper conversation with scepticism.

141. I have carefully considered the submissions made and the submission that Mr Zelenko's evidence that he didn't even understand what the phrase said to have been overheard meant was not credible. I do however find it credible as the answer was a matter of considerable detail whose relevance was by no means apparent. On the balance of probabilities (into which the implausibility of such a breach committed (i) by two people one of them a lawyer and former Federal prosecutor, warned not just by me but also by the CS team (ii) actually within the court building and effectively under the nose of the Claimant's team, when there would be ample opportunities to talk privately outside of the building) I have concluded that there was no impropriety or breach of the purdah rule and this concern probably arose out of a mishearing informed by complete focus on and immersion in the case. I do not for one instant consider that the member of the L30 team who identified the concern was doing anything other than reflecting what they honestly believed they saw and heard. I do however conclude that they were mistaken.

142. What this episode did however throw into clear perspective is that Mr Sacco – and many of the other CS witnesses – has considered the events of this period repeatedly both via depositions and in discussion with his lawyer. He too, therefore has been "refreshed" on much of the material in play. I do therefore

have to treat the evidence of Mr Sacco and the other deposed CS witnesses as being likely to have been affected by the process of recollection and discussion.

143. Mr Nordyk was another of the individuals against whom fraud was alleged by L30 (in respect of all but one of RMBS Representations). He was a Vice President at CS (he now works elsewhere). Mr Nordyk was in the Credit Policy & Underwriting Group. He was responsible for due diligence in the Bulk Channel, and his evidence is focussed on that issue. He was also in charge of (and gave evidence on) quality control for some time during the Relevant Period. He reported to Mr Sacco, of whom he spoke very highly as a manager and a teacher in the course of his evidence. Mr Nordyk was a firm and fluent witness. He was however also disciplined in his approach to evidence – perhaps as a result of the numerous depositions he had undergone over the years. Thus he was unwilling to answer questions he regarded as unclear or ambiguous, meaning that on occasion he appeared a little defensive. When within his comfort zone he was extremely earnest and fluent, speaking quickly and decisively and being prepared to offer considerable detail. His earnestness and fluency was compelling; subject to the point made about the effect of the deposition process.

144. Mr Sack was the final of the witnesses against whom L30 alleges fraud (RMBS Loan Compliance and QC Representations) and another witness whose evidence L30 urged me to reject as dishonest. He also remained at CS until very recently. He was (with Mr Kaiserman) Co-Head of TMG. Mr Sack was more focused on the issuing and underwriting of securitisations. He dealt in particular with the Quality Control/due diligence process and the Mortgage Loan Purchase Agreement ("MLPA") process, as well as the culture of the RMBS Group.

145. It is fair to say that his evidence was not as clear and focused or as enjoyable to listen to as some. But I cannot accept the submission that he had no regard for the importance of telling the truth. He was a careful and considered witness – verging on the overcareful in terms of giving detail when he was not clear where a question was going or pointing out ambiguities in questions. He was thinking ahead about where questioning was going and gave some answers which suggested a familiarity with the deposition and/or trial process to which he alluded in his statement; and very possibly a desire to needle Mr Lord. His recollection was (understandably) imperfect as he frankly acknowledged both in writing and orally. My strong impression of him from his live evidence was as a witness of candour and I therefore substantially accept his evidence, subject to the rider about the effect of previous encounters with the legal process on these matters.

LIMITATION

146. The starting point is that it is common ground that L30's claims in deceit and negligence are *prima facie* time-barred. L30 says however that it is not barred from suing because of the effect of sections 14A (negligence) and 32 (fraud) of the Limitation Act 1980. It is common ground that the cut off date for these purposes is 15 November 2012 for the claim in fraud and 15 November 2015 for the negligence claim.

147. It is section 32 which is principally in focus because it is this provision upon which L30 relies primarily (and solely with respect to the deceit claim). In addition there is a close connection between section 32 and section 14A, so the answer to one question will tend to drive the answer to the other. That connection was noted in *FII Group Test Claimants v HMRC* [2012] UKSC 19 [2012] 2 AC 337 ("FII 1") where at [63] Lord Walker emphasised the interrelationship of the two when noting that an expansion of section 32 would require the limits and indeed the rationale of ss. 11 and 14A of the Limitation Act 1980 to be revisited. That analysis was endorsed in *FII Group Test Claimants v HRMC* [2022] AC 1 ("FII") at [194].

Legal Principles: general

148. Section 32 provides materially as follows:

> "Postponement of limitation period in case of fraud, concealment or mistake
>
> (1) …where in the case of any action for which a period of limitation is prescribed by this Act, either -
>
> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the [claimant's] right of action has been deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake;
>
> the period of limitation shall not begin to run until the [claimant] has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it."

149. There was little dispute as to the principles which come out of the many authorities on this section. They may be summarised as follows:

i) The burden of proof is on the claimant because section 32 constitutes an exception to the ordinary regime: see *Paragon Finance v Thakerar* [1999] 1 All ER 400 at 418 per Millett LJ (endorsed in *FII* at [203]);

ii) The claimant must be "on notice" of the need to investigate whether there has been fraud and/or concealment. This is sometimes referred to as a trigger. This can be engaged whether or not the claimant has actual knowledge of it, so long as the claimant could with reasonable diligence have discovered the trigger: see *OT Computers v Infineon Technologies AG* [2021] EWCA Civ 501 at [47]:

> "…Although some of the cases have spoken in terms of reasonable diligence only being required once the claimant is on notice that there is something to

> investigate (the "trigger"), it is more accurate to say that the requirement of reasonable diligence applies throughout. At the first stage the claimant must be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. At the second stage, he is taken to know those things which a reasonably diligent investigation would then reveal".

iii) The meaning of the words "*could with reasonable diligence":* The Supreme Court in *FII* endorsed as "authoritative guidance" the following statement by Millett LJ in *Paragon* at 418:

> "The question is not whether the plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take…In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree."

iv) Whilst these words lay down an objective standard, it is an objective standard informed by the position of the actual claimant – i.e. the question is whether the actual claimant with its particular experience (not a hypothetical claimant) could objectively have discovered the fraud or concealment, save that certain potential characteristics of a particular claimant "*bearing on the likelihood of the particular claimant discovering facts which a person in his position could reasonably be expected to discover, such as whether the claimant is slothful, naïve, shy, nervous, uncurious or ill informed*" are not relevant: see *OT Computers* at [38] and [48];

v) A claimant may therefore have particular characteristics relating to its status or business, which are matters to be brought into account for the purposes of the objective inquiry: see *OT Computers* at [57]-[61] and *Allianz Global Investors v RSA Insurance* [2021] EWHC 2950 (Ch) at [76]-[77];

vi) Where fraud is concerned the court will bear in mind that the authorities state that parties should be reticent about pleading fraud and should not do so without a "solid foundation" in the evidence: see *FDIC v Barclays Bank* [2020] EWHC 2001 (Ch) at [36]-[39];

vii) Section 32(1) does not postpone the onset of the limitation period until the claimant can show that it is more likely than not to succeed on its claim or can verify the facts on which it relies; nor until the claimant is in a position to plead further details going beyond those which are strictly required to complete the cause of action. Bryan J put it this way in *LIA v JP Morgan Markets Limited* [2019] EWHC 1452 (Comm) at [34]: "*...at the point at which the claimant can plead the complete cause of action, however weak or strong, time starts to run. Not every detail needs to be known and a realistic view must be taken by the court*.";

viii) While the test is in large measure objective the cases do show that a claimant cannot be heard to deny what they in fact subjectively thought – in particular as to whether they have a properly arguable claim. At the same time a party cannot say that a stricter approach be adopted than the one which was in fact adopted: see *FII* at [188]-[189], summarising the observations of the Supreme Court in *AB v Ministry of Defence* [2013] AC 78:

a) "*it is a legal impossibility for a claimant to lack knowledge of attributability for the purpose of section 14(1) at a time after the date of issue of his claim*" [3] per Lord Wilson;

b) "*I do not see how a claimant who has issued a claim form claiming damages for personal injury can be heard to suggest that he did not, when it was issued, have the requisite knowledge for the purposes of the 1980 Act*" [67] per Lord Walker;

c) "*... once a claimant issues his claim, it is no longer open to him to say that he still lacks the knowledge necessary (by reference to sections 11 and 14) to set time running*." [71] per Lord Brown;

d) "*A claimant bringing proceedings necessarily asserts that he or she has a properly arguable claim*" [84] per Lord Mance.

150. Discovery can in some cases create a debate. Two different "tests" or points in time have been discussed in the authorities, namely the point at which the claimant had (or would acting with reasonable diligence have had): (a) sufficient knowledge to plead its claim ("the Statement of Claim Test"); and (b) sufficient knowledge "*to justify embarking on the preliminaries to the issue of a writ*" or "*in the sense of recognising that a worthwhile claim arises*" ("the Worthwhile Claim Test").

151. The cases in which there is a difference between the two will be rare: In *Gemalto Holdings BV v Infineon Technologies* [2022] EWCA Civ 782 Sir Geoffrey Vos MR observed at [45]: "*there is unlikely in most cases, as in this case, to be a real difference between the application of the statement of claim test and the [worthwhile claim] test. Indeed, the statement of claim test is, perhaps, little more than a gloss on the [worthwhile claim] test*".

152. The Statement of Claim Test which the parties have agreed that I should apply in this case requires that the claimant is in a position (i.e. has sufficient actual or constructive knowledge) to plead a complete cause of action, which in fraud cases entails the critical allegations that a representation has been made, that it was false and that the representor knew it to be false: see *Barnstaple Boat Co. v Jones* [2007] EWCA Civ 727 at [34]; *Bilta (UK) Ltd v SVS Securities plc* [2022] BCC 833 at [31(7)(h)].

153. A final aspect of the legal backdrop is the question of which version of the case must be known in order to trigger the running of time. In this context the question is whether it is the version originally put forward, or the version finally pursued (to the extent that they are different). On this the submission was made by L30 that it is the fraud as found by the Court, not (if different) as originally pleaded by the claimant which must be reasonably discoverable. This argument was advanced by reference to the recent Court of Appeal decision in *Seedo v Gamal and Salfiti and others* [2023] EWCA Civ 330 in particular [53] per Nugee LJ:

> "I accept [the] submission that there is nothing in the authorities which requires the Court … to confine its attention to the case as pleaded by the claimant. Normally of course one would expect the claim as found to reflect the claimant's pleaded allegations, but one can envisage a case where the pleading contains allegations that are not pursued or turn out not to be well-founded, but where the judge nevertheless finds there to have been a fraud. It seems wrong in principle, and a distraction, to ask when the claimant discovered allegations which in the end went nowhere: the question is when he discovered the essential facts of the fraud found proved by the Court."

154. While this point was clearly stated by Nugee LJ, it is not ratio and I conclude that I am not bound by it in circumstances where;

    i) It is recorded at [3] that the point had ultimately been conceded: "*The first question is whether for these purposes 'the fraud' means the fraud as formulated by the claimant in his pleading, or the fraud as found by the judge after a trial…. in the result, as set out below, we heard no adverse argument on it, counsel being agreed that in such a case the question of limitation should be assessed against the facts as found;*"

    ii) The point addressed is a very particular point about a limitation ruling made separately after trial and the handing down of the judgment with full fact findings (see [33] of the judgment).

155. The point which was really in issue in *Seedo* was the following point, isolated at [4] of the judgment: "*Where the defendant has deceived the claimant into entering into a transaction by telling more than one lie, what happens if the claimant discovers that one lie is untrue but does not then bring a claim, and then some years later discovers that a second lie is untrue*?"

156. That was the true nature of the problem in *Seedo*; it was a case where the claimant had been deceived by two lies told by the defendant Mr Salfiti. The question was whether he was time barred six years after he could have discovered the first lie – or, in respect of a claim brought in relation to the second lie, only six years after he could have discovered that lie. The first lie was the one pleaded: the fraud in respect of the alleged loan and Mr Seedo's financial contribution, the Trust Deed being alleged to be invalid and so of no effect. The second lie, that which the judge found, was that Mr Salfiti led Mr Seedo to believe that he would be 100% owner of the property. It can be seen that these are essentially two different points.

157. I conclude that the question of which version of the case needs to have been known is not as cut and dried as L30 suggests. Where there are two distinct lies, as in *Seedo*, a party will not be timebarred if one (bad) claim is timebarred, if an entirely different claim, ultimately successful, is only discoverable later. However the position may be different where one is looking at two versions of the same argument, or arguments which have some relation to each other. The argument is likely to be fact sensitive – as was the decision in *Seedo*.

The Principles applied

The precise deceit

158. L30, relying on *Seedo*, suggested that it would be wrong to take as the starting point the question of the point at which L30 could with reasonable diligence have pleaded the "precise deceit" set out in the 2018 letter from RPC enclosing the Claim Form. It suggested that the claim as ultimately argued is the correct starting point.

159. As indicated above I take the view that *Seedo* does not justify this conclusion, and that it is necessary to analyse whether the case as run is essentially the same or essentially distinct from the case set out in the letter before action.

160. The Letter Before Action sets out three implied CDO representations relating to the characteristics and quality of the underlying business – specifically the RMBS – in summary:

   i) CS had no reason to know that the Reference Portfolio would contain any RMBS containing loans which did not comply with the relevant offer documents or underwriting criteria;

   ii) CS had acted honestly in structuring and distributing any RMBS that was a CS structured or distributed RMBS and had not knowingly securitized loans that failed to comply with the offer documents or underwriting criteria;

   iii) CS had acted honestly in procuring the ratings both of the Magnolia Notes and the RMBS in the Reference Portfolio;

161. The falsity alleged in the Letter Before Action was skeletal: "*The representations above are demonstrably false in the light of the admissions contained in the*

Statement of Facts and they were made dishonestly (alternatively negligently) thereby entitling L30 to rescission and/or damages".

162. The alleged falsity was expanded in the draft Particulars of Claim ("DPoC") produced on behalf of L30 (on KfW's instructions) in May 2019 to be, in essence, as follows:

 i) Loans were originated in breach of underwiring guidelines (EV3) or in breach of local rules;

 ii) Loans were accepted without an assessment via an appraisal or in knowledge the appraisal was inflated;

 iii) Loans were accepted with the LTV in excess of 100% or in the knowledge that LTVs were unreliable;

 iv) Absence of rigorous due diligence process;

 v) Not all final loan decisions were made by underwriters as opposed to third party contractors;

 vi) CS did not always conduct quality control reviews in particular re: the wholesale channel.

163. No particulars of falsity or knowledge were set out in RPC's letter of 21 December 2018, but some guidance as to L30's analysis at the time of issue of these proceedings may be gleaned from the DPoC. In particular, at [41] of the DPoC L30 set out the facts derived from the SoF which it claimed (at [46]) falsified the representations. These included:

 i) The fact that the third-party due diligence vendors ("DD Vendors") engaged by CS graded many sampled loans as "EV3" and yet CS nevertheless purchased and securitized these loans;

 ii) The fact that CS purchased certain pools of loans on a "sample" basis, such that it did not subject the unsampled loans to any credit or compliance diligence; and

 iii) The fact that CS knew that LTV ratios were unreliable since the appraisals had been inflated.

164. It was also said that the representations were made fraudulently. On this it was said in the DPoC that the Relevant Persons (Messrs Kimura, Marriott, Serageldin and O'Driscoll) knew that the representations were false or were reckless where:

 i) They knew of the proposal to sell to investors notes linked to one or more of the relevant RMBS;

 ii) It is to be inferred that they knew of CS's dishonest conduct because of their seniority and the systematic nature of the RMBS misconduct.

165. Then there is the question of the case as finally run. The CDO representations as pleaded and run were in essence:

     i) CS had no reason to believe (in respect of any of the Reference Obligations that CS had itself structured etc) that the offering documents made false representations relevant to the value or credit quality of the Reference Obligations;

     ii) CS had no reason to believe that the credit ratings of the Notes or the Reference Obligations were procured by false representations;

     iii) The Notes were suitable for sophisticated Investors.

166. The falsity alleged is similar but not identical to that alleged in the DPoC. It hinged on:

     i) Knowledge that the credit ratings and LTV values were unreliable in the light of misrepresentations to RMBS investors as to due diligence, origination in compliance with underwriting guidelines and/or federal state and local laws, valuation diligence (LTV ratios), rigorous due diligence, approval by CS underwriters, QC reviews after purchase/origination;

     ii) Knowledge of falsity because of: purchase of EV3 graded loans (now by reference to the Countrywide case study in the SoF, rather than generically), knowledge of no DD of unsampled loans, conduit loans being approved by fulfilment centres, awareness that of conduit DD issues, awareness LTVs may have been calculated using appraisals with inflated values.

167. The fraud case was by trial directed at a wide variety of people.

168. It follows that the case advanced at trial was in some respects slightly broader and in some respects slightly narrower or more detailed than that which was outlined in the DPoC. But it was essentially similar to that earlier iteration. It was not a case of the DPoC case being abandoned and a different case pursued. In those circumstances I do not consider that the analysis in *Seedo* is applicable. However given the resemblance between the two cases run, nor would the *Seedo* analysis be likely to make a material difference here.

169. The question is therefore what L30 could have discovered and whether it could have used that material to plead (or to embark upon the preliminaries to pleading) this claim against CS.

170. The central issue for limitation purposes is as to L30's awareness of the falsity of these representations. There can be no issue, given the nature of the representations and the case L30 runs that the representations were discernible (and if we get so far) perceived/understood. The only thing which holds up the ability to make the claim must therefore be the knowledge of falsity.

171. The issue then becomes whether there is any practical difference involved in the argument as to whether L30 had to be aware of the entirety of the case that it

made either at the outset or later. L30 says both that the case as advanced at trial was different and also that there were additional grounds of falsity relied on.

172. I conclude that there is in fact no difference. This is because, as summarised in Appendix 2B of this judgment (reflecting L30's careful summary in written closing), all the CDO Representations are said to be falsified by all and any aspects of the RMBS Misconduct. Thus any part of the RMBS Misconduct, if established, is said to justify a conclusion of falsity (see for example in closing "*Representations C13-C14 are falsified by any strand of the RMBS Misconduct*" or, as Mr Lord KC put it on Day 1 of the trial: "*A little bit of fraud goes a long way. So we don't need very much fraud in and about the underlying representations, we say, to establish the falsity at the CDO level.*").

173. It follows that:

    i) So long as any of the RMBS Misconduct alleged at the outset is the same as the RMBS Misconduct ultimately pursued, there is no practical difference here for limitation purposes between the case originally run and that pursued at trial;

    ii) For limitation purposes the necessary awareness can be established by awareness of any part of the RMBS Misconduct – to a standard sufficient to advance the case in this jurisdiction.

174. Before moving on a point should be noted about knowledge. Reliance was principally placed by CS upon the actual knowledge of KfW, the Loreley SPVs and their (joint) attorneys (and with such assistance from IKB as was required); this was said to be demonstrated by the actual complaints which were brought which were claims in fraud against numerous banks, specifically: Calyon, Morgan Stanley, Countrywide, Wells Fargo, Merrill Lynch, Citi or Deutsche Bank ("DB"). L30's original case was that only its own directors' knowledge could be counted against it. It appeared that the question would be hotly contested and that it would be necessary to analyse just what L30's directors knew, as opposed to KfW/IKB.

175. In closing that position shifted: what was said was:

> "L30 is content to proceed on the assumption that L30 either knew or could with reasonable diligence have known of (i) public material in all proceedings in the United States which CS relies upon and (ii) the contents of the FCIC and Levin reports (and their exhibited materials). This renders redundant (and will avoid the Court needing to embark on) any factual enquiry into whether any such claim/report in the public domain actually came to the attention of a particular Loreley director...
>
> L30 is content to proceed on the basis that, at all material times, KfW and L30 were reasonably attentive as to whether the Loreley companies may have potential claims against the banks which sold CDOs in respect of the Rhineland portfolio,

> including the Magnolia Notes. Therefore, if there had been material in the public domain from the US claims/reports which would have enabled L30 to bring its fraud claim, it can be assumed that such material would have come to the attention of L30 for the purpose of considering a potential claim against CS."

176. The net result is that the question of attribution of knowledge largely disappeared. The issue as to knowledge remained only in relation to such matters as contract specific investigations performed by IKB in relation to other contracts.

Stage 1 Emerging claims – a trigger?

177. The question of trigger was therefore less in focus in closing than it was in opening. L30 says that because it has on reflection decided that it is prepared to proceed on the basis of certain assumptions, it is not necessary to decide the trigger issue. However CS pointed out in closing that the effect of the assumptions which L30 is prepared to make is to focus attention on only one part of the evidence and take attention away from the actual subjective knowledge of KfW. That is a valid point.

178. Further it can often be the case that assumptions or concessions can lead to tensions within the other parts of the argument. It is therefore preferable to consider the trigger issue on its merits, via the emergence of knowledge and the making of other complaints.

179. In looking at what happened in those complaints it is necessary to bear in mind the division highlighted in argument, which is one between what were described in argument as "special knowledge" claims (a phrase which denoted that the banks which had arranged the CDOs had "special knowledge" about the assets selected for the CDO and which involved allegations of "*non-disclosure of information to investors because the banks wanted to remove poor quality assets from their books*") and those described as "Magnetar-type claims" – a description which covers an adverse selection type claim which will be explained further via the timeline below. The claims in this case are special knowledge claims: L30 sought to argue that the knowledge it could have had related only to Magnetar type claims.

180. The story proceeds as follows. The Financial Crisis of course impacted in 2008. It did not however come from a cloudless sky. As later inquiries would report, concerns about a residential mortgage bubble had been the subject of widespread discussion since at least 2005. The link to the securitisation and the repackaging of securities into CDOs stayed for some time under the radar but began to emerge in 2007.

181. By July 2007 Federal Reserve Chairman Ben Bernanke was forecasting that subprime losses could hit US$100 billion. By the end of July a deal to rescue IKB via a buyout by Lonestar was announced with stories suggesting that it had already bought more than US$30 billion of CDOs from Merrill Lynch at 22 cents on the dollar.

182. In 2008, KfW put in place a press monitoring and/or alert system "*to capture information on developments relating to the financial crisis*". It also instructed lawyers to provide advice on potential legal avenues in both jurisdictions including what potential claims may be available, and later asked both U.K. and U.S. lawyers to provide "*updates on litigation relating to the financial crisis*" and advice on potential claims that might be available "*in connection with [the Loreley SPVs'] assets*".

183. In parallel from mid 2009 the Financial Crisis Inquiry Commission was taking evidence.

184. One resource available to those reviewers were the "All Clayton Trending Reports" ("the Clayton Report"). This report was produced by Clayton Risk Insight Solutions, a provider of due diligence, underwriting and risk mitigation solutions for the residential and commercial real estate markets. The Financial Crisis Inquiry Commission Report ("FCIC Report") noted that it was "*a major provider of third-party due diligence services*" and that "*Because of the volume of loans examined by Clayton during the housing boom, the firm had a unique inside view of the underwriting standards that originators were actually applying—and that securitizers were willing to accept*".

185. Its reports were publicly available on its website. The Clayton Report for the period from Q1 2006 to Q2 2007 covered nearly 1 million loans – and set out data showing the rates at which loans reviewed by Clayton were rejected (i.e. marked EV3) and how many of those loans were nevertheless "waived" in by the client financial institution, all broken down by financial institution. It showed for the 18 months to June 2007 39% of loans Clayton found deficient were "waived in" and recorded Clayton's view that clients waived in loans to preserve relationships with a business originator. The summary – set out clearly in the FCIC Report - stated for CS that 32% of loans were rejected by Clayton (graded EV3) yet CS waived in 33% of those rejected loans.

186. The Clayton Report provided a basis for any careful reader to say that:

    i) The bank knew from the high number of rejections by Clayton that the sample of loans being reviewed departed from underwriting guidelines;

    ii) Despite this knowledge, the bank did not review unsampled loans which were likely to suffer from similar problems;

    iii) The bank waived loans marked EV3 and purchased them anyway.

187. The publicly available testimony of Clayton's employees given to the FCIC gave more – for example the testimony of Ms Vicki Beal that banks would often use the information obtained from Clayton to negotiate a discount rather than to reject or put back the loans. This is a point which was not specifically reported in the final report, but was made in oral evidence; which evidence was picked up in some of the actions subsequently brought by Loreley companies (against Citi, DB, UBS and Merrill Lynch/Morgan Stanley). All of these show that the transcripts were readily available and read by KfW's lawyers. But they also show that the testimony was reported and interesting issues "flagged" at the time. So

for example the Citi complaint cross refers to an article at the time Ms Beal's evidence was given: Jonathan R. Laing, *Banks Face Another Mortgage Crisis*, Barron's, Nov. 20, 2010.

188. I note here for completeness that in 2009 MBIA sued CS (*MBIA Insurance Corporation v Credit Suisse Securities* (USA), LLC ("the MBIA Proceedings")). While the contents of this action became relevant at a later stage, I do not consider that the profile of the original claim was such that it should be counted amongst the publicly available material which could constitute or contribute to a trigger.

189. In 2010 Magnetar emerged. In mid-2010, there was publicity surrounding a hedge fund called Magnetar (reputedly named for the super-magnetic field created by the last moments of a dying star) which had taken a short position in CDO transactions which it had helped create. The particular feature of the allegations relating to Magnetar was that it had selected deliberately risky assets in the Reference Portfolio such that the CDO was "designed to fail". It was therefore an adverse selection claim. But at the same time, a part of what was said in that claim was that those involved had known of the lack of quality involved and had nonetheless sold the CDOs.

190. A similar adverse selection allegation was made in relation to Goldman Sachs' involvement with the Abacus CDOs, a series of 24 of which were sold from 2004. In the 2004 CDO Goldman was the short investor for the entire US$2 billion deal: it purchased credit default swap protection on these reference securities from the CDO. The funded investors, including IKB, put up a total of US$195 million to purchase mezzanine tranches of the deal. These investors would receive scheduled principal and interest payments if the referenced assets performed. If the referenced assets did not perform, Goldman, as the short investor, would receive the US$195 million. Thus in this deal IKB and other investors were "long" investors, betting that the referenced assets would perform well, and Goldman was a "short" investor, betting that they would fail. But in April 2010, the SEC charged Goldman Sachs with fraud for telling investors that an independent CDO manager, ACA Management, had picked the underlying assets in a 2007 Abacus CDO when in fact a short investor, the Paulson & Co. hedge fund, had played a "significant role" in the selection. The SEC alleged that those misrepresentations were in Goldman's marketing materials for one of Goldman's Abacus deals. In July 2010, Goldman Sachs settled the case, paying a record US$550 million fine. Goldman acknowledged that the marketing materials for the transaction contained incomplete information.

191. These developments prompted KfW to identify the 161 CDOs owned by the Loreley companies and to investigate whether they might give rise to claims. Primarily in the picture were "Magnetar-type" claims, i.e. claims arising out of a "net short deal" or adverse portfolio selection, but (in line with the initial instructions given to IKB's legal advisers in 2008) the consideration extended to any issues which were thought to be worthy of investigation.

192. This review (the "IKB Review") was based on public information, together with IKB's own information and documents stemming from its due diligence in connection with the investment recommendations. The IKB Review was completed by the end of 2010. The review exercise included a review of the Notes

and other CS CDOs. It was conducted by three firms engaged by IKB. The agreement by which this review was conducted and the outputs have not been before the court, on the basis that privilege was claimed over them, and therefore what was said is not known.

193. However, in around August 2010, KfW instructed US counsel, Meister Seelig & Fein ("MSF") and Kasowitz Benson Torres LLP ("Kasowitz"), to advise it in relation to "*potential Rhineland Programme asset recoveries*." Kasowitz also set up a monitoring system to alert KfW to developments regarding RMBS and CDO litigation, particularly in New York. Again, the ambit was "*anything that would be relevant*" to the 161 CDOs, in particular to identify possible claims and material to support them. Mr Bulgrin was sent and read documents as part of the monitoring exercise.

194. At more or less the same time the FCIC Report emerged. That was published in January 2011. It concluded (amongst other damning conclusions) that "*collapsing mortgage-lending standards and the mortgage securitization pipeline lit and spread the flame of contagion and crisis.*" It is notable that some of the evidence submitted to the FCIC was freely reported earlier. So, as one of the L30 US complaints notes:

> "the New York Times noted in a September 26, 2010, article, ―[b]ecause these loan samples were provided to the Wall Street investment banks that commissioned them, they could see throughout 2006 and into 2007 that the mortgages they were financing and selling to investors were becoming increasingly sketchy."

195. A few months later, in October 2011, came the Levin report (the Report of the Permanent Subcommittee on Investigations of United States Senate entitled "*Wall Street and the Financial Crisis: Anatomy of a Financial Collapse"*). That similarly offered the damning conclusion: "*a host of financial institutions that originated, sold, and securitized billions of dollars in high risk, poor quality home loans that inundated U.S. financial markets. Many of the resulting securities ultimately plummeted in value, leaving banks and investors with huge losses that helped send the economy into a downward spiral. These lenders were not the victims of the financial crisis; the high risk loans they issued were the fuel that ignited the financial crisis…. Two case studies, … illustrate a variety of troubling practices that raise conflicts of interest and other concerns involving RMBS, CDO, CDS, and ABX related financial instruments that contributed to the financial crisis.*"

196. The IKB Review exercise was followed by careful consideration of the outputs with KfW's lawyers (MSF and Kasowitz). Where the view was then formed that there may be a viable claim in respect of a CDO, that then led to discussions between KfW and the Loreley company as to progressing that potential claim. Potential claims were identified against 23 potential defendants; across 95 CDOs, including CS and the Notes. A Common Interest Agreement was executed in September/October 2011. That Agreement stated:

> "Whereas the Parties anticipate litigation… against the Arranging Banks, Managers, Magnetar and others … in connection with the CDOs… (the "CDO Litigation Project")…
>
> Whereas this agreement confirms that the parties and the undersigned counsel have already been in communication regarding the Anticipated Actions and the CDO-Litigation Project …"

One of the CDOs identified in the Common Interest Agreement was the Notes.

197. While the centre of gravity of the investigations was with KfW and the lawyers, L30's directors did get updates about what was happening. There were regular substantial (about an hour long) telephone calls every week or so. These included explanations of the progress of the investigations into potential claims. There were also email updates regarding new litigation filings, press reports or public reports. Those actual documents were again not before the court, having been withheld on the grounds of litigation privilege. However summary documents show (to give but one example) that in September 2011 Mr Hollywood of L30 (as well as the main players at KfW) was sent an email entitled *"SEC Widens CDO Probe"*. In June 2011 he was also sent a copy of the MBIA decision. Mr Hollywood accepted that he would have read this material and that he expected the lawyers to familiarise themselves with the docket in the MBIA Proceedings.

198. Various claims were then brought in the United States by certain of the Loreley companies in 2011, against e.g. DB, Merrill Lynch, Wells Fargo, JP Morgan and UBS.

199. This is an appropriate point to ask whether there was a "trigger" which would reasonably prompt L30 to investigate. I conclude without any real hesitation that there was.

200. As for the contention by L30 that nothing thus far indicated wrongdoing, still less fraud on the part of CS and that all that had emerged was generalised concerns regarding the practices of banks in general which were insufficient to amount to a trigger, I reject that submission.

201. Firstly, the focus here is not on precision but on a trigger – being on notice that there is something to investigate: a something which would have caused a reasonably attentive and diligent person to ask questions (cf. *OT Computers* [47]). What all of this did was not to highlight a case against CS alone nor indeed to point a finger at specific other banks. Rather it indicated the potential for claims in multiple directions. Even absent specific material relating to CS I would have been minded to conclude that the fact that numerous banks were mentioned would cause a reasonably attentive person who had bought similar (and similarly unsuccessful) products from other banks to ask whether there might not be something wrong with its own purchase.

202. This conclusion is supported by the fact that IKB in fact did ask precisely such questions, as the narrative above reveals.

203. But in fact the indications went further than this. L30's case in opening that a conclusion had been reached that there was not a viable claim against CS, or that CS was not at that time seen as a potential defendant, is contradicted by the evidence: by September 2011 the CDOs in respect of which Mr Bulgrin anticipated litigation were the 95 in Exhibit A to the Common Interest Agreement, including the Notes; "*At least that point in time, it may have been sooner*" as Mr Bulgrin said. This means that it is established on the documents, supported by a relevant witness, that at this point CS was seen as a potential defendant in relation to this transaction.

204. Accordingly I conclude that there was a trigger by the date of execution of the Common Interest Agreement in September/October 2011. I also note that in the light of the evidence which has emerged L30's disputing of this point all the way up until the service of closing submissions is somewhat surprising. That evidence included not just Mr Bulgrin's recollection noted above, but also Mr Hollywood's frank admission that:

   i) At this point he had received materials that identified allegations of fraud against CS, and was aware that CS was one of the "relevant…banks" which had sold CDOs to Loreley SPVs;

   ii) The passage of his statement indicating that the first time that he had "*anything which led me to believe that [CS] had committed any fraud (and certainly not a systemic fraud) in relation to its RMBS securitisation business…*" was on the emergence of the DoJ SoF was not accurate.

205. Even if that were not so, I conclude that this trigger would have been reached by late 2011, when KfW discovered that IKB had sued CS for fraud in respect of certain RMBS which IKB had purchased. That litigation was the result of the monitoring processes for publicly available documents it had implemented.

Stage 2: The pleadable case

206. The main point at issue on the question of whether L30 could with reasonable diligence have known of the central RMBS allegations – including the dishonesty aspects – before 15 November 2012 concerns what one can properly take from the claims which were made.

207. Here I shall consider three possible sources, on top of the fully public materials to which I have already referred;

   i) The first is the claims made by Loreley against other banks ("the Rhineland claims");

   ii) The second is the litigation commenced on 2 September 2011 by the U.S. Federal Housing Finance Agency ("the FHFA") (the conservator for Freddie Mac and Fannie Mae - federally backed entities supporting the US mortgage market) in the United States District Court for the Southern District of New York against various members of CS relying upon alleged mis-statements in offering documents for RMBS which CS had either securitised and/or unwritten (Case No. 1:11-cv-06200-DLC) ("the 2011

FHFA CS Action"). The 2011 FHFA CS Action (which was one of seventeen actions filed against different banks by the FHFA at the same time) concerned 43 RMBS, including five of the CS RMBS;

iii) The third is the claim brought by IKB against various CS entities, including CSSU, in the Supreme Court of New York, which was issued on 10 November 2011 (Index No 65312/2011) ("the 2011 IKB CS Action") and in which IKB alleged that the defendants had been involved in "*pervasive fraudulent conduct in connection with the offer and sale to Plaintiffs of certain [RMBS]*" and in particular had knowingly made misrepresentations in the offering documents for various RMBS, including two of the CS RMBS.

The Rhineland claims

208. The relevant claims are:

i) DB: filed October 2011;

ii) Citi: filed January 2012;

iii) ML/MS filed March 2012;

iv) UBS filed May 2012.

209. The Rhineland claims were all approved by KfW (Mr Bulgrin and the steering committee), the US law firms retained by the Loreley companies, Mr Hollywood and the relevant Loreley companies' directors. They therefore reflect L30's knowledge.

210. L30 says that the claims it made were primarily "Magnetar-type" claims and "*the fact that one has a claim against Peter for some wrongdoing does not mean that one has a claim against Paul for some other wrongdoing. .... Moreover, the 'Magnetar-type' claims were wholly different in kind from the RMBS Misconduct alleged against CS in these proceedings.*"

211. There has therefore been a lot of concentration in submissions and the evidence of what was alleged in those complaints and what knowledge can be taken from them. Before entering into this it is worth reiterating what the essence of the "worthwhile case" or "statement of claim" case here is: knowledge that the underlying business did not match up with the offer documentation – and most specifically knowledge as to falsity of ratings.

212. The essence of that is the "riskier than you told us" element. This broad allegation was central to essentially all of the complaints and can be seen to have been the malaise underpinning much of the publicity. So on this one sees for example:

i) Citi complaint: Citigroup knew that even the most senior tranches of CDOs were far more risky than their ratings suggested;

ii) Citi complaint: "*Citigroup knew that the RMBS it and other major banks were packaging…were likely to default – making the RBMS assets and the CDOs that rested on them far less secure than portrayed by their ratings*".

213. Then if one looks to the RMBS elements and knowledge of that, there is also considerable specific knowledge alleged.

a) Taking first the allegations about packaging inappropriate RMBS: this featured thus in the Citi complaint: "*Citigroup knew that the RMBS it and other major banks were packaging into CDOs included a significant percentage of subprime mortgages that violated basic underwriting standards*";

ii) A similar allegation features in the ML/MS complaint:

> "…[MS] knew about the faulty processes that many loan originators employed. As part of its review before purchasing blocks of mortgage loans, [MS] retained Clayton to perform an analysis on a sample of loans being purchased…As part of its analysis, Clayton found that a significant portion of loans originated in 2006 and 2007 by New Century violated underwriting guidelines".

214. Eerily similar language showing a familiarity with Clayton and the underwriting guidelines issues appeared in other complaints;

i) The DB complaint [74] "*between 2006 and 2007 – the period when Deutsche Bank arranged and marketed to Plaintiffs the investments at issue in this complaint – Clayton found that 35% of the mortgages it analyzed for Deutsche Bank failed to conform to underwriting standards, and recommended that Deutsche Bank put these loans back to their originators*";

ii) The Citi complaint [68-72] "*Mr. Bowen further testified that, on other occasions, Citigroup purchased subprime loan pools where only 70% of the constituent loans met Citigroup's underwriting guidelines. Still on other occasions, the Chief Risk Officer instructed underwriters to assess loan pools using the originators" more lenient underwriting guidelines rather than Citigroup's more stringent standards. …And if the company required any further confirmation of the red flags its Chief Underwriter was raising, Citigroup received such confirmation from Clayton Holdings ("Clayton"), the due diligence consultant Citigroup retained to examine samples of the mortgage pools that Citigroup was purchasing in order to determine whether the sampled mortgages conformed to applicable underwriting standards….Starting in late 2005 or early 2006, Clayton reported to Citigroup that a large percentage of the loans Citigroup had acquired for securitization were non-conforming…. Clayton flagged 42% as failing to conform to underwriting standards*";

iii) The UBS complaint [70] "*Representatives of Clayton Holdings testified before the FCIC that, between January 2006 and June 2007, it reviewed*

911,000 loans for 23 investment or commercial banks, including UBS. Of the loans it sampled from the pool UBS acquired for securitization, Clayton found that 1 in 5 did not meet the loan originators' underwriting standards. Nevertheless, UBS waived 33% of these non-conforming loans into the RMBS that it then sold to investors — including CDO investors".

215. The main thrust of the argument put forward by L30 was two fold. The first is that these complaints were Magnetar type complaints. The second is that even if the relevant knowledge was capable of being gathered, L30 was not capable of doing that.

216. However, I did not find either of these points persuasive. The relevant kinds of "special knowledge" were deployed in a number of the other claims. For example:

    i) The complaint against DB filed in October 2011 included claims that were not based on adverse selection, as Mr Bulgrin accepted. Mr Hunter accepted that the claim in relation to the Barramundi CDO was based on the Clayton Report (at [164]-[181]);

    ii) The complaint against Citi filed was, as Mr Hollywood accepted, based on Citi's "special" or "peculiar" knowledge that the underlying RMBS were riskier than their ratings suggested ("*Defendants knew but concealed from the market and potential investors that the subprime RMBS and CDOs of RMBS that they placed into the Pinnacle Peak and Plettenberg Bay CDOs cash portfolios were significantly more risky, and thus more likely to default, than suggested by their credit ratings*");

    iii) The complaint against UBS concerning various CDOs filed in May 2012 had Magnetar "designed to fail" allegations, but it also had special knowledge issues: *"UBS had peculiar knowledge of facts revealing that TABS and the other assets comprising the AMP Reference Portfolio were not of the quality represented and did not warrant the nearly riskless Aaa Moody's ratings assigned to them*".

217. One thing which is worth noting at this stage is that the material used by all these claimants in the Rhineland claims was essentially publicly available material. The sources were:

    i) The reports, testimony and evidence presented to various public inquiries into the financial crisis, including most importantly the Financial Crisis Inquiry Commission (the FCIC Report itself and the underlying testimony from witnesses and submitted documentary evidence);

    ii) The Clayton Report information;

    iii) Complaints filed by other litigants, the "dockets" of which were broadly publicly accessible (save for documents under seal);

    iv) Analysis undertaken by other plaintiffs (with outside assistance) indicated that it was possible to utilise the information on underlying loans which

(unlike the full loan files) was accessible. For example, a list of the addresses of the properties secured by an RMBS (which was available from loan tapes), could be used to commission Automated Valuation Models ("AVMs") on the properties in question.

218. All of this suggests that the kind of complaint which one sees in the other litigation could have been put together by L30.

The 2011 FHFA CS Action

219. The 2011 FHFA CS Action was a claim brought in the New York courts by the FHFA against CS arising out of CS' sale of RMBS to Fannie Mae and Freddie Mac. This was one of 17 actions filed against different banks. The claim was issued on 2 September 2011. The claim concerned 43 RMBS, including five of the CS RMBS. In broad summary, FHFA contended that CS had made misrepresentations e.g. as to whether the mortgage loans complied with underwriting guidelines. This was not however a fraud claim – a point emphasised by L30. The causes of action were breach of US securities laws and negligent misrepresentation.

220. The complaint did however have some notable overlap with the case run here. In particular:

i) It was pleaded that "*[RMBS] were sold pursuant to registration statements, including prospectuses and prospectus supplements…which contained materially false or misleading statements and omissions. Defendants falsely represented that the underlying mortgage loans complied with certain underwriting standards…*";

ii) There were allegations of problems with originators of loans: FHFA relied upon a report published by the Office of the Comptroller of the Currency (part of the US Treasury) identifying the "Worst Ten" mortgage originators in the "Worst Ten" metropolitan areas (a number of which contributed loans to CS deals);

iii) There was (again) reliance on Clayton at [160]: "*The Clayton trending reports described at paragraph 86 above, and summarized by the FCIC, have also documented that Credit Suisse routinely 'waived' into loan groups mortgage loans that did not comply with underwriting guidelines and without adequate consideration of compensating factors…. internal Clayton documents show that, contrary to Defendants' representations, a startlingly high percentage of loans reviewed by Clayton for Credit Suisse were defective, but were nonetheless included by the Defendants in loan groups sold to investors. According to a trending report made public in September 2010, Clayton found that 32 percent of the 56,300 loans that it reviewed for Defendants received the worst possible grade, i.e., they failed to conform to standards. Id. at 167. Credit Suisse 'waived' into its groups one-third of those toxic loans that Clayton had identified as being outside the guidelines.*"

221. The FHFA complaint also provided a reworking of allegations in proceedings brought by MBIA against CS in 2009 ("the MBIA CS Proceedings"). This was apparently done via a review of documents obtained by FHFA from the publicly available court file in that action. Such documents were equally obtainable by KfW/L30 and its lawyers. FHFA relied upon MBIA's review of original loan files (to which it had access, though they were not publicly available) and also MBIA's reliance on CS's QC reports. The material pleaded based on the MBIA allegations included:

    i) *"The findings of these insurers reinforce the results of the forensic review conducted by Plaintiff FHFA of nearly 2,000 files relating to loans backing the HEAT 2007-1 and HEAT 2007-2 Securitizations. Specifically, they demonstrate that the essential characteristics of the mortgage loans underlying the Certificates sold to the GSEs were misrepresented and that the problems with the underwriting practices used to originate the mortgage loans were systemic";*

    ii) *"MBIA ... states that Credit Suisse has produced internal emails that prove that as early as February 2006, Credit Suisse itself had become aware that the mortgage loans that it was pooling for securitizations had been originated in violation of the applicable underwriting guidelines. According to MBIA, when faced with alarming early payment default rates on loans that it planned to securitize, Credit Suisse employees sought to obtain 'quality control' reports. Those reports showed that substantial percentages of the delinquencies had been caused by substandard underwriting, misstated incomes, and undisclosed debts."*

222. The FHFA then in addition conducted its own "review of loan-level data", using thousands of randomly selected loans, which FHFA claimed supported claims of material representations based on owner-occupancy and LTV ratios. As for the LTV ratios, these allegations were based on the use of AVMs (which required the list of addresses of the underlying properties). FHFA also appears to have obtained nearly 2,000 loan files which it then used to conduct an alleged "forensic review" of compliance with underwriting guidelines. While the work was, as noted above, not based on publicly available material, it was used by the Loreley entities as part of some of the Rhineland claims.

The 2011 IKB CS Action

223. It is then sensible to look at the complaint which IKB did bring against CS in the US. IKB commenced an action in the New York courts on 10 November 2011 by way of a short Summons. A detailed Complaint was then filed on 2 July 2012. The claim related to 14 RMBS which IKB had acquired outside the Rhineland Programme which included two of the CS RMBS. The gist of IKB's claim is that CS had made misrepresentations regarding the loan quality (e.g. LTV ratios, occupancy status) and the loans' compliance with underwriting guidelines. IKB alleged that CS was aware that the representations were false. IKB's claim in this action did therefore involve a plea of fraud.

224. On 31 August 2012, CS issued a motion to dismiss the claim. In its Memorandum of Law in support of its motion to dismiss, CS set out its position that the claims failed in their entirety and fell to be dismissed on a summary basis for six reasons. The second of these reasons was that IKB "*fails adequately to plead fraud because it fails to plead an actionable misstatement or omission of material fact, scienter, reliance or loss causation*". CS explained that all of IKB's allegations failed because the offering documents contained no actionable representations. CS explained that IKB had failed adequately to plead "scienter", that being the required element of knowledge of falsity to support a fraud claim and that IKB's allegations had failed to identify any proper basis for a plea of scienter.

225. It is between this point and the ruling in this action that the key limitation date of 15 November 2012 passes.

226. CS' motion to dismiss was ruled upon on 3 March 2014. The Court rejected CS' motion to dismiss. CS filed its Answer to the Complaint on 15 May 2014, which consisted of comprehensive denials of any wrongdoing. The case then moved to discovery. The proceedings concluded in 2022 prior to trial.

227. L30 contends that there was nothing in the 2011 IKB CS Action which enabled L30 to bring a fraud claim in respect of the RMBS Misconduct. Nor was there anything which ought to have put L30 on inquiry.

228. The first point made by L30 is that as at the time of the limitation "cut-off" (i.e. November 2012), CS' position was that IKB's claim fell to be struck out, including on the basis that the claim disclosed no proper basis for alleging fraud. L30 says that there is a fundamental inconsistency in CS saying today that, as at November 2012, the 2011 IKB CS Action was sufficient to enable L30 to plead fraud, in circumstances where CS was itself contending as at November 2012 that the claim disclosed no viable basis for a fraud claim.

229. This is not L30's best point. The question of what CS was arguing and what L30 knew (to a standard of being able to allege it) is fundamentally different. There is no "fundamental inconsistency". There was an active dispute about whether the facts pleaded by L30 passed the pleadability hurdle as a matter of US Law. That does not affect L30's ability to rely on those facts. The same point arises in relation to the assessment of the Clayton Report material. L30 says that it could not have pleaded fraud because the FCIC Report recorded testimony which indicated that there could be innocent explanations for this. In order to be able to allege fraud a party does not need to know something to the point of certainty; it needs only to have a proper basis to allege it (cf. *LIA* [34]).

230. Second, L30 says that the fact that IKB considered that it could plead fraud in New York does not mean that L30 could have pleaded fraud in England. This position led into a vibrant debate, with CS maintaining in closing that L30 was debarred from denying the pleadability of fraud. I will revert to this point later.

231. As a primary route of analysis I regard it as preferable to consider whether what was alleged in the US contained the same building blocks as L30 did in the event use to advance its case here; in other words whether (regardless of pleading standards or ingredients for the local law or procedure) it knew and deployed

substantive elements which it could have used to advance the same case in these courts.

232. It was L30's case that there is very limited overlap between the allegations made in the 2011 IKB CS Action and the allegations of RMBS Misconduct made in these proceedings. This was addressed in Schedule 2 to the L30 opening skeleton the main thrust of the point being that:

i) There was no overlap as to the facts relied upon to show falsity or knowledge of falsity;

ii) Two allegations made in the IKB proceedings (misstatement of LTV ratios based on AVM valuations and occupancy status) form no part of the RMBS Misconduct relied upon by L30 and appear to rely on propriety analysis of information not available to L30;

iii) There was no identification of individuals who were said to have been dishonest – contrary to the English law requirements for pleading fraud.

233. This is the critical point at the heart of the limitation case. It is therefore necessary to analyse the allegations in the two sets of proceedings, and ascertain to what extent the IKB CS proceedings did give all or part of what was needed to found a claim in fraud in this jurisdiction.

234. The 2011 IKB CS Action focused on 11 CS securitizations, including two of the CS RMBS. In that case IKB's case on fraudulent misrepresentations was placed under three headings;

i) Fraudulent false and misleading statements regarding loan quality;

ii) Fraudulent false and misleading representations that the loans in the pool complied with the underwriting guidelines of the originators;

iii) Fraudulent false and misleading statements regarding transfer and assignment of the notes.

235. The last of these does not overlap with the case advanced in this litigation. However the first two (plainly) do. As regards the quality issues, while there was focus on LTV ratios by reference to AVM valuations and occupancy status, these were heavily concerned with the underwriting standards and process. Thus IKB's case theory was that "*In the Offering Documents, the Defendants knowingly misrepresented the credit quality and characteristics of the pools of loans…*" and that "*The Offering Documents also contained material representations…regarding the purportedly rigorous loan underwriting standards employed in the loan origination process, the characteristics of the mortgage loans purportedly underlying the Securitizations…*" in that *"…there was a widespread and systematic departure from the originators' underwriting guidelines, and the Defendants were fully aware of that fact at the time they made the false representations in Offering Documents…*"

236. Pausing here, a central point in this litigation concerns ratings. This is an area where the US litigation was not explicit. In the 2011 IKB CS Action, while there was no headline allegation about ratings, the quality issues also did engage allegations regarding ratings. Thus at [169] of the 2011 IKB CS Action it was pleaded that: "*In order to meet Plaintiffs' investment criteria, Certificates had to have an investment rating of at least BBB– and at least 77% (or at certain times, more) of Plaintiffs' investment portfolio was required to have a rating of A or higher. As explained above, the investment ratings of the Certificates were a direct product of Defendants' misrepresentations concerning the loan pool.*". Again at [172] it was said: "*All of Plaintiffs' Certificates received investment grade ratings at issuance as a result of the Issuer Defendants' misrepresentations concerning the credit risk of the underlying loan pools. The vast majority of the Certificates have since been downgraded to junk status.*" Those pleadings, while not central to the US case, encapsulate allegations which are essentially similar to those run in this case.

237. There is also very considerable overlap regarding falsity. On falsity regarding substandard loans the complaint alleged:

i) At [76] "*Defendants were aware of the inflated appraisals based on their own due diligence and due diligence done for them by third-party vendors engaged for that purpose*";

ii) At section III. C there was a topic which particularized this allegation. From [101]-[112] the topic was addressed in detail:

a) At [103] the pleader outlined the Clayton scoring system, with 3 meaning the loan failed to comply with the originator's underwiring guidelines and did not possess any compensating factors. At [104] the specific allegation was made that "*During the period from 2006 through 2007, approximately 32% of the loan files Clayton reviewed for Defendants and other Credit Suisse-affiliated entities received a failing score of 3*";

b) At [105] it was said that "*Defendants therefore knew when they were preparing the Offering Documents for the RMBS Securitizations that, on average, approximately 32% of the loans for their securitizations failed to comply with the underwriting guidelines of the originator and were without any compensating factors.*" In the following paragraph the allegation about "waiving in" was made;

c) Then at [110] it was pleaded that "*after having knowingly waived in loans that violated underwriting guidelines and had no compensating factors, Defendants nevertheless told investors, including Plaintiffs, that the exact opposite was true. In other words, Defendants represented in the Offering Documents that all the loans in the mortgage pool either complied with the underwriting guidelines or had compensating factors, even though they knew this was plainly false*".

iii) Specific allegations were made as to the CSAB 2006-3 CSAB 2006-4 AND CSMS 2007-1 securitizations.

238. On falsity regarding absence of due diligence on unsampled loans the Complaint pleaded:

> "even though the reports from Clayton gave notice to Defendants that on average 32% of the sampled loans did not comply with underwriting guidelines or possess compensating factors, Defendants failed to conduct any additional review of the loans not yet sampled. In other words, even though they knew that the un-sampled set would contain approximately the same proportion of bad loans (as such is the purpose of sampling), Defendants ignored this obvious defect, and instead, placed all of the un-sampled loans into the Securitizations as well."

239. On falsity regarding unreliable LTV ratios and inflated appraisals it was pleaded that:

i) At [76] "*the originators deliberately inflated their appraisals in order to achieve the target LTV ratios sought by Defendants, and Defendants were aware of the inflated appraisals based on their own due diligence and due diligence done for them by third-party vendors engaged for that purpose.*";

ii) Falsity as to the LTV ratios was pleaded by reference to the IKB proprietary analysis at [82]-[87];

iii) However, at [111] it was pleaded that "*since Defendants received detailed information regarding LTV ratios, CLTV ratios, and owner-occupancy rates from Clayton, Defendants knew or should have known that the representations concerning these important metrics were false*". On this basis the case could have been made by L30 itself based on Clayton (public) material rather than based on the proprietary material;

iv) Pausing here, part of the case made in the Schedule 2 to L30's opening submissions is that the 2011 IKB CS Action alleges that the LTV Representations were false because appraisal values had been inflated, based on evidence using AVMs, whereas L30 alleges that the same representations were false because appraisals were inflated, but for a different reason (based on BPOs). This is an immaterial distinction. The question is not whether L30 could have pleaded the highly detailed case it now advances (post disclosure) but whether it could have pleaded the high-level case advanced pre-disclosure.

240. On knowledge and fraud no specific allegations were made against the Defendants. The sole basis for alleging dishonesty came back to the Clayton material, as Mr Nowotny made clear in his evidence. However at [52] the pleading did effectively make allegations against individuals: "*because of the substantial overlap in high-level personnel, the knowledge of each entity with an overlap can be attributed to the others with which it overlaps: a director, officer,*

or high-level employee does not forget what he knows about the operations of an entity when he changes hats to work for its affiliates." It then set out individuals who cross deployed across various CS entities. Among these were Messrs Marriott and Kimura. The overlap here with the present case is striking. The draft POC pleaded knowledge against "at least" Mr Kimura, Mr Marriott, Mr Serageldin and Mr O'Driscoll. The final RRRRAPOC pleaded actual knowledge on the part of Mr Kimura and Mr Marriott and inferred knowledge on the part of the others, as well as knowledge on the part of the various others named in Schedule 7 to the RRRRAPOC.

Pleaded case discoverable with reasonable diligence? Conclusion

241. Taking all of the above into consideration I reach the conclusion that, having had a trigger, there was ample material available from which L30 could have advanced the case pursued in 2018 at some point during the course of 2012.

242. It is not necessary in my judgment (based on the analysis of the authorities) for the precise case now run to have been available. Nor need the exact details have been available. What is necessary is that a case of the same nature (fraudulent misrepresentation) based on essentially the same representations could have been run. Here the alleged falsity of the CDO Representations is grounded in the alleged RMBS Misconduct and specifically those aspects I have highlighted above.

243. There are three aspects here. First was Clayton enough – L30's case being that this was all it had prior to the SoF, and that it was not enough. Secondly was there more available than Clayton? Thirdly, there is the question about the significance of the New York proceedings.

Was Clayton enough?

244. The headline (and easy) point here is that the allegation that CS used sampling and that Clayton marked many loans "EV3", and yet CS still purchased them – were matters which could have been pleaded on the basis of the Clayton Report. It follows that on the face of it those parts of the L30 case could have been advanced simply on the basis of the Clayton materials. L30 says (citing the FCIC Report) that the EV3 point was not enough because EV3 was a designation which did not necessarily mean that a loan was defective. This is a somewhat ironic point, because this adopts CS's own case on the substance of the allegation. However the reality is that L30 did advance this point, both here and elsewhere on the basis of this material.

245. L30's answer here is via *Seedo*; it says that the case originally indicated, which did fully take this point was not pursued to trial. However that is to ignore (i) the fact that the RRRRAPOC still pleads that EV3 means "*that the loans were not originated in compliance with applicable laws and regulations, the loans did not comply with applicable underwriting guidelines and lacked sufficient compensating factors, or the loan file was missing a key piece of documentation*" and that the fact that 39% of loans in the due diligence pool were graded EV3 meant that the Loan Compliance Representations were falsified and (ii) the point

was still deployed, if not separately pleaded: in closing L30 submitted that "*The obvious inference is that most EV3-graded loans were in fact defective.*"

246. The second point is that the Clayton Report addressed only loans which were acquired; not which were securitised or what if any further due diligence was undertaken post-acquisition. That is a perfectly valid point, but L30 has said in these proceedings that I should infer that loans were securitised: "*the whole purpose of CS acquiring loans was to securitise them*".

247. The third point which L30 takes is that the Clayton Report provided no link between the sample of loans addressed and the 7 CS RMBS. Again logically this has force, but it need not (and did not) prevent the point being pleaded here and in the DB complaint in the US.

248. L30 then contends that falsity and dishonesty could not properly be alleged, because on "waiving in" the FCIC Report indicated the possibility of an innocent explanation. To this the answer is similar to that given earlier on regarding the US Proceedings: the fact that it is disputed does not make it unpleadable. And indeed L30 did allege fraud, albeit not specifically in connection with this aspect, and it did so while the same explanation as that given in the FCIC Report was still being tendered by CS. Therefore if the case was not pleadable for this reason, it was unpleadable throughout the entirety of the case. The same point can be made as regards inferring dishonesty from CS's knowledge of the extent of non-conforming loans; dishonesty was pleaded in the US on this basis and this has been pleaded here as a basis for dishonesty. It therefore ill becomes L30 to say that this could not have been pleaded when it was first known of.

249. Finally I should consider the submission that L30's case did rest on more than the substance of Clayton – for example the emails cited in the SoF. However none of the materials relied on appear to be significant in terms of providing evidence or any meaningful further material in addition to what was provided by Clayton.

Was there more available?

250. If there were to be enough doubt on the point via Clayton, the question arises as to whether there was other material – linking directly to the CS RMBS – which would carry L30 over the line. One answer to this would be to say (as CS does) that when L30 issued these proceedings it had no material to link the misconduct to the CS RMBS and therefore the point does not arise.

251. However in my judgment it is appropriate – and very helpful – to pan out and examine whether the point is really as binary as L30 suggests.

252. Here I conclude that L30 relentlessly undersells the other material available and in particular the combination of Clayton, the FCIC Report and the FCIC witness testimony. It argues that the public material was "*The Clayton Reports as addressed in the FCIC report*"; but that is wrong. In truth L30 (and any other concerned party) had access to:

    i) The Clayton Report in full (and not "as addressed in the FCIC Report");

ii) Plus the context and details identified by the FCIC Report and the extremely relevant granular details which seem to have been provided by FCIC witnesses including Clayton employees;

iii) Plus the Levin Report and associated material. For example:

a) The DB Complaint referred to a CDO trader at DB (Mr Greg Lippman – also referred to by one commentator as "the Cassandra of the financial crisis") referring to RMBS as "pigs" and "crap". The "pigs" and "crap" comment was repeatedly cited by L30 as making a critical difference for Deutsche Bank (ie without it Deutsche Bank lacked material, and without an equivalent L30 lacked material). In fact however this was lawyer's spin on a comment recorded in the Levin Report which was not Deutsche Bank specific. Mr Lippmann had thus derided the quality of the RMBS securities underlying many CDOs as part of the position he took in relation to the market generally. Either "pigs" and "crap" was not a magic phrase (in which case the other material was enough), or, if it was magic, it was magic for L30 too;

b) The Levin Report did make some interesting comments about CS specifically, for example quoting a Moody's witness as being concerned about CS taking advantage of Moody's being so pressed that they were doing a "light review" and another reporting being replaced on CS deals for being too hawkish.

253. All of this together, even before one adds in the other materials which can be seen being deployed in the Rhineland claims, makes a resource which demonstrates that "Is Clayton enough?" is actually a false point. Aside from the Clayton Report, the other publicly available material was not inconsequential.

254. I have also outlined above the detailed matters which were pleaded in the Rhineland claims. That demonstrates that knowledge that underlying loans in the CS RMBS failed to conform with offering documents underwriting criteria was plainly being alleged and pleaded in documents which were available to L30 and which it could very easily find.

255. For example, the allegation that the reported LTV ratios were unreliable in the case of many loans since the valuation appraisal was inflated, could have been pleaded on the basis of the same exercise which FHFA and IKB had performed (i.e. obtaining AVMs), or simply by adopting those parties' claims pending disclosure based on publicly available material. While Mr Hobson submitted that L30 could not rely on other litigants' work and would need to see the underlying documents, this is not consistent with what IKB/L30 did. As I have noted, the Rhineland claims show L30 adopting the analysis in the MBIA case.

256. The "Clayton or nothing" case is thoroughly wrong, therefore.

The 2011 IKB CS Action

257. The point then taken by L30 is that the primary facts known were insufficient to support a plea of fraud in England and in particular that a case on individual dishonesty could not have been run – relying on (i) the fact that the 2011 IKB CS Action did not identify individuals as dishonest and (ii) the high requirements for pleading fraud in this jurisdiction.

258. As to the latter, more general point, advanced by reference to *Three Rivers DC v Bank of England (No.3*) [2003] 2 AC 1 at [186] and *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm) at [20], L30 neglects to take into account the authorities which establish that the pleadable case (in circumstances where *ex hypothesi* all may not have been open and above board) is somewhat lower than the standard at trial which is what L30's authorities address.

259. L30's case cannot stand in the face of a consideration of these other authorities which focus on the requirements at the time that the plea of fraud is first deployed. Indeed at an earlier stage L30 itself argued that it need not name individuals, praying in aid the "*generous approach to pleadings*" in such situations referenced in *Portland Stone Firms v Barclays Bank* [2018] EWHC 2341 at [27]-[28] per Stuart-Smith J Nokia Corporation v AU Optronics Corporation [2012] EWHC 731 (Ch) per Sales J at [62]-[67] and *Bord Na Mona Horticultural Ltd & Anr v British Polythene Industries Plc* [2012] EWHC 3346 (Comm) per Flaux J at [29].

260. Indeed *Kekhman* itself does not really assist L30 because Flaux J there made clear that:

> "At the interlocutory stage … the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge".

261. Further even if these authorities did not exist, it would seem rather strange for a limitation defence to be defeated by reference to an assertion of pleading standards which was not observed when L30 did commence its action: no specific allegations were made against individuals in the original Particulars of Claim . It was only on the emergence of the RRRRAPOC in 2022 that underlying representations were pleaded and names named in relation to the RMBS Misconduct allegations. Although L30 says it was the SoF which enabled it to plead fraud, the link between the SoF and individuals has never been explained.

262. But in any event the nature of the case on fraud as regards individuals has always been inferential and little has really changed. The 2011 IKB CS Action did name names: two of the same names named in the pleading, namely Mr Marriott and Mr Kimura. Although the universe of names was ultimately considerably expanded, in closing it was notable that when pressed by the court as to the "main targets" the answer went thus:

> "Messrs Marriott and Kimura, as your Ladyship knows, we say are, putting it rather colloquially, bang to rights here, …in view of … what those two gentlemen likely knew about the CDO operation within Credit Suisse, given that Messrs Marriott and Kimura were co−heads of effectively the RMBS Group and we've seen reports back to them of some very serious misconduct matters …
>
> Mr Serageldin … performed a very central role…Mr Healy … the chief risk officer …The other four... who really stand out are the four traders …Daniel, Dodman, Schoen and Vibert".

263. It follows that based in the matters known in 2012 L30 could perfectly well have pleaded a case at least against Messrs Marriott and Kimura.

264. The other aspect relied upon is the one which becomes obvious when one looks at the Rhineland claims: whether L30 could properly plead matters pleaded by others in the US. L30 says, rightly that a claimant cannot "adopt" allegations made by another litigant, unless it has an independent basis for believing the truth of those allegations. That however begs the question of whether it has an independent basis for believing the truth of those allegations. A broad unparticularised assertion may well be something which a party will not feel able to adopt (unless for example it dovetails with other material which it has to similar effect).

265. But many of the allegations in the non IKB/KfW complaints were very far from unparticularised. Where, for example, one is looking at the pleaded results of a statistical exercise performed on original documents pursuant to a contractual right of inspection by reputable lawyers, that very pedigree provides its own independent basis for belief. This is an argument which applies to the MBIA and FHFA Complaints. L30 knew that a serious "deep dive" had been done by these litigants and that they had pleaded the results. I see no reason why this could not have been relied upon in the same way as (say) reports of conversations in the DoJ SoF. This is an even stronger argument when one comes to an exercise commissioned by IKB – even if underlying material was not made available to L30 or KfW, those acting for L30 would be able to have confidence in the robustness of that exercise.

Conclusion

266. Accordingly and despite Mr Hobson's very skilful submissions on this issue, I conclude that prior to November 2012 L30 could with reasonable diligence have pleaded all the elements of the cause of action that it ultimately pleaded in 2018. This is not a case of knowledge of some other wrongdoing or wrongdoing of other banks; it is knowledge of the key facts relating to CS which would enable the CDO Representations to be pleaded by reference to falsity created by one or more facets of the RMBS Misconduct.

267. It follows that the protection of section 32 (and 14A) of the Limitation Act is not available to l30, and the claims advanced are time barred.

The cross-check: what L30's witnesses said

268. Of course the question of whether the knowledge L30 had is sufficient is one for me. However it is nonetheless interesting to note what the L30 witnesses had to say about their actual subjective knowledge of the RMBS Misconduct. As I have noted above, the L30 witnesses were honest and doing their best to assist. They were also clear that L30 did have pieces of information which the above analysis identifies as key and their deduction from that was that L30 had knowledge to bring a claim based on RMBS Misconduct by 2012.

269. In particular:

i) Mr Hollywood was asked about PoC para 42(4)(a) which set out the allegation that the Loan Compliance Representations were false by reference to allegations on "waiving in" EV3 loans and the Countrywide allegation. He accepted:

> "Q. Everything in (a) you knew in 2012, didn't you, because it's what the Clayton report said?
>
> A. Yes.
>
> Q. So you could have alleged that in 2012; yes?
>
> A. (Pause) Yes.";

ii) Mr Bulgrin was asked about the use to which the knowledge contained in the IKB complaint could have been put:

> "Q. So would you accept that the IKB complaint contained allegations of fraud pleaded on a similar basis to the claims that numerous Loreley SPVs had brought against Deutsche Bank?
>
> A. At least in part.
>
> Q. Yes, and would you accept that the IKB complaint contained material which could be used to allege fraud against Credit Suisse in relation to the Magnolia notes?
>
> A. Yes….
>
> Q. Would you accept that Kasowitz could easily have replicated the approach taken in the IKB complaint in putting together a claim against Credit Suisse in relation to the Magnolia notes?
>
> A. Copy and paste, yes, Kasowitz could have or Meister Seelig or any kind of law firm, could have copy and pasted what you showed me in the IKB complaint and write it in their own complaint …";

iii) Indeed looked at at the RMBS level, Mr Bulgrin seemed to regard a claim at this stage as obvious:

> "Q. … you would have thought there was sufficient linkage [to bring a claim] if Loreley 30 had invested directly in the RMBS rather than in the CDO; yes?
>
> A. Had a JPC invested in the same RMBS it would have struck me, the same RMBS in the same manner, and just the RMBS, it would have struck me odd not to bring a claim or being advised that not to bring a claim against Credit Suisse."

270. This was inevitable against a background where the L30 witnesses accepted that they:

    i) Were aware that RMBS offering documents contained statements concerning the underwriting guidelines applied by the originators of the loans, and described contracts (i.e. PSAs) which contained representations about the compliance of loans with those underwriting guidelines, which placed the risk of breach on the seller;

    ii) Were aware of the content of the description of sampling and diligence performed by Clayton and the summary table set out in the FCIC Final Report, and of the underlying Clayton Report itself;

    iii) Considered that the information contained in the Clayton Report was sufficient to allege that the percentage of loans reviewed by Clayton identified in Column B of the table were non-conforming with underwriting guidelines, and that the bank in question 'waived in' the percentage of loans set out in Column E and that this was sufficient to support an allegation of fraud;

    iv) Knew that this information had been used to support other claims in fraud.

271. This is also consistent with the fact that when the DOJ SoF emerged it was not apparently regarded as being of burning relevance to L30: Mr Bulgrin knew of the settlement in January 2017, but it was not until 2018 that he read it, or was prompted to read it by the KfW lawyers.

272. I add for completeness that in the light of the evidence it cannot matter that Mr O'Driscoll's evidence was that he knew nothing of the RMBS Misconduct until the DoJ SoF. As there is direct evidence from L30's witnesses one is not driven to inference from Mr O'Driscoll's evidence. Moreover the suggestion that "*it could not realistically be suggested that an outside investor in 2012 ought to have cottoned on to a fraud about which the bank's co-head of CDO structuring knew nothing*" is based on a false premise. The out of pocket outside investor was looking for information which could found claims; Mr O'Driscoll, a member of a team separate from the RMBS team, was not and was not directly concerned. This is an "apples and oranges" comparison.

The "estoppel" case

273. Having reached that conclusion, it is unnecessary for me to deal with the argument as to whether L30 was precluded from disputing that the pleading

standard in New York was lower than in England (which in practical terms approximated to an argument that it was precluded from pleading fraud).

274. The way the argument goes is this. L30 says that the fact that IKB considered that it could plead fraud in New York does not mean that L30 could have pleaded fraud in England. It says that it may have been wrong about its ability to plead fraud, or it may be that the requirements in England were different, or it may be that the facts pleaded in New York were not within L30's knowledge. L30 submits that regardless of whether IKB had proper grounds to pursue a fraud claim in New York, the position remains that L30 did not know, and could not with reasonable diligence have known, of facts and matters prior to November 2012 which would have enabled a fraud claim to be brought in England.

275. CS then says that L30, having satisfied itself it could plead fraud in the US, and having in correspondence disclaimed any difference between English law and US law, cannot now be heard to say that the material on which they did in fact rely was insufficient – referring back to *AB v Ministry of Defence* ("or *AB") and *FII*. Those authorities say (see above) that a party cannot say that a stricter approach be adopted than the one which was in fact adopted by them; here fraud being pleaded by other Loreley SPVs (on the instructions of the very same people) in 2011/2012 against other banks, L30 cannot say more was needed to plead fraud here. This is said to be particularly so given the history of the point.

276. In closing Mr Goodall took me in detail through the pleadings and the correspondence which had been exchanged. In essence:

i) In seeking permission to serve out L30 dealt with a full and frank disclosure point by saying that the standards of pleading were different;

ii) In CS's defence CS relied on the 2011 IKB CS Action as demonstrating knowledge on the part of L30.

iii) L30 replied, taking issue with this and saying "*It is .... irrelevant that another litigant, in another jurisdiction (where different rules apply as regards the pleading of fraud), considered that it had a sufficient basis to make fraud allegations as regards the securitisation of RMBS*";

iv) An RFI issued by CS was answered thus: "*Request 2 invites our client to enter into a comparative analysis as to the rules for pleading fraud in New York and England. This is wholly irrelevant… The relevant question for limitation purposes is whether dishonesty could properly be pleaded under the English standard; as such we do not consider it productive to debate what might or might not have been permissible under the New York pleading standard*";

v) In the run up to the first CMC CS flagged the point that on this basis they considered that expert evidence on New York law was needed: "*Very narrow and focused expert evidence will be also necessary on New York law's pleading standards (at least so long as Loreley 30 maintains as part of its case that those standards differ materially from those in the UK): see Issue 37(d) in the List of Common Ground and Issues;*";

vi) By the end of April 2021 CS was making clear that expert evidence was needed unless L30 amended its case on the pleading standard;

vii) On 2 March 2022 L30 indicated that it intended to delete the words "*where different rules apply as regards the pleading of fraud*", saying: "*It will form no part of our client's pleaded case that a lesser pleading standard applies as a matter of New York law or procedural/regulatory rules as compared with English law or procedural/regulatory rules*";

viii) CS responded: "*As regards New York law, we note your reluctance to provide a clear response to the queries that we raised. Our clients' current intention is to include a plea in their Re- Amended Defence that the pleading standard in relation to fraud as a matter of New York law or procedural/regulatory rules is no less rigorous than that which applies as a matter of English law or procedural/regulatory rules. Unless we hear from you to the contrary prior to the Third CMC, we will assume that that plea will be met in your client's Re-Amended Reply with a clear and unequivocal admission*";

ix) In the Re-Amended Defence CS pleaded that the New York pleading standard for fraud is "*as rigorous as prevails under English law. As such, if IKB considered itself able to assert fraud in the 2011 IKB CS Action in New York, it was equally able to do so in England*";

x) In the Re-Amended Reply there was no clear admission, nor a joinder of issue. L30 simply deleted the relevant plea.

277. L30's position was that its confirmation that it would not run a positive case that a lesser pleading standard applied in New York did not amount to an acceptance that the same standard applied. But it took two not entirely compatible stances. At times it said that the deletion was reflective of a decision that the averment was unnecessary; at others it said that it was simply saying that it advanced no position one way or the other. The only way these two cases could join up would be if one ignored the correspondence. But the reality was that this was not an unprompted decision; it was a decision taken against this considerable background of debate (and pressure) as to the significance of the point.

278. As has been made clear above, I would have been reluctant to decide this important issue on such an arid point. However had I had to do so I would have concluded that:

i) It was not open to L30 to deny that IKB's New York claim was properly brought (i.e. that it had sufficient knowledge to plead fraud as a matter of New York Law);

ii) Absent any issue being raised here that would not assist CS, because it would remain open to L30 to say that it did not have sufficient knowledge to plead fraud as a matter of English Law;

iii) This matter was ventilated in depth between the parties, with plans actually made for New York Law expert evidence on the subject;

iv) That plan was changed by L30 indicating in clear terms in correspondence that it would not take a point about a different standard applying;

v) With that background it did not put CS's specific pleading of equivalence in standards in issue, and it did withdraw its own positive pleading to the contrary;

vi) Had the point been in issue the parties were at idem that expert evidence would have been needed. But after this point there was no suggestion that expert evidence should be obtained;

279. In all the circumstances therefore I would if necessary conclude that even without an explicit admission L30 in essence unequivocally indicated that this was not a point it would take.

280. Accordingly if it were necessary to say so I would conclude that it was not open to L30 to dispute that IKB had knowledge sufficient to plead a case in fraud from 2011.

Limitation as a partial defence

281. This was a new argument, emerging in closing. It was touched on fairly lightly – and rightly so. It is plainly wrong; in that it is premised on the idea that there are separate claims which accrue at different times. However there are no separate claims: the claim is to unwind the Notes, which were entered into at a single point. The limitation argument arises from the fact that L30 (as noted above) needed only to be able to plead one aspect of the RMBS Misconduct giving rise to the fraud on which they relied. Limitation is therefore an all or nothing argument; it is not a case where part of the claim can be saved by unpicking the strands of RMBS Misconduct.

The "reality check"

282. I should not leave this subject without dealing at least briefly with the "reality checks" on which L30 placed so much emphasis: why would it be that L30/KfW had all the knowledge necessary to bring this claim, yet sat back and let a claim slip by? Or, putting it another way: if it took the US DoJ (with "*close to unlimited resources and extensive coercive and evidence gathering powers*") until 2017 to piece the fraud together how can it be expected that L30 should have done so much better?

283. These are both misconceived points, which on further analysis only serve to underline the conclusion to which I have come. I will deal with this second question first. Even assuming that the DoJ SoF did set out the details of a fraud (which, for reasons given elsewhere, it did not) the DoJ investigation covered not just investigation, but also negotiations and settlement discussions and the drafting of documents for public consumption, all done with no particular deadline in mind. Even if it were a question of "uncovering", the DoJ did not have a limitation clock ticking against it. Nor in many respects did the DoJ report "uncover": it is in fact replete with footnotes to other sources, such as the FCIC Report.

284. As for the first question: why would KfW sit back, against the knowledge which I have outlined above? The answer was relatively clear from Mr Bulgrin's evidence that: "*It did not occur to me that there was any sufficient linkage to merit any further follow-up between (i) IKB's action concerned with RMBS and (ii) any claim that the SPCs might have in relation to CDOs.*" The knowledge of the RMBS Misconduct therefore did not naturally link itself in the minds of those at L30 or KfW with the CDO transaction. It was only when approached by RPC in 2018 with a memo which apparently posited a means whereby the link could be drawn that the possibility of a claim was considered. This is a point to which I shall return below.

Limitation: conclusion

285. Accordingly I conclude that L30's fraudulent misrepresentation claim in this action is time-barred. It follows that the claim based in negligence is also time barred. That conclusion follows from an analysis of what L30 knew or could with reasonable diligence have discovered. It coheres entirely with the timeline of events. It is not contradicted by L30's "reality checks".

286. Consequently the issues on the making of the CDO Representations, whether they were understood and relied on and whether some aspect of the vast amount of material on the RMBS Misconduct case falsified them are not determinative. I do however deal with them below for completeness and against the contingency that this first conclusion might be sought to be challenged elsewhere.

WERE THE CDO REPRESENTATIONS MADE?

287. In this case L30 needs to show that in relation to the CDO transaction: (i) the defendant made a false representation; (ii) the defendant knew the representation to be false, or had no belief in its truth, or was reckless as to whether it was true or false; (iii) the defendant intended the representation should induce the claimant to enter into the contract; and (iv) the claimant was induced to enter into the contract by the representation. In this latter context there arises a debate about the necessity of awareness/understanding of the representation.

288. The first step is the making of the representations.

The representations

Representations generally

289. Before turning to consider the facts a brief recap is useful.

290. The starting point is that a representation is:

i) A statement of fact made by the representor to the representee;

ii) On which the representee is intended and entitled to rely as a positive assertion that the fact is true.

291. Express representations are the most straightforward form. While these are less in issue in this case, it is worth noting (for the purposes of read across into implied representations) the uncontroversial propositions that:

    i) 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: *IFE Fund v Goldman Sachs* [2007] 1 Lloyd's Rep 264 at [50], *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank* [2011] EWHC 484 (Comm) at [215].

    ii) A representation is to be understood in the light of the full terms of the relevant document and, where a series of representations are made, regard is to be had to their cumulative effect: representations may in combination convey a meaning which no single one imparts: See *Spice Girls v Aprilia* [63]; *Autonomy v Lynch* [2022] EWHC 1178 (Ch) at [506].

Implied representations: the law

292. Here one moves into the context of representations arising out of the representor's conduct rather than their words, or the implications of their words and conduct combined.

293. One of the passages on which reliance was particularly placed by L30 is *IFE* [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."

294. In other words the exercise is in essence the same as that conducted for express representations - except the question is what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context.

295. Generally, but in particular when it comes to implied representations, determining whether any, and if so what, representation was made by a statement requires (a) construing the statement in the context in which it was made, and (b) 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.

296. That context will include, importantly, the contractual and other documentation passing between the parties. This is a point which has been noted repeatedly in other cases dealing with complex banking transactions:

i) In *JP Morgan Chase v Springwell* [2008] EWHC 1186 (Comm), Gloster J stated that the question of what, if any, actionable representations had been made had to be considered by reference to the contractual and other documentation which had passed between the parties: see [669];

ii) In *Raiffeisen Zentralbank Österreich AG v RBS* [2010] EWHC 1392 (Comm), Christopher Clarke J said (at [97]) that the question of whether any representation had been made had to be assessed against the terms of an Information Memorandum, citing *inter alia Springwell*. He emphasised that whether or not the documents were contractual, they nevertheless formed "*an important part of the context in which the representations are said to have been made*" and were therefore relevant to the inquiry into what a reasonable representee would have understood;

iii) In *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm), which concerned derivative contracts entered into between CPC and Standard Chartered that CPC alleged that it had been induced to enter in reliance on various implied misrepresentations, Hamblen J rejected CPC's claims and relied upon the disclaimers set out in the termsheets which set out the proposed terms of the swaps: see [562(4)]. (See also *CRSM* [262]-[266].);

iv) It is important to assess the question of implication against the context of any express representations: see e.g. the approach of Hamblen J in *Brown v Innovatorone* [2012] EWHC 1321 (Comm) [902] and in *Ceylon Petroleum* [562].

297. That context may have a significant impact when it comes to the question assessing the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee. It is said to be so here. There will be cases where statements are accompanied by qualifications or explanations which indicate that the putative representor was not assuming responsibility for the accuracy or completeness of the statement or was saying that no reliance can be placed on it: see Hamblen J in *CRSM* [222] (citing Christopher Clarke J in *Raiffeisen* [86]).

> "It is necessary for the statement relied on to have the character of a statement upon which the representee was intended, and entitled, to rely. In some cases, for example, the statement in question may have been accompanied by other statements by way of qualification or explanation which would indicate to a reasonable person that the putative representor was not assuming a responsibility for the accuracy or completeness of the statement or was saying that no reliance can be placed upon it. Thus the representor may qualify what might otherwise have been an outright statement of fact by saying that it is only a statement of belief, that it may not be accurate, that he has not verified its accuracy or completeness, or that it is not to be relied on."

298. It is worth noting that this is a question which tends to come into focus in the banking context. The *CRSM* case was a CDO case; CRSM claimed that it was induced to buy four sets of structured notes from the defendant (Barclays), and to agree to the subsequent restructuring of the notes, by misrepresentations as to the risk of default which in each case were fraudulent, or which in any event Barclays did not believe or have reasonable grounds to believe were true. In concluding that there were no such representations, Hamblen J placed weight on the qualifications and disclaimers in the fact sheets which he concluded made it plain that CRSM was to be responsible for its own independent appraisal of the risks in respect of the notes and could not rely on Barclays in connection with the matters referred to. *Raiffeisen* concerned allegations of misrepresentations in the context of a syndicated loan, again in the context of complex documentation with disclaimers. In concluding that there were not actionable representations the judge observed rather tartly that "*The court may regard a sophisticated commercial party who is told that no representations are being made to him quite differently than it would a consumer.*"

The "helpful test"

299. Central to the debate before me was the significance of the so called "helpful test" enunciated by Colman J in *Geest plc v Fyffes* [1999] 1 All ER (Comm) 672 at 683B. L30 contended that it was highly significant in three places. First it contended that it *per se* justified the conclusion that some of the implied representations had been made (C13 and C14) and that it was an element (alongside prior authority) in finding representations C10-12. Secondly it contended that the test had significance at the reliance stage. Thirdly it was said to have relevance at the stage of finding fraud; L30 argued that knowledge that the CDO group was selling CDOs linked to the credit risk of CS-securitised RMBS, plus the helpful test, was enough to lead to a conclusion that implied representations C10-14 and D20 had been made.

300. The relevant passage of Colman J's judgment is this:

> "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 extent 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."

301. That test was considered and expressly approved in the case of *Property Alliance Group v Royal Bank of Scotland* ("*PAG*") [2018] 1 WLR 3529 at [132], having

been followed on numerous occasions at first instance, most notably perhaps in *IFE* and *Raiffeisen*. The Court of Appeal gave that approval in these terms:

> "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 dictum …. 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."

302. Both these citations, when given in full, make clear the problems which face L30 in its approach to the "helpful test". The first problem is that, as is clear from these citations, the test has thus far been used simply at the stage of deciding what if any representations have been made. The second problem is that even in that context it has not been given (by Colman J, whose use of language is always scrupulous) or adopted as "the test" for determining the existence of an implied representation:

    i) Colman J was careful to say that this is part of *"All the circumstances …including in particular … (b) the extent of the beneficiary's conduct"*;

    ii) The Court of Appeal in *PAG* gave the immediate rider as to the need for clear words or conduct from which the relevant representation can be implied.

303. The necessity to keep this latter part of the equation (the need for clear words or conduct) in mind is illustrated by the cautions in the other authorities. Those as to context have already been given. But in addition:

    i) The Courts should be cautious, such that implied representations should not be "too easily found": see *Raiffeisen* [85] quoting Rix J in *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297; followed in *SK Shipping v Capital VLCC 3 "The C Challenger"* [2022] 2 All ER (Comm) 784 *("SK Shipping (CA")*) [38];

    ii) The more vague, uncertain, imprecise or "elastic" the meaning of the implied representation, the less likely it is that it will be implied and the more that would be required in terms of words or conduct: see *Raiffeisen* [111]; *Innovatorone* [911]; *Ceylon Petroleum* [562]; *Marme* [123(3)-(4)] and [139]; *Pisante v Logothetis [2022] EWHC 161 (Comm)* [6(4)(b)].

304. That need for balance is required by the underlying position as a matter of law – there is generally no obligation to disclose information, as explained in *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665 at 798-799:

> "The general principle that there is no obligation to speak within the context of negotiations for an ordinary commercial

> contract (though qualified by the well known special principles relating to contracts *uberrimae fidei*, fraud, undue influence, fiduciary duty, etc.) is one of the foundations of our law of contract, and must have been the basis of many decisions over the years. There are countless cases in which one party to a contract has in the course of negotiations failed to disclose a fact known to him which the other party would have regarded as highly material, if it had been revealed. However, ordinarily in the absence of misrepresentation, our law leaves that other party entirely without remedy."

305. As Christopher Clarke J makes clear in *Raiffeisen*, the boundary between pure omission and misrepresentation must be carefully distinguished. The helpful test, stripped of its proper context erodes that distinction.

306. Therefore to the extent that L30 contends that representations can be found on the basis of the "helpful test" alone, I reject that argument. The test is that stated in *IFE*: what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct **in the context in which they were used**. The "helpful test" is no more than a "helpful test" in relation to one of the inputs into the overall decision.

<u>The authorities where implied representations have been found</u>

307. L30 relies for the second part of the basis for finding an implied representation on what it asserts are authorities in its favour. It relies on the cases listed in Schedule 1 to its Opening as establishing a sufficient basis in law for some of the representations it seeks to establish – principally those as to honesty. It contends that where parties enter into a transaction, the courts will readily imply a representation that each party is acting honestly in relation to the transaction. This core representation of counterparty honesty is said to be found in:

    i) *Gordon v Selico* (1986) 18 HLR 219: "*the concealment of dry rot by Mr Azzam was a knowingly false representation that Flat C did not suffer from dry rot*";

    ii) *Spice Girls Ltd v Aprilia World Service BV* [2002] EMLR 27 at [34] participation in a photoshoot implied a representation that "*SGL did not know and had no reasonable grounds to believe at or before the time of entry into the agreement that any of the Spice Girls had an existing declared intention to leave the group during the minimum term of the Agreement*";

    iii) *HIH Casualty v Chase Manhattan Bank* [2003] 1 CLC 358 at [15] per Lord Bingham: "*each party will assume the honesty and good faith of the other; absent such an assumption they would not deal*";

    iv) *Man v Freightliner* [2005] EWHC 2347 (Comm) at [78]-[79]. From a number of meetings was spelt out a representation that accounts had been prepared honestly;

v) *IFE Fund*: in supplying information about a transaction, the bank was acting in good faith and not knowingly putting forward information likely to mislead;

vi) *Graiseley Properties v Barclays Bank* [2013] EWCA Civ 1372 [27]-]28]: it was arguable that in proposing the use of LIBOR the banks impliedly represented that their own participation in the setting of the rate was an honest one;

vii) *UBS v KWL* [2014] EWHC 3615 (Comm) at [740], [747]: the bank impliedly represented that it believed in the honesty of the counterparty and that it did not know that the transaction was tainted by bribery and conflict of interest;

viii) *PAG* [132] the Court of Appeal held that by proffering a swap transaction linked to LIBOR it was a "*comparatively elementary representation*" that "*RBS itself was not manipulating and did not intend to manipulate LIBOR*";

ix) *Marme Inversiones 2007 v Natwest Markets* [2019] EWHC 366 (Comm) at [158]: following *PAG* in holding that there was an implied representation that "*RBS was not itself manipulating, and did not intend to manipulate or attempt to manipulate, EURIBOR.*"

308. These authorities and what they do and do not establish will be considered below. However what can immediately be seen is that these cases cover a range of disparate factual situations and none of them does more than say that in the circumstances of that case there was an implied representation (generally bearing some relation to honesty). None of them is authority for the proposition that an implied representation of honesty can be implied generally or in a wide range of cases.

The CDO Representations: analysis

309. Against that background it is necessary to look at the representations alleged against the relevant context. The background context (on which CS placed emphasis) is not really controversial.

i) This was a sophisticated transaction being entered into by a sophisticated investor. As Mr Schirmer IKB-CAM's in-house lawyer noted: "*...the highly regulated space in which this transaction took place is important context*";

ii) IKB (said to be L30's agent for these purposes) was a highly sophisticated bank, with enormous experience of purchasing CDOs of RMBS; the Loreley SPVs alone (i.e. ignoring purchases made by IKB directly) had already purchased more than 160 CDOs from a wide range of banks;

iii) More specifically IKB CAM and CS had by 2007 developed a very close relationship with IKB being CS's single biggest customer for CDOs. That relationship was based on trust on both sides. Dr Bauknecht described the relationship as that of a business partner in a long term business;

iv) As a highly sophisticated and experienced investor it had ready access to specialist legal advice;

v) It was understood by all (and "obvious") in the light of the disclaimers (see [62] above) that L30/IKB-CAM had to look after its own interests and had to make its own assessment of both the Notes themselves and the underlying Reference Obligations. This was (as Dr Bauknecht accepted) clear from the Termsheet. However he was emphatic that it was unnecessary for L30/IKB to read the Termsheet because:

> "what I'm saying is even if they hadn't [read the Termsheet], they were aware that we had to do our own analysis. … I wouldn't have drawn [this conclusion from the Termsheet], it would have confirmed what I knew already."

vi) Dr Bauknecht said that IKB did make its own independent determination of the value and credit quality of the Reference Obligations;

vii) The fact that some of the Reference Obligations were CS-issued deals was not part of the discussion or apparently regarded as relevant;

viii) The terms of the Notes were, and were always understood to be, contained in very detailed contractual/disclosure documents, namely the Programme Memorandum and the final Series Memorandum. The Termsheets were explicit that the Series Memorandum was the only definitive document upon which reliance could be placed and Mr Schirmer gave as his evidence that these would "*define the basis of the notes that Magnolia Finance II would issue*", with the final formal prospectus carrying with it "*all the rules and regulations and liabilities that attached to that status*";

ix) It follows that prior to the finalisation of the Series Memorandum, and in particular at the time the Termsheets and the RMBS Spreadsheet were provided, the precise terms of the CDO Transaction were still open to change and did in fact change. While this does not preclude representations from arising, it is relevant context;

x) Mr Schirmer somewhat reluctantly accepted that he understood from the terms of the draft Series Memorandum that, *inter alia*, neither Magnolia nor CS was providing any information about the Reference Obligations which was not in the Series Memorandum itself, or making any representation as to the credit quality of the Reference Obligations, or disclosing any non-public information which it might have about the Reference Obligations.

310. There is also essentially no controversy about the structural and contractual context (the former of which was the context on which L30 placed emphasis). As to this:

i) The Notes were a re-packaging or re-securitisation of credit risk. The credit risk of the Notes depended on the credit risk of the 100 RMBS, which in turn depended upon the credit risk of the underlying mortgages. As Mr O'Driscoll concisely put it: "*One can think of a CDO as a re-securitization.*

For example, an RMBS is one step removed from the underlying loans, whereas an RMBS CDO is two steps removed from the underlying loans. However, just like RMBS, CDOs are ultimately dependent on the performance of the underlying loans, as defaults in the underlying asset pools will lead to losses for CDO noteholders";

ii) It follows that the credit risk of the 100 RMBS, including the CS RMBS, was the underpinning of the credit risk of the Notes. The credit quality of the CS RMBS had a direct "feed-through" into the credit quality of the Notes. Mr O'Driscoll accepted this;

iii) If the credit risk of the RMBS was mis-described or corrupted, that at least could flow downstream into a mis-description or corruption of the credit risk at the CDO level. The linkage between the credit risk of the RMBS and CDO, and thus the significance of the credit risk of the RMBS to a CDO investor, was also accepted by Mr O'Driscoll;

iv) IKB CAM was particularly concerned to be able to evaluate credit risk as demonstrated by the detailed credit evaluation which it generally undertook and undertook in this case;

v) The Termsheets contained lengthy disclaimers and notices entitled "Important Notices" which inter alia (i) required the prospective purchaser to conduct its own independent analysis of the data in the document and (ii) disclaimed "*any and all liability relating to this information, including, without limitation, any express or implied representation or warranty for statements contained in and omissions from this information*" (see paragraph iv above);

vi) The Programme and Series Memoranda;

   a) Had similar provisions emphasising the need for an investor to make its own independent investigation and determination of "*the value and credit quality of the Reference Obligations*";

   b) Stated that it "*is not intended to and does not provide any financial or other information with respect to any Reference Entity or any obligor of any of the Charged Assets or any financial or other risks relating to the business or operations of any Reference Entity or obligor of any of the Charged Assets in general, or to the obligations of any Reference Entity or obligor of any of the Charged Assets in particular*";

   c) Are expressed to be documents of the Issuer, pursuant to which the Issuer (Magnolia) accepted responsibility for the information contained in it, save for a single discrete section (entitled "Information Relating to Counterparty"); references to CS and what it thought or represented are few and far between and clearly stated.

311. A controversial point as to context was the "black box" allegation. L30 contended that an investor in the position of IKB CAM/L30 was reliant on the offering

documents in respect of the CS RMBS having provided a faithful presentation of the credit risk; and that the securitisation of the CS RMBS was, in essence, a "black box" from the viewpoint of an investor in the position of IKB CAM/L30. It contended that other than the RMBS ratings/CDO rating, the pool characteristics as stated in the offering documents were the only source of information available to a CDO investor as to the quality of the loan pools that comprised the RMBS and that the CDO investor was entirely reliant on the bank which securitised the RMBS having done so in accordance with the representations/statements made to investors and rating agencies.

312. That is so – as Mr O'Driscoll stated the offering documents were "*the public side information that every investor had*" and such investors would have no knowledge of the pool characteristics other than as stated in the offering documents. But the "black box" argument implied an information imbalance which did not exist. This aspect of the argument can be seen in the formulation of the submission in closing "*it doesn't allow Credit Suisse to make representations and get away with it because to disabuse IKB would involve revealing essentially market−sensitive information…*"

313. The absence of such an imbalance is because in reality the CS team structuring the Notes was part of the CS CDO Group and did not deal with RMBS. This was, as Mr O'Driscoll explained, a facet of the "*general requirement within any investment bank, Credit Suisse being no exception, to separate people in possession of non-public information from people who are not in possession of that information, and that was the uniform rule that applied to the entire firm. There wasn't a distinct separate policy for it as between the RMBS Group and the CDO Group.*"

314. The result is that the members of the CDO team had no better access to underlying information than did IKB. The CDO team were in no position to give more information; there was therefore no asymmetry of information – as Mr O'Driscoll put it "*they [buyers] had exactly the same information that I had and there was nothing I knew that they didn't*". When asked for information on the Reference Portfolio the RMBS Spreadsheet provided information sourced from public sources such as Bloomberg, which L30 could equally access.

315. This information barrier was derided by L30 as a "complete red herring" which had no bearing on whether representations were made. But that information barrier is part of the context for ascertaining whether any representation was made; and the unthinkableness of this barrier being breached was vividly illustrated by Mr O'Driscoll's obviously genuine astonishment in the following passage of evidence:

> "Q. … there was nothing in that information barrier that would have prevented somebody in the RMBS Group of Credit Suisse from discussing the sorts of problems, the types of problems, that were being encountered with someone from the CDO Group, would there?
>
> A. You've got to be kidding me, sir, that would be a tip.

> … Barred by insider trading rules in the United Kingdom and in the United States for, you know, a generation now."

316. That evidence – addressed to the actual issue – is unaffected by the other points on which L30 relied, such as the very general and broad hypothetical indication by Mr Kaiserman that an RMBS problem that might affect what Credit Suisse CDO Group were doing would probably be flagged to CDO Group.

317. L30's approach to the "black box" which indicated a position of dependency on L30's part, was also in tension with L30's own witnesses' evidence:

    i) L30 admitted that no-one at IKB read the offering documents for any of the 100 RMBSs. In closing it was L30's case that this was not to be expected: *"[it] is not to say that such an investor would have been expected to read the offering documents"*. Consistently with this Dr Bauknecht said that he had only looked at such documents once in his life;

    ii) Dr Bauknecht made clear in his evidence that he, and Messrs Zimmermann and Langer, fully understood (without being told) that it was for IKB to do its own independent analysis of the value and credit quality of the Reference Obligations, and that it in fact did so;

    iii) Mr Schirmer confirmed that he understood from the terms of the draft Series Memorandum that, inter alia, neither Magnolia nor CS was providing any information about the Reference Obligations which was not in the Series Memorandum itself, or making any representation as to the credit quality of the Reference Obligations, or disclosing any non-public information which it might have about the Reference Obligations.

<u>Conclusions on the making of representations</u>

318. During the opening of the case I indicated that I found the range of representations relied on difficult to comprehend and somewhat inconsistent with the way the case on representation was summarised in the L30 opening, which said:

> "The essence of these representations is that CS was unaware of any conduct on its part which tainted the credit quality of the Notes or the .. CS RMBS or which otherwise undermined the reliance which could be placed by an investor in L30's position on the credit ratings ascribed both to the Notes and the .. CS RMBS."

319. Implicit in the concern I expressed was a query about how such numbers of different implied representations could all conceivably be made, effectively at the same time.

320. Mindful of that implicit warning L30 then rearranged their case on representations; not explicitly withdrawing any parts of the case but rearranging the representations into buckets or groups which more closely aligned with the case as opened and effectively pursuing only 9 representations arranged in three groups. Those rearranged representations are annexed to the judgment as Appendix 2B. What became apparent was that (doubtless with an eye to the

authorities) core representations of honesty were the "hero" point, followed by representations regarding credit rating. I will deal with the representations as finally relied on in closing, and not as originally advanced.

Group 1: The honesty representations

321. The honesty representations were as follows:

    i) C10: in respect of the CS RMBS which CS had itself structured, arranged, underwritten, issued, marketed or sold CS had no reason to believe that the offering documents in respect of any such reference obligation made any false or misleading representations relevant to a determination of the value and credit quality of the reference obligation;

    ii) C11: in respect of the CS RMBS which CS had itself structured, arranged, underwritten, issued, marketed or sold CS had no reason to believe that any matter relevant to a determination of the value and credit quality of any such reference obligation had been deliberately concealed from any offering document; and

    iii) C12: in respect of the CS RMBS which CS had itself structured, arranged, underwritten, issued, marketed or sold CS had acted honestly in so doing.

322. L30's case in summary was that they connote that CS acted honestly in respect of the securitisations of the CS RMBS and had no knowledge of matters which tainted those securitisations.

323. These representations are, on the authorities, the apparently soft target. However, the authorities stop some considerable way short of saying that there is an implied obligation of honesty generally. The correlate is that it is necessary to consider carefully whether the honesty-related implied representations are justifiable here. It is not, as L30 submits, "perfectly straightforward". L30 relies on two things (aside from the "helpful test") to justify the conclusion that these representations were made. The first is the offering of the transaction against the relevant context. The second is the authorities.

324. Looking first at the question separately from the authorities, simply looking at the written down form of the representations certain things are apparent:

    i) They are not simple core honesty representations – for example honesty in relation to the CDO transaction;

    ii) Although now grouped into a single group, the honesty related implied representations still cover some quite disparate ground such as false or misleading representations relevant to the determination of value and credit quality;

    iii) Then each of the representations itself covers quite complex matters such as structuring, arranging, underwriting, issuing, marketing and selling. They have some subtlety.

325. From that, base questions immediately arise: How is it said that they are made in these terms? How is it said that they not only co-exist as implied representations, but that they are each, distinctly made?

326. That naturally leads to a question as to how other aspects of the exercise – the determining of intention to be relied upon and understanding/reliance – can be discerned. In the end it seems to me that these secondary concerns do not require specific answers because the argument founders in any event when analysing a sub-set of the very first question, which is how representations relating to just some of the underlying reference obligations are spelled out.

327. The key point here is that the honesty representations, which L30 says are implied as a result of CS's conduct in proposing the transaction, via the 16 May email attaching the Termsheet and the RMBS spreadsheet derive from material which plainly covers all of the Reference Obligations; and yet the representations sought to be implied (and which, on the authorities, must be clearly discernible) relate only to a small subset of the Reference Obligations. Those are the Reference Obligations which CS itself had "*structured, arranged, underwritten, issued, marketed or sold*" – i.e. they distinguish between the CS RMBS (in relation to which CS played such roles) and the other 93 RMBS where it did not. That is therefore a subset of seven out of the one hundred Reference Obligations.

328. That is not a distinction which seems capable of founding an implied representation. An implied representation needs to be clear and capable of being spelled out from the surrounding circumstances. No representation relating to these seven underlying RMBS's can be clear – or even discerned at all - in circumstances where (i) the documentation which accompanies the conduct relied on relates to all Reference Obligations and (ii) that distinction has no foundation in the factual interactions between CS and IKB-CAM. There is no evidence that the CS RMBS were ever referred to by CS, or L30; or that there was any discussion about them, or about CS's role (if any) in dealing with ratings for those deals. In fact, the CS RMBS were treated completely indistinguishably from the other 93 RMBS. There is no allegation to the effect that there ever was any distinction of treatment. CS put it this way "*There is therefore no 'hook' – in the form of express statements or conduct – upon which these implied representations are said to hang.*" Another way of putting it is to say that the allegation that there was an implied representation on these points lacks its basic foundation.

329. This is a point which L30 ignores when praying in aid Colman J's "helpful test": it simply cannot be said that IKB CAM/L30 would naturally have assumed the state of affairs reflected in representations C10-C12 in a situation where it did not know (or apparently care) that there were CS RMBS within the Reference Obligations. This feeds into CS's submission (which I consider well founded) that this set of representations has been reverse engineered. There is simply no way when looking at the relevant documentation that anyone would take representations specific to a subset of underlying reference obligations as being manifest. The conclusion seems inescapable that these representations have been constructed to dovetail with the specific facts sought to be captured.

330. It follows that the allegation that there were honesty related representations falls at the first fence.

331. I should add that I would in any event conclude that the Group 1 (Honesty) representations fail for another reason. And that is that the second base relied on by L30 (precedent) gives way; the representations here are not analogous to those which have been found in other cases. In addition they are not ones which would have a material impact.

332. These two points elide and are therefore best considered together. The factual centre of this issue is that the relevant representations concern the existence of RMBS Representations; rather than being representations directly about the underlying subject matter of the RMBS Representations. There is a distance between the subject matter of the two. While L30 says (as it did in closing) that "*the mischief was the bank selling a CDO product which packaged credit risk of underlying RMBS which the bank knew to be misdescribed*" or focuses on Dr Bauknecht's consideration of the stated pool characteristics of the underlying RMBSs because their credit risk drove the credit risk of the CDO, that description or concern does not map onto the representations it alleges. For a misrepresentation case there has to be a representation. The representations are (for example) that CS had no reason to believe that the RMBS offering documents made false representations regarding credit quality (a slightly contracted version of representation C10). In focussing on the mischief of the credit risk of the RMBS L30 seeks to move the subject matter of the RMBS representations (in the past, to others) into the CDO Representations when in fact the two are distinct.

333. That distance is not merely a conceptual distance, but a practical distance, which can be seen when one considers the question of what effect those representations could have on the performance of the Notes. The misrepresentations to third parties did not and could not affect the RMBS itself, or its credit quality or performance. Each RMBS (good or bad) was what it was; the underlying misrepresentations alleged affected who might buy those RMBS. They did not affect their performance. If CS had never made any representations to any investors, the RMBS would perform exactly the same and so would the CDOs.

334. Against that background one can then look at the cases where a representation has been found to have been made. A good starting point is *PAG*. In *PAG* the claimant was buying from the bank interest rate swaps referenced to LIBOR. What happened to LIBOR therefore affected directly what the claimant had to pay to the bank. As the Court of Appeal said at [133]: "*RBS was undoubtedly proposing the swap transactions with their reference to LIBOR as transactions which PAG could and should consider as fulfillment of the obligations contained in the loan contracts*". Against that background (with the addition of some lengthy discussions), the claimant succeeded in persuading the court that RBS was saying that it was not itself manipulating and did not intend to manipulate LIBOR. The representation, the transaction and the bottom line were all intimately connected. In *PAG* the representation mattered because if RBS manipulated GBP LIBOR, that would very directly affect the published LIBOR rate and therefore a counterparty's payments under an interest rate swap referenced to that rate.

335. But PAG did not succeed in persuading the Court of Appeal to find some other representations. PAG's submission (advanced there as here by Mr Lord KC) went wider than this and it was argued that the following representations were made:

> "(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 am on that date …
>
> (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 am on that date …
>
> (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 …"

336. Those submissions were rejected at [122] as being "unnecessarily complex". As in this case it appears that there was a need during the course of argument *"to reduce their complexity to something simpler"*. The Court then went on to find the much more limited representation, and noted at [137] that "*any implied representation cannot legitimately extend further than the particular transactions allegedly induced by the representations*". The Court of Appeal therefore rejected a submission:

    i) That the implied representation extended to past conduct;

    ii) That the implied representations extended to representations made to others (such as the BBA).

    In addition the first instance judge, Asplin J had already rejected a submission that the implied representations related to the conduct of others. As Males LJ noted in *SK Shipping (CA)* [52] *PAG* did not "*extend to a representation as to the bank's honesty, either in relation to other LIBOR currencies or generally. It was the bank's honesty in relation to the particular transaction proposed which mattered*".

337. The representations relied on here of course (i) extend to past conduct and (ii) are dependent upon representations made to others. Unlike *PAG* the representation is not as to the present and it is not as to the particular transaction. Nor does it have, as the *PAG* representation did, a very direct and clear correlation to, and effect on, the payment obligations under the contract between the parties.

338. In closing Mr Goodall sought to systematise the distinction between the *PAG* representation and the representations here via a confection of layers (hence Mr Lord's description of it as "*the layer cake analogy*") which stretched from Layer 1 of a CS managed CDO with a representation that CS would not act dishonestly in how it managed the Reference Portfolio, to Layer 6 (said to be analogous to these representations) where the representation was that CS had been honest when

telling investors about how it diligenced loans which might end up in an RMBS in the Reference Portfolio.

339. The cake was, in truth, somewhat indigestible, but it had value in forcing attention on the different elements rolled up into the CDO Representations and reminding one of the rigour involved – and demonstrated by the Court of Appeal in *PAG*.

340. I therefore conclude that L30 is wrong to say that there is no material distinction between the facts here and what the Court of Appeal has implied in *PAG*. There is also nothing in any of the other authorities relied on by L30 which enables it to say either that life has moved on since *PAG* or that there is a different line of authority which assists with these problems. In each of those cases there was a clear and direct linkage which is lacking here. Here there is a discernible link, but it is a link which is indirect and at some distance.

341. It is not therefore fair to say as L30 does, that the honesty representations here are straightforward or grounded in the authorities. L30 is not seeking to capture dishonesty in connection with the CDO Transaction, but rather dishonesty in relation to something completely different (representations made about a small subset of the RMBS within the Reference Portfolio). If one were to search for a directly equivalent representation to *PAG* it would have to be something along the lines of: CS would not act dishonestly in how it manages the CDO. Consequently L30's case falls not within the ambit of previous authority, but well outside it.

342. This was to an extent conceded by L30 in closing, when Mr Lord said that

> "it's not an altogether helpful endeavour to seek to fit our CDO representations into the glove of the LIBOR reps any more than it's helpful to seek to fit the LIBOR transaction into the *Spice Girls* transaction. The *Goldman Sachs v IFE* test, and helpful test, fall to be applied to the particular facts of the transaction at hand."

343. As I have already indicated the classic *IFE* approach using the "helpful test" only as it properly applies, produces a negative result for L30. It was only if the authorities provided a route through that the case could succeed. But they do not provide that route.

344. In addition the representations (particularly C10 and C11), even if they navigated these hurdles, are at least in a degree of tension with the contractual context. Representations C10 and C11 (said to arise from *inter alia* the Termsheets) directly concern the completeness and accuracy of the publicly available prospectus documents for the Reference Obligations. Both the Termsheet Important Notices and the Series Memorandum make clear that no representation was made by CS as to the completeness of the information provided and no responsibility was accepted by CS for any omissions, and that L30 had to make its own, independent assessment of that credit quality.

345. The authorities indicate that this presents a difficulty for the party seeking implication:

i) Similar disclaimers were found to be fatal to similar alleged representations in *CRSM*: see [262] and [265].

ii) In *Raiffeisen*, the Information Memorandum stated that "*no representation, warranty or undertaking (express or implied) is made, and no responsibility is accepted as to the adequacy, accuracy, completeness or reasonableness of this Memorandum…*" Christopher Clarke J concluded this wording (and in particular the reference to the completeness of the information) was fatal to the claim of an implied representation to the effect that there was no undisclosed "support" of Enron by RBS: see [110].

iii) See also the similar wording in *IFE* (CA) quoted at [13] and Gage LJ's finding at [67] that it "inevitably follow[s]" that no representation had been made, including a representation that GSI was not aware of any further facts that showed the facts in the Memorandum were incorrect or that the opinions expressed might not be reasonable.

346. For this reason too the honesty representations alleged would fail.

347. I should mention for completeness the very considerable reliance placed by L30 on evidence from the CS witnesses as to what investors would have assumed. L30 submitted that "*CS own witnesses accepted the core underpinning of these implied representations*" i.e. that IKB would naturally have assumed that CS had acted honestly in relation to the securitisation of the CS RMBS, and had no reason to believe that the information in relation to those RMBS was false or misleading in a way relevant to an assessment of the RMBS. L30 says that "*while the legal test remains an objective one, the evidence of CS' witnesses is highly relevant as evidence of what a counterparty in the position of L30/IKB CAM would reasonably understand*" and that it helps to inform the assessment of whether to imply a representation.

348. As noted during the course of argument the question of whether a representation was made is one for the court based on its assessment of the context. The subjective opinions of witnesses as to what investors would have assumed is both irrelevant and inadmissible for these purposes. L30 relied upon Males J in *UBS v KWL* [2014] EWHC 3615 (Comm) [740]-[743] as establishing the proposition that such evidence was relevant and admissible. However that passage does not support the submission made. While clearly in that case on some very striking facts (the bank's knowledge that an intermediary had proposed the fabrication of some documents) some quasi-expert evidence as to banking practice and the expectations of a reasonable and honest banker was given, no principle or ruling is given. Indeed, in the (very particular) context of that case, it does not seem to have been contentious.

349. That factual occurrence in one case does not however mean that the evidence of any banking witness will automatically be relevant or admissible even as to banking practice or the understanding of a reasonable and honest banker in relation to a particular type of transaction. Further here we are (as already noted) not looking at simple basic propositions for which all the building blocks are well established; but more complex ones where (for example) the building block of knowledge of the inclusion of the CS RMBS was not established.

350. As for the proposition that this evidence should be taken as important material information to inform the assessment of whether to imply a representation, it is just possible that if appropriately put against the full relevant background there might be some assistance to be gained from answers from those involved. But the questions which were put and which founded the answers upon which reliance was placed were not so put, but rather were based on taking documents out of context

Group 2: Representations regarding credit rating

351. These are representations B7, A2, C13 and C14 namely that:

    i) B7: CS impliedly represented that it believed that the Notes would carry a triple A credit rating on or shortly after the date of issuance (following data integrity checks on the reference obligations and feedback from the rating agencies);

    ii) A2: Each of the RMBS in the Reference Portfolio carried a credit rating of A2 or above;

    iii) In respect of the CS RMBS which CS had itself securitised:

        a) C13: CS had no reason to believe that, in the process of procuring the credit rating for any of the Reference Obligations for which CS had itself procured the rating, CS had (a) caused or permitted any false or misleading information to be given to the rating agency, (b) deliberately concealed from the rating agency any matters relevant to a determination of credit quality or (c) acted other than honestly in and about the procuring of the rating;

        b) C14: CS had no reason to believe that, in the process of procuring (or assisting Magnolia to procure) the credit rating for the Notes, CS had (a) caused or permitted any false or misleading information to be given to the rating agency, (b) deliberately concealed from the rating agency any matters relevant to a determination of credit quality or (c) acted other than honestly in and about the procuring of the rating.

352. As regards representations C13 and C14 these can be dismissed at once, essentially for the same reasons as the honesty representations in that:

    i) They are both dependent on the introduction "*In respect of any of the Reference Obligations that CS had itself structured, arranged, underwritten, issued, marketed or sold*";

    ii) C13 itself concerns the credit ratings of the Reference Obligations.

353. The body of C14 deserves separate treatment. This fails for the reasons given, but itself encapsulates what appears to be a representation as to the Notes' own credit rating, which need not be logically dependent on the "In respect of …" rubric. Were it to stand alone it would not therefore suffer from either the problem of

reliance on part only of the Reference Portfolio or on the distance issues. It is much closer to the *PAG* formulation. There are however still the problems of:

i) Clarity (especially as to how one spells out a representation as to "deliberate concealment");

ii) Inconsistency with the terms of the contractual documents (see above).

354. So far as B7 and A2 are concerned the position is slightly different. In respect of Representation B7 (anomalously said to be derived from the now effectively abandoned (express) Representation A1) L30 admits that the express representation and indeed B7 as worded was (literally) true. However L30 contends that that true statement carried with it a further implied representation effectively along the lines of C13 and C14. CS's characterisation of this argument ("*a convoluted mess which bears no relationship to reality*") is perhaps a little harsh. However it certainly (again) falls foul of the requirement that an implied representation be clear. The rating of the Notes was a condition precedent to the purchase of the Notes; that represented the parties' contractual bargain. There is no logic in the requirement for and no apparent basis for a further representation as to CS's belief in the rating.

355. Substantially the same point arises in relation to Representation A2. The rating of the Reference Obligations was a matter of objective fact which was capable of being (and was in fact) checked by IKB CAM. There is no logic to or basis for a further implied representation as to the non-existence of the points which cannot themselves stand as representations for the reasons already canvassed.

356. It follows therefore that the claim based on these misrepresentations also fails at this first stage.

Group 3: Ability to make an informed determination of credit quality

357. The sole representation in this category is Representation B8: "*CS impliedly represented that L30, as a prospective investor, would be able to make an informed determination of the value and credit quality of the Reference Obligations.*"

358. L30's case is that by stating that a potential investor was required to make its own independent determination of the value and credit quality of the RMBS, this necessarily implied that it would be possible for potential investors to make an informed determination of the value and the credit quality of the RMBS. If CS was aware of something which disabled an investor, however sophisticated and with full access to publicly available information, from making an informed determination of the value and credit quality of the RMBS, CS could not act honestly in saying that it fell to each investor to make its own assessment. That statement carried with it an implicit representation that CS was not aware of anything which would disable an investor, however sophisticated, from making an informed assessment of the credit risk of the RMBS.

359. It is tempting to think that such a representation does, as L30 suggests, flow from the contractual documents. However when more closely examined it is possible

to see that the representation contended for is not a simple correlate, but a considerable extension, which justifies the submission made by CS in opening that L30 is seeking to convert an express warning that the Notes could only be suitable for sophisticated investors into a positive representation that the Notes were suitable for sophisticated investors and then (in substance) a representation that if the facts relied on by L30 existed, they would be disclosed. In other words, it "flips" a disclaimer, by trying to make it into a term encompassing a positive duty of disclosure (which is *prima facie* itself inconsistent with the other express terms).

360. The starting point here is the passage which is used as the springboard for the implied representation. It is not itself a warning, or a warranty. What it is, is part of Section 6 (Certain Risk Factors) which outlines 14 risk factors, ranging from "Risky Investment" through "no other Recourse" via "Potential Conflicts of Interest" to "Complex Tax Issues". Part 6 is a 3 page section which comes after Parts 1-5 (General Terms, Transaction Description and Capital Structure, Portfolio Manager, Portfolio Information and Credit Default Swap Provisions.) The text in question is at page 20 of the document:

> "Asset Backed Securities Market: The Reference Obligations will consist of asset backed securities, which are subject to a variety of risks that may adversely affect creditworthiness and/or performance of the Issuer and that could adversely affect demand for the Notes generally. Each prospective investor must make its own independent determination of the value and credit quality of the Reference Obligations."

361. All of Parts 1-6 come after the section called "Important Notices" which contains the warning about the accuracy and completeness of the information and the statement that no representations are being made.

362. Further the first warning within Part 6 says this:

> "Risky Investment: Investing in the Notes involves substantial risks and is suitable only for sophisticated investors who have the knowledge and experience in financial and business matters necessary to enable them to evaluate the risks and the merits of an investment in the Notes. The Notes will not be principal protected and investors in the Notes are exposed to full loss of principal. Only prospective investors who can withstand the loss of their entire investment should buy the Notes."

363. Thus even within Part 6 the warning actually addressed the need to evaluate the risks is directed to "*the risks and the merits of an investment in the Notes*". It is not a wording which is directed to "*the value and credit quality of the Reference Obligations*".

364. Thus when one looks at the documentation at all holistically it becomes impossible to see how the wording relied on can conceivably spell out, essentially by way of a logical correlate, the representation relied on. If this one passage were to give rise to a correlative representation it would be hard to see why all the other parts of the text should not do likewise. In the context of such a lengthy document

if that were the case, the result would be that the Termsheet would metamorphose into something positively bristling with add-on implied representations (much like, as I suggested in argument, a covid germ); and yet at the same time in the important notices at the start of the document the making of representations within the document is expressly disowned. That cannot be right.

Group 4: Draft Series Memoranda

365. The single representation here, D20, is that: "*In preparing, approving and supplying the draft Series Memoranda, CS impliedly represented that it was acting in good faith, that is, not knowingly putting forward information in the draft Series Memoranda that was likely to mislead.*"

366. D20 is the sole representation from Category D which is pursued. It suffers from three considerable difficulties:

i) The first is that the Series Memoranda are expressed to be documents of the Issuer, pursuant to which the Issuer (Magnolia) accepted responsibility for the information contained in it, save for a single discrete section (entitled "*Information Relating to Counterparty*"). L30 appears to have conceded this point elsewhere in that it has now abandoned Representations D15-D19. That would appear to carry with it an acceptance that the first sentence of RRRRAPoC ("*The representations in the draft Series Memoranda pleaded at paragraph 32A [i.e. D15-D19] were made and/or adopted by [CS]*") is not sustainable. It is difficult to see on what basis D20 can be distinguished;

ii) The second is that it is directly in conflict with L30's own case on the Series Memoranda, which is that "*the draft series memoranda was not supplied until after Loreley 30 approved entry into the transaction*", with the result that it cannot contain representations intended to be relied upon:

iii) Thirdly, it is also structurally in conflict with L30's case:

a) The equivalent implied representation in relation to the Termsheets – B6 – has been abandoned;

b) As noted, so have representations D15-D19.

367. These points present a formidable hurdle for the D20 case on the making of an actionable representation. I do not consider that they can be overcome; that conclusion aligns with the fact that the above points were not dealt with by L30 in oral closings, with submissions focussing instead on whether a document of a third party could give rise to a representation, whether Mr O'Driscoll accepted that the representation was made and whether it conflicted with disclaimers.

Conclusions on the making of the CDO representations

368. It follows that for the reasons I have given the CDO representations all fail at the first stage: I conclude that the alleged CDO Representations were not made.

369. Although many of the representations pleaded were not pursued I should add that the decision not to pursue them was plainly right. It is not the case that L30 has (under some pressure from the bench) pursued the wrong representations. The narrowing of the case did focus on the stronger end of the pleaded representations. The reality was that the vast majority of the representations were doomed to failure for one or more of the following reasons:

   i) Nearly all of the CDO Representations essentially concerned additional information relating to the credit quality of a portion of the Reference Obligations which it was said that CS should have disclosed. The problem as to making a representation relating to an unknown portion of the reference obligations applied to all such representations;

   ii) Some of the representations were in direct conflict with the terms of the contractual documentation;

   iii) Each of the Category C representations (along with the six 'express but true' CDO Representations) and Representations D18 and 19 concerned CS's knowledge or belief in the accuracy and comprehensiveness of the disclosures made to either investors or rating agencies in relation to the CS RMBS – i.e. they are alleged to arise from CS's role. Yet the Series Memorandum (which the Termsheets made clear was the definitive document) expressly stated that:

   > "other than as expressly set out in this Series Memorandum ad the Programme Memorandum, neither Magnolia nor [CS] … (i) has provided or will provide prospective investors in any Series of Notes with any information or advice with respect to any Reference Obligation, any Charged Assets … or (ii) makes any representation as to the credit quality of any Reference Obligation, any Charged Assets… Further … [CS] may have acquired, or during the term of the Notes may acquire information (public and non-public) with respect to any Reference Obligation, any Charged Assets … which will not be disclosed to you."

   .

370. In other words the Series Memorandum made it clear that CS may have material information arising from such roles but that no such disclosures would be made. The Category C Representations plainly seek to go behind this clear agreement.

371. There were also issues (to which I have alluded in passing in relation to the honesty representations) as to the way in which the representations depend upon numerous highly complex or elastic concepts. As I have noted it is hard to see how such difficult and complex concepts could be suitable for implication and could only be addressed expressly (which in many cases they were: see above). For example CS asked: "*How was the reference to RMBS which CS had 'structured, arranged, underwritten, issued, marketed or sold' (which features in each of the Category C ... Representations) somehow said to be conveyed implicitly? How would the reasonable observer have picked up, from the mere*

offer of sale of the Notes, that CS was making representations covering all of these highly specific roles/activities and not merely some or other of them?" These were but some of the questions which arose and which L30 did not seriously address. They do however serve to illustrate why the implied representation case was in large measure doomed to failure.

372. There was also a fatal lack of clarity and rigour in L30's case in that it sought to imply Representations which were couched in the conditional alternative – either that RMBS would be affected or that there was a "material risk" that those RMBS might be affected. The litigation charms of this approach were easily understood – if the case could be posited on material risk/might there would be no need to show that any of the CS RMBS (ie the seven particular CS RMBS) were actually the subject of any alleged misconduct. But such a formulation simply cannot provide a basis for a clear implication as the authorities cited at [123(3)-(4)] of *Marme* make clear. Only in such a large basket of proposed representations could such a defective argument hide away.

373. At this point I return to the point dealt with at paragraph 284 above. As I noted there, it appears that the reason why this case was not pursued until after it was time-barred was because (even with careful attention being directed to possible claims which could recoup losses on CDOs) no-one at L30/KfW saw a connection between the CDO transaction and the RMBS Misconduct. They did not see it because it did not present itself to their minds. It did not present itself because it was not clear, or obvious; that is precisely why there are no misrepresentations. In effect, the reason the claim became timebarred is because there was no claim to see.

WERE THE CDO REPRESENTATIONS RELIED ON?

374. My conclusions to date mean that this issue does not arise. However in the light of the fact that there has been full debate on the point, and that I have been asked by L30 to revisit my conclusions in the case of *Leeds City Council v Barclays Bank* [2021] QB 1027 (a case in which I had granted permission to appeal but which settled just prior to the hearing of the appeal) I will deal with this point in some detail.

375. The core requirement is to establish that the claimant was materially influenced by the representation. The question of inducement is centrally concerned with establishing a causal link between the conduct of the defendant and the conduct of the claimant. It is a control mechanism: if the defendant told a lie, but that lie had no effect on the claimant's thought-process or conduct, no remedy will be available. The overarching question is whether the representation operated on the mind of the claimant or materially influenced the claimant.

376. The issue which has caused much debate in this case and elsewhere is the balance between the authorities which say that the representee must be aware of the representation in the sense that it must be the subject of "*contemporaneous conscious thought*" or "*actively present to his mind*" and those which indicate that the claimant is assisted by an evidential presumption *("the presumption of*

inducement") which infers inducement from the facts that a material misrepresentation was made and the claimant did enter the contract.

377. It may be not insignificant that this debate has been conducted almost exclusively in the context of cases where – as here – representations were found not to have been made at all.

Awareness/understanding: L30's submissions

378. L30 of course submits that awareness is not a prerequisite. It submits that "*commonly, ... implied representation will be a matter which the claimant tacitly, rather than consciously, has in mind*".

379. It submits that the correct analysis can be summarised as follows:

i) The question is whether the representation materially influenced the claimant's conduct;

ii) In a representation case, the correct counterfactual is that the representation was not made;

iii) In the case of an implied representation, this means that the totality of the facts would have been such that the claimant was not entitled to believe the defendant was asserting the representation. There might be more than one way in which this counterfactual could have occurred, but in the ordinary case, especially of dishonesty, the most plausible way is that the defendant could (and should) have revealed the truth or corrected the misrepresentation;

iv) The question "*what would the claimant have done had it known the true position?*", or the "*counterfactual of the truth*", is an evidential tool which will often assist (a claimant, but not a defendant) when testing the position if no representation has been made. The linkage between these two counterfactuals is well-established: see *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland* [2010] EWHC 1392 (Comm) at [182] and *Parabola Investments v Browallia* [2009] EWHC 901 (Comm) at [105]-[106];

v) Therefore, contemporaneous "awareness" of the implied representation is not a required element of reliance. A claimant may rely on an implied representation without giving conscious or active thought to the representation. If the defendant makes an implied representation which it intends the claimant to rely on, reliance may be established by the claimant showing that it would not have entered into the relevant transaction had it known the true position.

380. This approach is said to be supported by the following authorities:

i) *Gordon v Selico* (1986) 18 HLR 219, a case where the seller had deliberately concealed dry rot in a flat which was sold to the claimant. Goulding J held that the concealment of the dry rot amounted to

an implied representation that there was no dry rot. L30 submits that Goulding J also held that there was reliance by the claimant, on the basis that if he knew of the concealment of the dry rot, he would not have bought the flat. There was no suggestion of "conscious awareness". Goulding J held that deceit was established; this was upheld by the Court of Appeal;

ii) *Spice Girls v Aprilia* [2002] EMLR 27. The Spice Girls agreed to take part in a publicity photo-shoot for a company which sold scooters. Arden J held that the band's participation in the photo-shoot gave rise to an implied representation that the Spice Girls did not know, and had no reasonable grounds to believe, that any of the members of the group had a declared intention to leave the group (see [34]). In fact Geri Halliwell ("Ginger Spice") was about to leave; the representation was therefore false. Arden J held that a claim in misrepresentation was established; and this was upheld by the Court of Appeal. L30 points to the Court of Appeal saying that "*no one [at the claimant] gave any consideration at the time to what representations were to be implied*" ([67]). The Court referred to (i) the presumption of inducement at [68] and (ii) the claimant's evidence that it would not have entered into the contract had it known the true position [69]. The Court upheld the decision of Arden J that inducement was established: and L30 submits that the inducement analysis was undertaken (i) without any "awareness"' requirement and (ii) by asking how the claimant would have reacted had it known the true state of affairs.

iii) *Man v Freightliner* [2005] EWHC 2347 (Comm), was a case where Moore-Bick J found there to be an implied representation that accounts had been prepared honestly (see [78]). The judge held that Man had relied on this representation. That involved no finding that Man consciously had in mind the representation. L30 relies on [123]: "*I think it is clear that the essential honesty of the accounts was fundamental to the discussions between the parties. Dr. Schubert said that MN would have withdrawn from the negotiations immediately if it had discovered that Mr. Ellis had been deliberately manipulating ERF's books in any material respect, and one can well see why.*"

iv) *UBS v KWL* [2014] EWHC 3615 (Comm). In this case Males J held that UBS had impliedly represented that it had no knowledge that a putative transaction was tainted by dishonesty. Males J held at [785] that reliance was established. L30 says that he made no finding that the representee had any conscious awareness of the representation and that the judge held that reliance was satisfied by asking what the representee would have done had it known the true state of affairs: "*I have no doubt that Depfa relied on both misrepresentations in entering into the Depfa Back Swaps. If it had been told that UBS knew that the intermediary advising KWL was dishonest or that the transaction which UBS had already concluded was tainted by a conflict of interest affecting that intermediary, it would have had nothing to do with this proposed deal. I accept the evidence of the Depfa witnesses to this effect.*"

v) *IFE v Goldman Sachs International* [2006] EWHC 2887 (Comm), was one of the cases where it was held that the implied representations as alleged

were not made. The court then considered the situation had such representations been made. On this the claimant's witness (Mr Mitjavile) accepted in his evidence that he did not understand the bank to have made any representations on which he could rely; but that had he known the true position, he would not have proceeded with the transaction. Toulson J at [78]-[81] left the contingent issue of reliance (which did not arise on his findings) unresolved. The issue was, however, addressed obiter by Waller LJ on appeal. At [28] Waller LJ stated: "*I am very doubtful whether [Goldman Sachs] would succeed simply on the issue of inducement by reference to Mr Mitjavile's evidence. It is true he said he did not rely on any representation and that may be relevant to whether there was misrepresentation, but if there was a misrepresentation what one would then have to ask is what would have occurred if the misrepresentation had [not] been corrected.*" Therefore L30 says the case shows that the question of reliance fell to be tested by asking what the claimant would have done had the representations been corrected, i.e. if the claimant had known the true position.

vi) *Crossley v Volkswagen* [2021] EWHC 3444 is the last of the authorities and the only one post-*Leeds*. It was a group action arising out of the diesel emissions scandal. The claimants were buyers of cars who claimed that Volkswagen had made implied representations, essentially to the effect that the vehicles sold to them were in compliance with all legal requirements. The claimants alleged that had they known the true position, they would not have bought the car. There was no evidence that the claimants consciously had in mind the representations. Volkswagen applied to strike out the claims on the grounds that reliance was not established. That application failed. Waksman J cited a number of cases in which reliance had been established by reference to the "counterfactual of truth" and held that the question whether reliance could be established in this case, notwithstanding the lack of conscious awareness, gave rise to a triable issue.

381. L30 contends that the cases suggesting a requirement of awareness *(Property Alliance Group v Royal Bank of Scotland* [2016] EWHC 3342 (Ch) ("*PAG first instance*") per Asplin J, *Marme Inversiones 2007 v Natwest Markets* [2019] EWHC 366 (Comm) per Picken J and *Leeds* are obiter – and have taken a wrong turn.

382. In relation to *Leeds* specifically it was submitted that:

i) The body of jurisprudential material which bears on the analysis has developed significantly since Leeds, such that the decision in *Leeds* is ripe for reconsideration, particularly in the light of *Volkswagen* and the article by Messrs De Verneuil-Smith KC and Day: "*Reliance: A comparison between the Common Law and s 90A FSMA*" (2021) 6 JIBFL 389;

ii) *Leeds* was a decision confined to the particular LIBOR representations that were a mirror-image of those addressed in *PAG* and *Marme*. See in this respect *Volkswagen* at [90]-[95]. The representations in the present case are wholly different in character;

iii) If and insofar as *Leeds* is to be read as holding that (i) it is always necessary to show some element of awareness and (ii) a claimant cannot rely on the "counterfactual of truth" for the purpose of establishing reliance, it was respectfully submitted that the decision is not correct and is ripe for reconsideration in the light of the detailed analysis set out in the subsequent *Volkswagen* decision. *Spice Girls* is a case where reliance was established notwithstanding an express finding that the claimant gave no consideration to the implied representation. Insofar as Leeds holds that awareness or active consideration is required, that cannot stand alongside *Spice Girls*. Waksman J in *Volkswagen* departed from *Leeds* on this point (see [92]), and it was submitted that *Volkswagen* reflects the correct analysis consistent with the line of cases relied upon. Moreover, as noted in *Volkswagen* at [76], the decision in *Leeds* was reached without the benefit of considering the Court of Appeal decision in *Gordon v Selico*.

383. If (contrary to its primary submission) awareness is the test L30 submitted that:

i) It is plain from *Leeds* that there is no one-size-fits-all requirement to show awareness. The requisite degree of awareness will depend on the precise facts of the case: see [102], [146]-[149];

ii) The claimant may rely on the representation in a "quasi-automatic" way: see *Leeds* at [113], [148]. It would be artificial to treat the waiter in *DPP v Ray* as having the representation consciously in mind; "quasi-automatic" awareness would instead suffice. Awareness may therefore encompass a state of mind which falls short of conscious or active thought. The line which separates quasi-automatic processing from an assumption will often be a thin one. Waksman J observed in *Volkswagen* at [92(3)] that there was no reason why "quasi-automatic awareness" could not supply the requisite reliance in the circumstances of that case;

iii) In this case the evidence amply justifies a finding that the requisite degree of awareness was made out.

Awareness/understanding: Analysis

384. As my views on the subject align significantly (though not entirely) with the submissions of CS I will not rehearse those submissions here, save to say that they were presented with great clarity and élan by Mr Sher.

385. I will start with what *Leeds* says, or attempts to say. At the heart of it is what I saw as a necessary and logical bridge between the representation and inducement (*Leeds* [67], [70]). The starting point – which is not controversial – is that representation has to cause inducement (see Lord Selborne in *Smith v Chadwick* 9 App (1884) Cas 187 "*it must have produced in his mind an erroneous belief, influencing his conduct*.") and that causative link has to be at least capable of being discerned.

386. That bridge consequently has to exist in all cases of representation: express, implied, by words and by conduct or any combination thereof (*Leeds* [65]). It is sometimes referred to as "understanding" or "conscious thought" or "active

presence"; or it may be referred to as "awareness" (*Leeds* [57]). The formulation of "active presence" is classical – it dates back to the judgment of Bowen LJ in *Edgington v Fitzmaurice* (1885) 29 Ch D 459. That was a C19 prospectus reliance case which dealt with the competing claims of assumption and representation. The other formulations have arisen in other cases subsequently.

387. Reliance was placed by CS on *Smith v Chadwick* with Mr Sher submitting that in order to succeed in a claim for deceit, the claimant must show not only objectively that the representation had a meaning which was false, but also that the representee understood the representation in that false sense. This is true; however as I noted in *Leeds* at [68], *Smith v Chadwick* was dealing with the question of a representation which was capable of being understood in two senses. In this context, while it is true that *Smith v Chadwick* and the extensive line of cases following it in essence endorses the requirement of awareness/active presence of the representation, those cases have a specific focus (the particular sense of the representation) which is different. I therefore consider it preferable to negotiate by reference principally to the authorities where the question of awareness/active presence itself was in issue. However Mr Sher does rightly note that the issue of ambiguity is also likely to arise where representations are implied, simply because of the difficulty of spelling out a particular representation without words.

388. The way in which the requirement of awareness/active presence is characterised and what one might expect to see to satisfy that requirement will differ according to the circumstances of the case. An oral express representation might well best correlate to contemporaneous conscious thought – but it is in such cases that the understanding/awareness requirement is least often problematic on the facts. Simple representations by conduct may well correlate most closely to awareness with a quasi-reflexive understanding (*Leeds* [146-8]). That does not mean (as may have been suggested in some subsequent considerations of the case) that there is no such requirement of awareness or understanding in simple representation by conduct cases. What it means is that tests such as "contemporaneous conscious thought" are often inapt in such cases and other ways of expressing how the bridge between representation and reliance takes effect will be more apt. I remain of the view expressed in *Leeds* that the awareness/understanding bridge is however always present and it is always distinct from assumption – though in simple cases the process of awareness and understanding may look like assumption.

389. That leaves a question as to how the presumption of inducement and the counterfactual of truth fit in.

390. As to the presumption, my conclusion remains as stated in *Leeds* at [140] that logically the requirement of awareness precedes the presumption of inducement. This is consistent with *Marme* [2019] EWHC 366 (Comm), *Vald Nielsen A/S v Baldorino* [2019] EWHC 1926 (Comm) at [154]; *BV Nederlandse Industrie Eiprodukten v Rembrandt Enterprises* [2020] QB 551 and *ACL Netherlands BV v Lynch* [2022] EWHC 1178 (Ch) at [515(7)]. No argument was really addressed to this point, though I shall return to it below. More in issue was the counterfactual of truth – here re-dressed as the "helpful test" in another guise or eliding into it.

391. Dealing first with the counterfactual of truth pure and simple, I consider the arguments that such a test can stand in for the relevant test of understanding/awareness are doomed to failure. The counterfactual of truth is not without purpose: it can be used as (another) helpful test applicable in some cases. For example, particularly where there is some doubt about whether a representation has been received or understood, the counterfactual of truth can provide some evidence which is relevant to deciding the question of whether there has been receipt or understanding.. So it can be helpful in some cases. That is effectively the point being made by Flaux J in *Parabola Investments Ltd v Browallia Cal Ltd* [2009] EWHC 901 (Comm) [106].]: "where the evidence is that, had the claimant known the true position, he would have acted differently, that in itself demonstrates that the fraudulent misrepresentation, which by definition does not reveal the true position, "was actively present to the mind" of the victim of the fraud to a sufficient extent to establish inducement." [3]

392. But it only works when there are not competing causes for the action; and particularly the possibility – of huge import in cases such as this one where representations of honesty are posited – that the representee's own pre-existing (mistaken) assumption may be operating. Christopher Clarke J in *Raiffeisen* at [187] makes clear that the counterfactual of truth is not necessary and:

> "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."

393. As Mr Sher pointed out "*the counterfactual of truth does not work as a gatekeeper because it does not distinguish between, on the one hand, mistaken assumptions not caused by the conduct and on the other, an understanding caused by the conduct or the representation.*"

394. Testing this against the situation in *DPP v Ray* (aka *Ray v Sempers* [1974] AC 370, discussed in *Leeds* from [105]), CS suggested that the waiter would almost certainly assume that the customer is not a terrorist who intends to attack the restaurant. The counterfactual of truth is that the waiter would not serve the customer if they knew the truth. But it cannot sensibly be suggested that the customer is impliedly representing that he is not a terrorist. CS suggested that the best way through this was what they termed the "open question test" i.e that a hypothetical questioner asks what the representee understood was being said by the conduct and that on this hypothesis the waiter would never give an answer in favour of implied representation that the customer was not a terrorist. I part company with CS here, in that I fear that such a test remains too blunt an instrument. One might think that it is rather dubious whether the waiter in *Ray* would have answered the open question in favour of the implied representation found. Open questions are, as any examiner in chief knows, fraught with danger.

[3] Or take for example a situation where A is about to step into the road just before B shouts "Ambulance coming!". The fact that A stops in their tracks (consistent with a counterfactual of truth that an ambulance was indeed coming) provides some evidence that A heard and acted on B's representation that the ambulance was coming.

395. I also rather doubt whether the "open question test" would have worked for the implied representation found in *PAG* – a degree of leading would have been necessary because of the co-existence of the assumption that the other party was honest. Mr Sher might suggest that the answer suggests that *PAG* may require reconsideration; I obviously cannot. But further if there is to be a test it must leave room for the co-existence of assumption and representation; the open question test will struggle here.

396. Overall I deprecate the tendency to seek a single universally applicable test in a situation of this sort. In the case of implied representations one is discerning something on the basis of anything from simple conduct to a combination of actual words and conduct against a background of considerable complexity and sophistication. Ultimately, as here, in complex situations it may well be that as a result a clear representation cannot be spelled out; and it is thus that this debate can become a little artificial, because understanding/awareness is so often falling to be considered when there is no representation. But even so one cannot shut the door to the possibility (as in *PAG*); and in those cases an open question test will be as defective in a different way as the counterfactual of truth. In addition this search for a single test creates an extra formal stage within the process of analysing misrepresentation and hence adds to the already sufficient complexity.

397. I therefore maintain the view that, like the question of deciding whether a representation was made, the question is a nuanced one; and that the court and the parties are better focussing their minds on the need for the bridge (however expressed) and the reason why it is necessary than exhausting themselves in the search of the elusive single perfect test.

398. I should here deal with the deployment of *Geest* by L30. At some points this appeared to be the central plank in the argument of L30. Mr Lord submitted that if the representation was being decided via *Geest* it was illogical or incoherent for the same test not to be deployed at the understanding level. Obviously that does not work on the approach I have taken because I consider that *Geest* is or may be a factor in one element of the decision as to the existence of the representation; what it is emphatically not is "the test". But secondly even if *Geest* were "the test" at the stage of finding a representation, this approach of engaging it again at the inducement stage would collapse the stages of finding an operative misrepresentation. Perhaps inspired by reliance on the *Spice Girls* case, two [stages] become one. But having distinct stages is not incoherent – it is disciplined, and more significantly it is part of the gatekeeping function of the law because absent these stages non-disclosure becomes misrepresentation. This is of course legal heresy.

399. Mr Sher pointed out that a similar argument was run in *Marme* [285] where Picken J pointed out that it was unsupported by authority. In *Leeds* [94] the argument appeared in the written submissions, but was not pursued orally.

400. Mr Lord also suggested that this approach of decoupling the test from *Geest* created a rogue's charter, because a representation could be found, and then the second stage could not be surmounted. However there is no unfairness in not providing a remedy in respect of a representation which has not been received or

comprehended. The greater unfairness is to provide a remedy when the standard requirements of the cause of action are not satisfied.

401. What is more the cases where this is a problem will be very few and far between; as I have noted, more often where there is a problem at stage 2 there has already been a fatal problem at stage 1. It should be borne in mind that:

i) In *Marme* Picken J had, prior to his consideration of contemporaneous conscious thought, already concluded that the case failed at the levelof the making of the representations [158];

ii) In *Leeds* the existence of the representations had to be assumed; they had not been proved: see for example [2].

402. Next I note that it is not fair to say, as L30 does, that the cases suggesting a requirement of awareness are limited to *PAG First Instance*, *Marme* and *Leeds*. Those cases come from a fairly lengthy line of authority starting with (as I noted in *Leeds* at [60-8]) *Arkwright v Newbold* and *Smith v Chadwick* via *Raiffeisen* [80], *BV Nederlandse* [32], *CRSM* [224], *Brown v Innovatorone* [882][906], *Foster v Action Aviation* [2013] EWHC 2439 (Comm) [100-1], *Leni Gas and Oil Investments v Malta Oil* [15][164] and *Vald Neilsen v Baldorino* [2019] EWHC 1926 (Comm) [152]. Of these I pick just two lines, both characteristically clear statements by Hamblen J:

i) *Foster* at [100]: "*Unless one understands the representation is being made, it is difficult to see how it can be said to have been relied upon.*"

ii) *Innovatorone* 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.*"

403. What then of the cases on which L30 relies? I conclude that there is nothing within any of them which either binds me or which persuades me that I need to revisit the analysis above.

404. I will take *Volkswagen* first and at length as the most recent case which considers many of the others.

405. *Volkswagen* was, as noted above, a case where buyers of cars claimed that Volkswagen had made implied representations, that the vehicles sold to them were in compliance with all legal requirements. The claimants alleged that had they known the true position, they would not have bought the car. There was no evidence that the claimants consciously had in mind the representations. Volkswagen applied to strike out the claims on the grounds that reliance was not established. That application failed, with the judge holding that the question whether reliance could be established in this case, notwithstanding the lack of conscious awareness, gave rise to a triable issue. In his conclusions at [94] he noted the very different context to that which prevailed in *Leeds*:

> "The case before me is very different from Leeds (and indeed PAG and Marme). The conduct, and the representations to be implied therefrom, as pleaded at para 63 of the GPOC (albeit at some length) are both in fact relatively simple. They are not to be spelled out from a complex web of communications. And while in Leeds it was to be assumed that the implied representations have been made out, it cannot be denied that the whole context was one where the implied representations might have been difficult to establish and indeed were positively rejected in PAG and Marme."

406. En route to that conclusion Waksman J conducted a review of the authorities. He accepted that there were cases in which reliance had been established by reference to the "counterfactual of truth". Amongst those he numbered the following.

407. *DPP v Ray* (considered in detail in *Leeds* at [105] and following). At [94] Waksman J saw in the passage at [1974] AC 370 at 386:

> "on the facts as found it is clear that all concerned (the waiter, the respondent and his companions) proceeded on the basis that an ordinary customer would pay his bill before leaving. The waiter would not have accepted the order or served the meal had there not been the implied representation.
>
> a clear invocation of the [counterfactual of truth]. The analysis appears to proceed at least at some points on the basis that there is a "conscious thought"/counterfactual of truth dichotomy, rather than the more nuanced approach I was attempting to convey in *Leeds*. Later in the judgment he considered that if (as I saw it) one viewed *Ray* as a case of awareness, in the sense of quasi-automatic awareness, it offered a parallel for the VW purchasers. That analogy might well be seen as apt based on the much simpler factual background,"

408. *Gordon v Selico*. In differing from my analysis in *Leeds* Waksman J placed some weight on the fact that *Gordon v Selico* was not cited. While, particularly given the fact that Waksman J was considering a preliminary issue/strike out application, I see that the very fact of the case might be seen as a factor, I do not consider that it offers any real support for the analysis of L30. Before Waksman J Volkswagen argued that the case was distinguishable as a concealment case. He rejected that and concluded that it appeared to provide support for the counterfactual of truth analysis: "*while the claimant could readily say that had he known of the dry rot etc he would not have purchased, it is hard to see how he could have been 'consciously aware' of the representation as distinct from making an assumption.*" However I cannot agree with this. The judgment cited in *Volkswagen* was the appeal, in which the main issue was whether attribution of dishonesty by the contractor to the builder was correct. It is clear from page 233 of the report that that was underpinned by the following issues which had been decided at first instance: (i) that the concealment of dry rot amounted to an implied representation as to the absence of dry rot and (ii) that this had been relied upon by the purchasers to their detriment. These aspects were not appealed and

therefore form no part of the reasoning in the appeal. The appeal in *Gordon v Selico* therefore has no significance.

409. I will however deal for completeness with the judgment at first instance, which did deal with these points. That judgment [1985] 2 EGLR 79 by Goulding J may have been an extempore judgment. There was a considerable range of issues: deceit, breach of terms of the lease, breach of terms implied by the lease, negligence, breach of trust. There was no detailed consideration of either the making of a representation or reliance upon it. Instead at page 8 of the judgment the judge considers the credibility of the witnesses who joined issue on the question of whether the agent of the defendants, Mr Azzam, knew of the dry rot. He alludes in passing to the fact that "*I have evidence which, if believed, leads irresistibly in my judgment to the inference that Mr Azzam deliberately covered up active patches of dry rot without any attempt at eradication*". He then passes seamlessly on to saying "*In conclusion I find that the fact of deceit alleged by the plaintiffs is proved*." The consideration of representation and reliance comes next thus:

> "The law must be careful not to run ahead of popular morality by stigmatising as fraudulent every trivial act designed to make buildings or goods more readily saleable, even if a highly scrupulous person might consider it dishonest. But it is to my mind quite a different matter for an intending vendor to hide so sinister and menacing a defect as active dry rot. The case is fairly comparable, in my view, with the concealment of cracks indicating the settlement of foundations, considered *in Ridge v Crawley* …, and, in the Court of Appeal …. There the plaintiff relied on a combination of words and conduct, but I believe it to be the law that conduct alone can constitute a fraudulent misrepresentation (see *Horsfall v Thomas* (1862) 1 H & C 90 *and Smith v Hughes* (1871) LR 6 QB 597). In my judgment the concealment of dry rot by Mr Azzam was a knowingly false representation that Flat C did not suffer from dry rot, which was intended to deceive purchasers, and did deceive the plaintiffs to their detriment. I am satisfied that the plaintiffs would not have entered into a contract or accepted the lease had they known there was dry rot inside Flat C."

410. What is apparent from this is that (i) this is not a case where the issues were broken down with at all the degree of thoroughness that has occurred in this case (ii) to all appearances the question of reliance was only ever considered in broad terms and (iii) no-one put in issue whether the representation found was understood by the plaintiffs. I therefore consider that this earlier judgment adds nothing to the sum on knowledge in this context. On this basis, despite the doubts so politely expressed by the editors of Clerk and Lindsell at 17-35, I do not

consider that any disharmony between this case and the present analysis should cause concern[4].

411. The most significant of the judgments relied upon by Waksman J and thus L30 is indubitably *Spice Girls v Aprilia* [2002] EMLR 27. Waksman J disagreed with *Leeds* on the question of whether awareness was live in this case (see [92(2)]), and at [78-84] cited lengthy passages from the judgments at first instance and on appeal leading to the following passage:

> "It is hard, in my judgment, to resist the conclusion that while the points as to awareness and CFOT[5] [were] specifically taken, this case establishes that at least sometimes, an implied representation, intended by the representor to be relied upon by the representee, which is accompanied at least by CFOT, can be sufficient"

412. On my reading the reference to [were] should be a reference to [were not]; there certainly were issues as to (i) understanding in the sense alleged and (ii) inducement. However at the level of the appeal, those hinged on the absence of a witness to these matters, and on understanding the battle was really as to whether the representation would reasonably be understood in that sense or not. There were not issues as to awareness *per se*, or as to counterfactual of truth *per se*.

413. The passage in the *Leeds* judgment may not be optimally expressed (De Verneuil Smith and Day in *"Reliance: a comparison between the common law and s. 90A FSMA"* perhaps rightly chide it for being "a bit thin"); however the facts remain:

i) Neither at first instance nor on appeal was the question of awareness live. Nor was there a debate about counterfactual of truth taking the place of awareness;

ii) The debate which took place did (as is so often the case) shift somewhat between first instance and appeal;

a) At first instance:

(i) There was much factual ground to cover, including who knew that Geri Halliwell was going to leave and when, and whose was the loss;

(ii) For present purposes the key issues were whether a fax saying that "*the band are totally committed to their involvement with Aprilia .. fully committed to make it as powerful as possible … over the period of the agreement*" followed by entry into the agreement between the parties amounted to a representation as

[4] Clerk and Lindsell also cite the case of *Schneider v Heath* as a basis for doubting the analysis. It was not suggested that this case – described by Mr Lord as having a "typically quaint and old fashioned judgment" provided much assistance on the point.

[5] CFOT= Counter Factual Of Truth

to the Spice Girls' intentions and if so whether that induced the agreement; those were supplemented by issues as to whether the supply of logos and images plus participation in press activities amounted to representations by conduct to the same effect;

(iii) On the issue of the making of the representation having rejected the representation to be spelled out of the documents, Arden J found that participation in the commercial shoot carried with it a representation by conduct that Spice Girls Limited did not know and had no reasonable grounds to believe that any of the Spice Girls had an existing declared intention to leave the group before the shoot was utilised

(iv) On reliance the finding was brief: "*Given that Aprilia had to sign the agreement to get the right to use the commercial shoot (and there was no other reason for it to sign the agreement except to get the rights thereunder) it seems to me that the court can infer that indirectly it was induced to enter the contract by the representation made to it*".

b) On appeal the court accepted the existence of an implied representation in the explicit assurances in the documents as well as upholding the representation by conduct. There was a dispute about inducement which was multilayered.

(i) First there was a point formulated in the *Smith v Chadwick* "in the sense alleged" mode, rather than as a question of the existence or absence of understanding. The fact that the Court of Appeal recorded that "*no one [at the claimant] gave any consideration at the time to what representations were to be implied*" ([67]) is neither here nor there in the present context because (as the court recorded) it was focussing on that "in the sense alleged" point – and concluded later in the same paragraph that there was no ambiguity;

(ii) The second part was whether inducement was wrongly found (i) because it was on the basis of evidence directed to withdrawal from the agreement if the truth had been told rather on reliance than leading to entry into it (ii) where there was no evidence of inducement and there was another basis for entry into the contract (reliance on commercial success to keep the Spice Girls together) (see [66]);

(iii) The conclusion at [72]-[73] does not purport to lay down any test. It is a decision not to disturb the judge's conclusion ("*the judge was entitled to find…*"), having hedged the conclusion by reference to (i) a finding that it need only be "a" material inducement and (ii) the inference (and hence the appeal) was one of fact ([70])

iii) The factual background of the *Spice Girls* case was very different to the factual background here. It was far more akin to *Gordon v Selico* and *Volkswagen* or *Ray*. In each case the contract induced concerns a fairly simple and obvious thing and the representation in question is one where a representation by conduct is easy to spell out. In such circumstances it may well often be the case that understanding of a representation (if established) is not contentious.

414. It follows that I conclude that there is nothing in *Spice Girls* (even post *Leeds* commentary) which justifies a view that inducement can be established by reference to the counterfactual of truth without satisfying at least an awareness test. I note that although Messrs De Verneuil Smith and Day critique some of the *Leeds* reasoning (and do take real issues with the "contemporaneous conscious thought" approach) they do at least implicitly, in their consideration of *Ray* at p 390 accept the need for a causal link between representation and action.

415. In *Man v Freightliner* [2005] EWHC 2347 (Comm), Moore-Bick J found there to be an implied representation that accounts had been prepared honestly (see [78]). The judge held that Man had relied on this representation. That involved no finding that Man consciously had in mind the representation. Instead, the analysis was tested by reference to the counterfactual of the truth at [123]: "*I think it is clear that the essential honesty of the accounts was fundamental to the discussions between the parties. Dr. Schubert said that MN would have withdrawn from the negotiations immediately if it had discovered that Mr. Ellis had been deliberately manipulating ERF's books in any material respect, and one can well see why.*"

416. Other cases relied upon by L30 include *UBS v KWL* [2014] EWHC 3615 (Comm). L30 submits that Males J held at [785] that reliance was established with no finding that the representee had any conscious awareness of the representation but rather by asking what the representee would have done had it known the true state of affairs: "*I have no doubt that Depfa relied on both misrepresentations in entering into the Depfa Back Swaps. If it had been told that UBS knew that the intermediary advising KWL was dishonest or that the transaction which UBS had already concluded was tainted by a conflict of interest affecting that intermediary, it would have had nothing to do with this proposed deal. I accept the evidence of the Depfa witnesses to this effect.*"

417. Here I tend to agree with CS that this is to take a very short passage of a very long judgment out of context. The section on fraudulent misrepresentation starts at [642]. If one looks at [666] of his judgment in relation to an earlier alleged representation (found not to have been made) the judge says that:… "*[E]ven if such a representation had been made … there is no evidence (or at any rate none that I accept) that KWL was conscious of any such representation having been made to it, that it relied upon such a representation or that the representation played any part in KWL's decision … There is nothing in Dr Schirmer's evidence, and certainly no evidence which I accept, to suggest that he was ever conscious of the representation which KWL claims to have been made*." That shows that at least at this stage in the judgment the judge was applying the approach which follows from *Edgington v Fitzmaurice*.

418. Later in the judgment the judge concludes, based on what appears to have been a devastating cross examination of a witness on "general banking principles" by the "tag team" of Mr Lord KC and Mr Railton KC that:

   i) There was an implied representation as to the honesty of the intermediary being proposed [740-1];

   ii) There was an implied representation that the transaction was not known to be tainted was found to have been made: [747-8];

   iii) He then goes on to say this (relied on by L30): "*As an experienced banker he cannot have failed to appreciate, as other UBS witnesses did, that any bank to which the intermediation opportunity was presented would assume that UBS was not aware of any dishonesty on the part of Value Partners or Mr Heininger and that any bank which knew the true position would have nothing to do with this deal. It follows that he intended Depfa to be deceived.*"

   iv) Finally there is the conclusion quoted above at [785].

419. I accept that this appears to show a conclusion of reliance being reached essentially by a link to assumption. However it must be borne in mind that this question of awareness does not seem to have been live at this stage of the argument. As such the case is somewhat akin to *Gordon v Selico*. Both are cases where there was essentially an active and conscious falsification of a fundamental representation which was being made implicitly; an active falsification layered on top of what would anyway be assumed. Plus – and significantly – in both cases the judge had on the evidence concluded that a sufficiently clear and clearly intended representation had been made. It may well be that in both cases it was considered imprudent to argue the point. But the fact remains the point was not live, and the case therefore cannot add anything significant to L30's argument.

420. A similar point arises in relation to *IFE v Goldman Sachs.* The point did not arise because it was held that the implied representations as alleged were not made. It is accepted by L30 that the point was only addressed obiter by Waller LJ on appeal.

421. I conclude that the law does require that a representation (however made) is received by the representee and that to satisfy the requirements of reliance the representee must be aware of it/have it actively present to their mind when they act on it.

422. Mr Lord endeavoured to persuade me that in this context a test of "present to the mind" would suffice. This I regard as a dangerous step away from where the authorities stand, essentially because such a test too easily elides into assumption. *"Actively present to the mind"*, becomes *"present to the mind"*, from which it is but a short distance to *"at the back of my mind"* - which was exactly where L30 wanted to go because that was what Dr Bauknecht said. But where something is at the back of the mind is it because of assumption or representation? Very often it will be only because of an assumption unconnected to what has been said or done. Accordingly I consider that this approach merely provides another route to

dissolve the distinction between representation and assumption – which is also the division between representation and non-disclosure. This is a problem which is particularly acute when (as here) one is dealing with implied representations as to honesty, because it turns every contract into a contract of utmost good faith.

423. I return finally to the fault line which plainly exists in the cases. The authorities above show that there are cases where on the particular facts in play reliance/inducement is found without any distinct evidence of understanding or awareness being identified. It is fair to say that when placed under the analytical microscope those cases do offer a different flavour to those which I have decided establish the orthodoxy which applies where a question arises as to reliance based on an issue as to the operativeness of a representation. But it can be seen that these cases where no evidence of understanding/awareness is separately discernible are, in type, very different cases to the ones where this issue is really live. There are two hallmarks which appear to drive the distinction. The first is that in the *Gordon v Selico/Spice Girls* type case the representation is simple and cannot well be missed by the representee. There is no issue as to whether the representation is discerned so as to be operative. In the *Leeds* and current type case, the representation is being said to be capable of being implied despite complex contractual provisions, usually in complex multifaceted transactions. That pushes to the fore a need to see what has been registered or understood.

424. The second (related) distinction is that in the *Gordon v Selico/Spice Girls* type case the representation is one which is at the heart of the transaction. Are you buying a good flat or a money pit? Are you buying the star power of a flourishing or an imploding group? Both of these factors mean that the question of awareness is one to which the answer is obvious (the representee cannot miss it) and where the whole question of reliance is, in the light of that, likely to be susceptible of being decided by the presumption of inducement. As noted above, it would have taken a brave counsel to raise this point in *Gordon v Selico* (when the court had been prepared to find a representation). In *Spice Girls* a similar flavour emerges from the use of the word "inconceivable" in [72] of the Court of Appeal judgment. In the banking cases awareness is far from obvious; so much else is being said more explicitly that there are real questions as to whether a particular implicit message is received and understood. A proffering of a complex transaction such as this is not analogous to the ordering of a meal or the raising of an auction paddle.

425. All of this of course feeds back in to the question of making of the representation. In these more complex cases the question will often arise either contingently (as here – arising only if I am wrong about the making of the representations) or (as in *Leeds*) based on an assumption which might never be made out; but the facts that drive the first conclusion impact on the situation where causation arises. In the simpler cases the answer is often either so obvious that there is no dispute, or the court may be prepared (instinctively, but I would suggest technically incorrectly) to elide the question into the presumption of inducement. That is in essence the point being made by Longmore LJ in *BV Nederlandse v Rembrandt Enterprises* [2019] EWCA Civ 596 [2020] QB 551 at [45] to which Mr Lord alluded in reply. None of this however affects the logic of the argument. Because points are not in some cases taken, does not mean that they are not there.

Reliance: the facts

426. L30 effectively conceded that if the test was "active presence" or "contemporaneous conscious thought" its case could not succeed. That was an inevitable concession in a situation where there was no evidence from L30 as to anyone reading the Termsheets, still less as to the relevant understanding on their part. Dr Bauknecht never saw the 16 May email or the draft Series Memoranda. Indeed, on this basis the case in relation to the Category A and B representations fails even apart from the interesting question of awareness.

427. For A2, had this been surmounted, there would also be the difficulty that IKB relied on its own checking process to confirm ratings.

428. A case was advanced by reference to Dr Bauknecht and Mr Schirmer's evidence on the Category C representations and representation D20. As noted above their evidence was problematic in that they had been "refreshed" before giving their statements, in a way which would not comply with PD57AC, in particular being supplied with documents which they would not have seen at the time and via an iterative process. Particularly on such a delicate topic, where recollection is being sought so many years ago, the effects of this are to leave the court in real difficulties in being able to establish that anything is a genuine memory.

429. Even had the evidence from the witnesses been such as to on its face support a case of receipt and understanding of representations I would as a consequence have had some difficulty in accepting that evidence, because I could not accept it as recollection of the facts. I conclude this without intending any disrespect to Dr Bauknecht and Mr Schirmer, who were plainly doing their best in difficult circumstances. The conclusion would if necessary be driven by the extent to which the statements made in the witness statements were revealed, on unpicking in cross-examination, to be reconstruction. The witness statements by the end of oral evidence bore the hallmarks of having been driven by the legal team's analysis and approached by reference to what one might term case theory, rather than by eliciting genuine thoughts and recollections.

430. But fortunately I am not driven to this point; as matters transpired the evidence did not begin to come to that level, and even assuming that the evidence could be accepted as genuine recollection I would conclude that it did not satisfy the requisite test on awareness.

431. It was suggested by L30 that if the test was finessed to "quasi-automatic awareness" the answer was different, in that Dr Bauknecht would have taken the representations as "obviously the case" and these matters "*encompass matters that would have been in my mind whilst I assessed the transaction and considered whether to proceed*"; and that his oral evidence was that these things would have been "*in the back of my mind*".

432. However in my judgment both these passages of evidence are not evidence of fact at all, but are plainly reconstruction. In essence therefore L30 offered no positive evidence on this. Further even if one were to accept it as a statement that Dr Bauknecht (to the best of his compromised recollection) did have this in the back of his mind, the evidence goes no further than evidencing an assumption. That is

not changed by the background of trust; the background simply deepens the assumption. I do not accept the submission that they show that Dr Bauknecht "*plainly had the requisite degree of awareness in relation to the substance of representations*." They do not evidence any sense of receipt of or understanding of the making of a representation. They illustrate precisely the danger outlined above of the tweak to the test which L30 proposed.

433. Further Dr Bauknecht's evidence that he struggled with the concept of implied representations supports the conclusion that there was no such representation, or that if there was it was not understood by him or present to his mind.

434. There was also a pleaded case as to Mr Schirmer's reliance. That was not strenuously pursued by L30 in closing. To the extent that it was it does not differ in any essential respect for the case based on Dr Bauknecht's evidence. Mr Schirmer's evidence was also based on reconstruction of what his understanding would have been. In his oral evidence Mr Schirmer readily accepted that his position was based on an assumption that CS would be honest based on his general expectations of his counterparties, deepened by the trust built up over previous deals. It was he said, "*the basis on which I deal with them*".

435. Representation D20 is one said to have been addressed to and relied on by Mr Schirmer. Again even leaving aside the issues with Mr Schirmer's obvious lack of recollection, his oral evidence went no higher than agreeing that he assumed honesty. There is on a fair reading of his evidence no basis for concluding that he understood representation D20 to be made or relied on it.

436. It therefore follows that the case on the CDO representations would fail at the level of reliance also.

FALSITY: RMBS MISCONDUCT (SUMMARY)

Introduction

437. In the light of the conclusions which I have reached already, the issues as to the RMBS Misconduct not only do not arise, but do not arise unless multiple conclusions were different.

438. It is therefore strictly speaking unnecessary to deal with any of the multiplicity of issues on RMBS Misconduct which occupied such a very large part of the trial, and doubtless the preparation time of the parties also. However for completeness I here give a summary of the reasons why I would (if necessary) have found that the case on RMBS Misconduct also failed, and failed by a very clear margin.

439. Further, largely in deference to the immense amount of time, work and cost which has been expended on this issue, I include at **Appendix 1** to this judgment slightly more detailed reasoning on each of the strands of RMBS Misconduct.

440. The case on RMBS Misconduct relies on two things. The first is taking everything within the DoJ SoF and The 2017 Press Release (fact and commentary) as true fact. The second is the sheer number and complexity of the allegations (see above

and Appendix 3 for the many elements of that case) – a "some mud must stick" approach.

441. This situation reinforces the point that both of L30's overarching approaches must be rigorously interrogated. Both, when interrogated, can be found to be faulty. As to the DoJ SoF, this has been dealt with earlier. I have concluded that save as regards the Approval Representation the SoF has no legal consequences. It is evidence of the facts stated in it; but no more. The facts stated in it do not (save in one respect, as regards the Approval Representations) establish a basis for the RMBS Misconduct allegations. The rejection of the simple read-across from the SoF naturally impacts the RMBS case.

442. On the latter point (complexity) it is telling that at no stage has L30 been able to break out from the morass of allegations a single "hero" point. Even in closing L30 declined to prefer one strand over another, calling all elements "fundamental". This meant the RMBS Misconduct was presented largely as a block, necessitating Mr Lord KC making submissions at a speed and in a telegraphic form which was accepted to be impossible to follow live in order to cover the myriad of highly detailed points. A prime example may be given: "*Subparagraph or row (35), the reference there is to subparagraph (68) below, but that chiefly concerns Mr Sack's evidence in cross−examination on what he thought the email meant. That is of course irrelevant to Mr Vibert's knowledge.*"

443. This absence of a "hero" issue is a striking point when one bears in mind that for one of the aspects – the Approval Representations – it was accepted by CS both that the representations had been made and that they were (objectively) false.

444. Those two hallmarks indicate the problems in L30's case. The remainder of the case disappears when the structure is broken down.

The Approval Representations

445. It is instructive first to look at the case on the presumptive "bull point" of the Approval Representations.

446. As noted, it is common ground that there were representations and that they were literally false. The relevant phrase was that "*all final loan decisions were made by CS senior underwriters, not third party contractors*". I have concluded in the more detailed section below that despite the fact that the Fulfillment Centres operated within tightly controlled parameters, referring any difficult cases back to CS underwriters, the fact that the vast majority of decisions on loans were made by the FCs under those parameters with only a very small proportion of risks being referred back to the CS underwriters, means that falsity was material (though the point is highly arguable).

447. So, in relation to this representation L30 establishes: (i) representation (ii) materiality (iii) falsity.

448. But falsity does not equate to deceit. While the objective meaning is agreed, as regards the Approval Representation the subjective understandings to which witnesses spoke cannot be said to be unreasonable or not believable. For example

it is perfectly credible that "final loan decisions" could be seen as being either or both of the underwriting policy decisions as to criteria for easy cases, and the referred decisions on the grey areas/exceptions, which did come back to CS senior underwriters.

449. On that basis when one breaks down the case into what the individuals knew and the basis for saying that they knew the representations were false it becomes apparent that even though some (but not all) of the individuals (i) knew of the representation and (ii) knew of the facts which (objectively) made it false, there is simply no evidence that they subjectively knew of the falsity. That of course is a requirement: *Ivey v Genting Casinos (UK) (trading as Crockfords Club)* [2017] UKSC 67 which (as L30 summarised it) establishes that the question whether someone's conduct was dishonest involves (i) ascertaining that person's subjective state of mind and (ii) applying the objective standard of ordinary decent people.

450. Here there is no smoking gun on knowledge of falsity and no logical inference. Indeed the balance of the evidence suggests that the CS individuals identified by L30 as having the relevant knowledge subjectively did not know of the falsity. The same ambiguity in the language and evidence as to their understanding means that, whatever the agreed objective meaning of the representation, I cannot find that their conduct was dishonest by the standards of ordinary decent people.

451. Similarly the evidence is adverse to any conclusion that they intended the representation to be relied on in the false sense.

452. It follows that the case on the Approval Representations, though it gets some distance down the line, fails on knowledge of falsity. This is the closest that L30 gets to success on the RMBS Misconduct and this is not a borderline factual decision. It is a clear decision based on a complete absence of evidence. Thus even the simplest of the RMBS Misconduct cases fails.

Making of the Underlying Representations

453. When one deconstructs the other "strands" where the route to L30's case is complicated by extra hurdles, the margin of failure is even larger.

454. In essence, the only Representation which can be established as having been made at all is the Approval Representation. Of the other strands each, other than due diligence, fails on at least one basis at this preliminary level:

   i) The Underwriting Standards Representation and Applicable Laws representations were not made. The attempt to find a representation in the offering documents involves rewriting descriptions of general standards as specific representations. The PSA sets out the regime as to representations and there is no good basis for looking beyond it where the wording is not even apt;

   ii) The Compliance Process Representation and the Rigorous DD Representation were not made. They are dependent upon presentations which are generally not apt to give rise to operative representations and are

couched in terms which would make the particular pieces of text not apt nonetheless to constitute representations;

iii) It follows that the Loan Compliance Misconduct cannot be made out. Nor can the Fulfillment Centres Misconduct, which is based on the exact same Representations, in a different order.

iv) In addition, the Due Diligence Misconduct, the LTV Misconduct and the QC Misconduct (RMBS Misconduct 2, 5, and 6) cannot be made out to the extent that they are based on these alleged Representations;

v) So far as the remaining strands go:

a) Due Diligence Misconduct: the remaining representations depend upon the presentation slides which (i) are not generally apt to give rise to an actionable representation and (ii) were either qualified or unclear on the slides or qualified in the oral presentation which accompanied them. None of them were therefore made.

b) Valuation Diligence Misconduct: The LTV and the <100% LTV Representations were not made because the statements relied on were not statements of fact but statements as to the expected make up of the trust. The LTV Misconduct based on these Representations would fail on this basis also;

c) The QC Representation was not made. It derives from a Presentation Slide which I have concluded were not generally apt to give rise to operative representations, and is couched in terms which by no means takes it outside this position. In particular the words used are not directed to securitising loans and were never addressed to the generality of QC. Hence the QC Misconduct case based on this Representation fails.

Falsity and knowledge/fraud

455. For many of the representations (other than the Approval Representation), even if they were established as having been made the case on falsity would also fail.

456. As regards knowledge and therefore fraud, the case breaks down entirely on many of the strands. The case of knowledge as finally pleaded (as it needs to be) against individuals encounters the telling problem that the material (such as it is) is exiguous in the extreme and is afflicted by the division between the two sides of the business: in order to try to bridge the knowledge gap allegations are made against individuals in both CDO and RMBS teams, yet in practice those who knew about the CDO and any representations in that context, were divorced from the RMBS context, and vice versa.

457. This problem led to a certain amount of cross-examination on the CS office floor plans, designed to demonstrate an interconnectedness between the desks which would enable this disconnect to be overcome. This evidence did not achieve its aim. Although L30 did elicit evidence that (for example) only one bank of desks

separated Messrs Sack/Othman from Messrs O'Driscoll/Serageldin, that there was a lot of discussion which was not on email and that Mr Kaiserman often walked over to see people on the trading floor, that is a country mile from where L30 needed to be. The impression created by the floorplans and the evidence was not one of interconnectedness of these two desks but rather of the vastness of the business. Taking the floorplan, so small was the print that on an A3 version the names of the people at each desk were illegibly small, even to the junior members of the teams, and had to be captioned off at the side. The graphic of the layout resembled the Matrix.

458. Even within the RMBS-side witnesses there were issues as to the knowledge of the kinds of details which were involved in the RMBS Misconduct which relied on quite granular details of how loans were acquired and packaged and sold.

459. There are also repeated issues (which were relevant both to falsity and knowledge) regarding the fact that in the welter of extremely detailed evidence L30 has routinely elided the position as between the raising of issues as to acquisition of loans with loans that were securitised, and also as to issues arising on quality control, with issues which L30 says should have been picked up by due diligence. Thus heavy reliance is placed on documents where someone in CS is expressing themselves freely about QC results, on the basis that they are highlighting issues with DD, ignoring the fact that a QC issue does not mean that there was a breach of warranties or a DD issue owing to the facts that (i) both are judgment processes with a range of answers and (ii) they operated to different guidelines and on different material.

460. As regards many of the key individuals whose names have been advanced since the start of this litigation L30 lacks any link to the making of one set of representations or the other (or both). Thus ultimately L30 pointed at Messrs Marriott and Kimura as being their primary targets so far as knowledge was concerned with Mr Serageldin being just behind them. However:

i) For Mr Marriott (RMBS side but senior – as co-head of the Group) the case that he knew of the making of four of the Underlying Representations rests on his knowledge of the content of Presentation Slides, which he has testified he did not draft or review (and there is no evidence to contradict this), and on the evidence that he was *"familiar with the contents of the RMBS Offering Documents"*, which (given their size and complexity) is some way distant from the kind of knowledge which would have to be shown. On CDO business, which later (but not at the time of the Notes) fell within his remit, the evidence goes no further than that he would be *"entirely familiar with CDOs*";

ii) For the other "front and centre" target, Mr Kimura (the other co-head), again there is no particularised allegation that he knew that any Underlying Representation had been made and there is no case of any real knowledge of CDOs or the Notes.

iii) For Mr Serageldin there is no evidence that he had any knowledge of any RMBS Misconduct. While he was plainly senior in CS, and he was plainly very actively privy to the CDO transaction the highest it can be put by L30

is that *"it's inherently likely that he would have known about the RMBS Misconduct"*. Although in one sense he *"straddled the RMBS and CDO groups"* he did so at a much higher level than would have had him involved in the issues which go to make up the RMBS Misconduct. He is not on relevant emails. He is not identified once in the granular schedules to the RRRRAPOC. It appears likely that he was named in part because he was sent to prison for financial misdemeanours relating to the financial crisis, and indeed L30 openly submitted that this made it more likely that he had been involved in a fraud here. Whatever might be the appropriate inference if relevant knowledge on Mr Serageldin's part could be established, this was a hopelessly overoptimistic submission[6] in the context of the absence of any evidence of knowledge of RMBS Misconduct on the part of Mr Serageldin.

461. For those individuals the case as to knowledge has a very slight base and never rises to the level of a credible case. For Mr Marriott for some representations the case on falsity and knowledge of falsity depends on a single point within an audit report which itself (i) documents that systems were being tightened and (ii) indicates that to the extent there was a problem someone else (Mr Fallacara) had signed off on the issues as resolved.

462. In relation to the other representations it rests on a single email chain, (mainly between Mr Vibert and Mr Sack) for example containing text such as the following: "*FYI... this is indicative of what we spend our time on every day here in the field. We tell our investors that we do 100% due diligence on LBL, but then when we have a competent QC firm do an underwriting review, they flag all kinds of errors that our fullfillment centers did not catch….Our fullfillment process is broken.*" Yet at the same time the wider context shows that:

i) The question arose against a much broader background than underwriting by Fulfilment Centres, and L30's case completely ignored Mr Marriott's response: "*We will be reviewing a lot of different things in the coming weeks as we look to improve the overall process including pricing, underwriting, feedback loops, etc. Everything is on the table, and points like you raise will be part of the discussion."*

ii) The person who wrote the passage relied on (Mr Vibert) has testified that he was frustrated and using incendiary language emotionally.

463. While it was repeatedly and forcefully said that handwringing is no defence (i.e. that good intentions to improve process do not stand in the way of a conclusion of knowledge of falsity) the context makes the conclusion of knowledge of falsity impossible to draw. At best for L30:

a) Mr Marriott has some knowledge of Offering Document terms including the alleged representations;

[6] Or as Mr Goodall put it, a submission "which would have had Sidney Phipson turning in his grave."

b) He knows that there are problems with (say) Fulfilment Centres ("FCs") as part of one of many many emails he will receive in many contexts;

c) The emails are received not in the context of the Offering Document;

d) As far as he is concerned work is being done to improve processes.

To join the dots so as to even infer falsity, let alone knowledge of falsity seems too much of a reach.

464. For Mr Kimura similarly half the case depends on a handful of emails taken out of context, including another "emotional" email from Mr Vibert. For the other half, concerning three representations, it rests on a single email showing a prompt and concerned reaction to *"concerns/problems the market has had with acceptable value variances"* and overtly designed to address (i.e. solve) this issue.

465. Another person whose position is worth considering discretely is Mr Sacco. He is said by L30 to have been "integral" to the alleged RMBS fraud. There are two aspects here.

466. The first is that like so many of those named (other examples are Mr Daniel, Mr Vibert, Mr Kaiserman, Mr Nordyk, Mr Sack, Mr Fallacara, Mr Schoen, Mr Dodman, Mr Othman, Mr Salomon, Ms Baird) he had no ties to the CDO business and therefore no involvement in the CDO Representations. While some RMBS personnel did have involvement in the portfolio selection for the CDO, they were not any of those on the RMBS side against whom knowledge is alleged. In respect of those who are named the evidence seemed to go no further than that the CDO Group was selling CDOs linked to the credit risk of RMBS. There is no evidence that they knew any more than that.

467. There were no documents linking Mr Sacco to the Notes or the CDO business. His evidence was that he was "*probably aware there was a CDO group*" but that "*I don't know what CDO means*". L30 nonetheless invited me to find that "*Mr Sacco is likely to have known that the CDO group sold CDOs linked to the credit risk of CS-securitised RMBS*" and that his evidence that he hadn't heard of a CDO until after the credit crash was untruthful evidence. The basis for this was (i) "*Mr Sacco was no financial ingénu*" and (ii) "*He participated in a presentation alongside Mr Sohn (an ABS/CDO trader) where CDO trading was likely discussed.*" That is a manifestly inadequate basis for such a conclusion. Parenthetically, it is perhaps illustrative of the strained nature of the case for a "bridging of knowledge" between the CDO and RMBS Groups, that the case against Mr Nordyk (another of the main targets vis a vis RMBS) in one respect rested on a suggestion that a reference in a single email to a visit to Las Vegas meant that he **must have been** to the conference of the American Securitisation Forum (and heard something about CDOs at a panel event) when there was also evidence that he had been to Las Vegas for family holidays and he on this visit did not intend to take his laptop, as he would for a work event.

468. Secondly even in the context of the RMBS Misconduct case against Mr Sacco, it was striking how far short of the target the case in relation to him came. The L30 case theory posited Mr Sacco, who was Head of the Credit Policy and Underwriting Group within the RMBS Group between 2003 and 2008, as a pervasive and somewhat sinister figure with extensive and guilty knowledge covering every single one of the strands. However Mr Sacco's evidence was clear as to the limits of his role. The contemporaneous emails depict a man doing his best to hold a realistic balance between the demands of sales and the integrity of the underwriting process. That impression from the documents was only reinforced by Mr Sacco's oral evidence which, although somewhat affected in terms of the freshness of his recollections by his repeated encounters with the deposition process, was candid, clear and credible.

469. Another key facet of the case, is that the evidence relied as linking someone to the making of the Underlying Representations either points to no-one or it points to a very large number of people. It has proved impossible for L30 to advance a case which posits just one or two people as involved in the alleged fraud. The case advanced is not one of a few "bad apples"; as noted in the more detailed sections below, the case against a number of people effectively forms a subset of a case against someone else (thus the case against Mr Schoen almost entirely sits within the case against either Mr Sacco or Mr Nordyk). L30 effectively has to pursue Mr Schoen (and Mr Dodman and Ms Baird – none of whom had any exposure to the CDO business) because their names are on the circulation lists of "key" emails relied upon against Mr Sacco and Mr Nordyk. Because of the exiguous nature of the evidence relied upon and its fairly broad circulation the effect of the case is to become one of systematic or wholesale fraud, taking in many people across different desks and departments of CS and even manuals and policy documents issued by CS. And such is the extent of what is alleged that it appears hard to divide those named from those who are not named – the fraud would effectively be entirely pervasive.

470. To be fair L30 did not shy away from this case. In closing Mr Lord put it thus:

> "Messrs Sacco, Nordyk and Sack graphically corroborated the serious and systemic flaws within Credit Suisse's RMBS business, their awareness of it and the failure by Credit Suisse so take any or certainly any meaningful steps to remedy those failures. The upshot: such serious and systemic misrepresentation of RMBS credit risk to investors and rating agencies to the knowledge of Credit Suisse is beyond serious argument and certainly proved on the balance of probabilities."

471. Such a fraud is – of course – not impossible. But again it provides food for thought and question. Ultimately there was no evidence to support a "systemic fraud" case beyond the isolated documents forming the basis of each strand of misconduct and that was manifestly inadequate.

472. Perhaps a bellweather of this aspect of the case on fraud is given by Mr O'Driscoll. As the executive with direct responsibility for the Notes transaction he was the obvious target. The case commenced with a case in fraud very much maintained against him: it was clearly pleaded that it was to be inferred that he

knew of the RMBS Misconduct not because of any particular knowledge, but because it was systemic and because he held a senior position in CS. No document even indicating knowledge on his part was ever pleaded. In cross examination Mr Lord was reduced to asking Mr O'Driscoll to confirm that bits of the DoJ SoF showed that CS had made representations and to posing in the most general terms: "*I'm going to suggest to you, Mr O'Driscoll, that you have exaggerated the degree of separation of the CDO and RMBS groups within Credit Suisse at the time ... And in those circumstances, ..., I suggest it's likely that you did know about the statement of facts issues or at least some of them by the time of the .. transaction.*"

473. In written closing L30 felt it could not go further than to suggest that the Court "*could quite properly form the view that Mr O'Driscoll would have known at least certain of the systemic problems*" outlined in the SoF and "*may…conclude*" that Mr O'Driscoll knew that the CDO Representations were false. L30 also stated in terms that while there were in their view unsatisfactory elements to Mr O'Driscoll's evidence he was not a key target on the knowledge front.

474. One other feature of the L30 case was the extent to which it was said that adverse inferences should be drawn from the absence of witnesses. For example: "*Due to Mr Daniel's failure to give evidence, the prima facie case against them [sic] is unanswered and is made out; and/or an adverse inference should be drawn against them [sic] that they [sic] knew of the falsity and re liable for fraud as L30 alleges.*"

475. But adverse inferences are not to be drawn at large. Although in *Royal Mail Group Ltd v Efobi* [2021] UKSC 33 Lord Leggatt at [41] has emphasised that the drawing of adverse inferences is a matter of common sense, there is some force in terms of analysis of when common sense should kick in, in the discipline urged in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324. Applying that test the level of evidence deployed is not such as to raise a *prima facie* case against the individuals in question, even were it not for the fact that many of them have good reasons for not being present.

KNOWLEDGE OF FALSITY

476. In the circumstances the final element of the CDO representations – knowledge of falsity – and the need (or otherwise) to establish an intention to deceive in the context of implied representation - does not arise. At this stage of distance from my findings the process of analysing this point would be entirely artificial and I therefore do not deal with it, although I have alluded to some of the factual issues in the previous section.

OTHER ISSUES

477. In the circumstances I need not deal with some of the remaining issues, in particular the "Alternative Note" issue and the question of the availability of rescission.

478. Two issues do however remain: Negligence and Conspiracy.

Negligence

479. As Mr Field wittily put it in closing – this is not a part of the case where the dispute has raged hottest. L30 relies upon section 14A of the Limitation Act 1980. Under section14A, the limitation period is postponed to the date three years from the date when L30 acquired the requisite knowledge to bring an action for damages in respect of the relevant damage. This includes, under section 14A(8)(a), knowledge that the "*damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence*". The relevant "cut-off" date for the purposes of section 14A is 15 November 2015 (being 3 years before the claim was issued).

480. L30 submits that even if the CDO Representations were not dishonestly made, they were on any view carelessly made. The questions of what representations were made, reliance and falsity apply equally to the negligence claim.

481. It follows that this part of the case fails both at the representation and reliance level for the reasons already given. So too does it fail on falsity. It also, for obvious reasons, fails on limitation, the issue being essentially similar save as to the critical date.

482. Since the remaining points only arise on a multiple contingency they can be dealt with very briefly:

  i) The existence of a duty of care: L30 cited *Esso Petroleum v Mardon* [1976] 2 All ER 5 at p.16 and *Bankers Trust v Dharmala* [1996] CLC 518. I would not find a duty of care in this case. The citation of *PAG* at footnote 648 of the L30 opening essentially explains why: a bank negotiating and contracting with another party owes in the first instance no duty to explain the nature or effect of the proposed arrangement to that other party; any duty to give an explanation or tender advice carefully depends on the precise nature of the circumstances. Like *PAG*, this case is not analogous to *Bankers Trust*. The asymmetry of information point is not fairly made (see above re the information available to the CDO team). L30 was a sophisticated investor. While the term sheets volunteered an explanation of the CDO transaction it is not the nature of the transaction which gives rise to any claim. In relation to the matters complained of these fall within the multiple risk warnings and disclaimers already discussed above. These form part of the circumstances against which one judges the question of existence of a duty. Where one has clear statements within the Series Memoranda which record non reliance on advice or recommendations, backed up by yet further disclaimers as to completeness and accuracy it would require something much clearer than the facts relied on here to enable a duty of care to be made out;

  ii) Breach of duty/liability. No sufficient factual case was made out on this aspect. The case as to failure to take care was not put to the CS witnesses and the case on breach in argument was put at the general "plainly it was" level without grappling with what exactly it is said that CS should have

done in practical terms. As Mr Field pointed out, as soon as one starts to posit the practicalities of what would be involved, one hits the information barrier within the bank designed to prevent insider trading. L30 would have had to explain what, properly, CS should have done and put it to witnesses.

483. There is therefore no need to deal with the case on contractual estoppel.

Unlawful means Conspiracy and Irish Law

484. Originally, L30 relied on several different strands which created the unlawful means: (i) the fraudulent misrepresentations or deceit; (ii) the negligent misrepresentations; (iii) breach of Irish Prospectus (Directive 2003/71/EC) Regulations 2005 ("Irish Regulations") and Irish Investment Funds, Companies and Miscellaneous Provisions Act 2005 ("IFCMPA"); and (iv) dishonestly procuring the ratings for the Notes. Following a certain amount of judicial encouragement L30 sensibly streamlined its claims in relation to unlawful means conspiracy and Irish law. L30 recognised that (save in relation to Irish law) it does not add materially to L30's other claims. It is further worth noting that L30 no longer pursues a free-standing cause of action under section41 of IFCMPA, which is the relevant Irish Regulation L30 seeks to rely on to establish its unlawful means conspiracy claim.

485. The conspiracy claim was however pursued insofar as it relies upon breach of Irish prospectus disclosure law as the relevant unlawful means. Here it offers L30 a genuinely alternative route to the relief it seeks. It says that even if it fails in its case on misrepresentation (as I have found it does) it still has a good claim in unlawful means conspiracy.

486. The essence of the claim is that the Defendants were party to a combination or understanding with each other with an intention to injure or cause financial loss to L30 (as the ultimate purchaser of the Notes) by use of unlawful means, with the object of achieving a sale of the Notes and/or the obtaining on a false basis of credit protection in respect of the reference obligations. The unlawful means consisted of breach of the Irish Regulations and IFCMPA.

487. The relevant Irish Law provisions are as follows:

i) Section 19 of the Irish Regulations:

> "(1) Without prejudice to Regulations 24 and 25, a prospectus shall contain all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading, is necessary to enable investors to make an informed assessment of -
>
> (a) the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and
>
> (b) the rights attaching to such securities."

ii) Paragraph 3(2) of Schedule 1 provides that (among others) the following persons are responsible for the contents of a prospectus:

> "… (d) if the case involves an offer of securities to the public, the offeror of the securities, if this is not the issuer;
>
> (e) if the case involves the admission to trading of securities, the person seeking admission, if this is not the issuer; …
>
> (f) each person not falling within any of the preceding provisions of this subparagraph who has authorised the contents of the prospectus."

iii) Section 41 of IFCMPA provides as follows:

> "Subject to sections 42 and 43, the following persons shall be liable to pay compensation to all persons who acquire any securities on the faith of a prospectus for the loss or damage they may have sustained by reason of—
>
> (a) any untrue statement included therein, or
>
> (b) any omission of information required by EU prospectus law to be contained in the prospectus, namely— …
>
> (ii) the offeror of securities to which the prospectus relates,
>
> (iii) every person who has sought the admission of the securities to which the prospectus relates to trading on a regulated market, … "

488. It is common ground that these provisions do not give rise to any directly actionable liability.

489. Two main issues arise here. The first is whether unlawful means can consist of breach of a foreign law. L30 submits that the weight of authority (*Bank of Tokyo-Mistubishi v Baskan* [2009] EWHC 1276 (Ch) per Briggs J at [932-942]; *Digicel v Cable and Wireless* [2010] EWHC 774 (Ch)at [22]-[23]; *Lebara Mobile Ltd v Lycamobile UK Ltd* [2015] EWHC 3318 (Ch) at [41] as well as my own judgment in *FM Capital Partners v Marino* at [94(2)(a)] favours the conclusion that it can and that there is no principled reason why an unlawful means should be limited to unlawfulness under English law, in particular where the law in question is an EU regime which underpins the relevant liability (with substantially co-extensive liability in English law).

490. The second issue is that CS contends that because breach of the Irish Regulations is not actionable, it cannot supply the relevant unlawful means for unlawful means conspiracy. CS relies on *Digicel*, where Morgan J held that "*non-actionable breaches of a non-criminal statute*" were not "unlawful acts" for the purposes of conspiracy. L30 relies on *BTA Bank v Khrapunov* [2018] UKSC 19 [2020] A.C. 727 where at [15] the Supreme Court expressly left open the question whether breach of statutory duty may supply the relevant unlawful means. In any event, L30 says that it does not rely merely upon the (non-actionable) breach of the Irish Regulations; that breach translated into an actionable claim under IFCMPA section41.

491. On these two interesting points my conclusions are as follows.

492. Foreign breaches: on this I would continue to consider that a breach of a foreign law may give rise to a claim in conspiracy. However the potential for "jurisdictional arbitrage" does give pause for thought as to how ready the court should be to go down this route. I also note that the Court of Appeal in *Emerald Supplies v British Airways* [2016] Bus LR 145 at [132] was sceptical:

> "As we have said, there is an issue whether foreign wrongs can be unlawful means for the purposes of these torts. But if they can, it would mean that the common law could provide remedies for breach of competition laws which those laws themselves had chosen not to confer".

493. Both of these points perhaps suggest that ultimately it may be necessary to have some kind of public policy/comity filter on the breaches of foreign law which may be held to be capable of constituting unlawful means. This would align with the example given by Mr Woolgar in argument – a case where if the conduct had taken place in England, it would be a tort or a crime; for example if there was a French company and a bribery takes place in France and it is thus French criminal law that governs, the bribery being illegal under French criminal law. There is no reason of principle why, that being a crime which is also recognised here, it cannot supply relevant unlawful means.

494. On non-actionable breaches, the relevant portion of *Khrapunov* states as follows:

> "[11] Conspiracy being a tort of primary liability, the question what constitute unlawful means cannot depend on whether their use would give rise to a different cause of action independent of conspiracy. The real test is whether there is a just cause or excuse for combining to use unlawful means. That depends on (i) the nature of the unlawfulness, and (ii) its relationship with the resultant damage to the claimant. This was the position reached by the House of Lords in Revenue and Customs Comrs v Total Network SL [2008] 2 All ER 413, [2008] 1 AC 1174. The Appellate Committee held that a criminal offence could be a sufficient unlawful means for the purpose of the law of conspiracy, provided that it was objectively directed against the claimant, even if the predominant purpose was not to injure him. …
>
> [15] The reasoning in Total Network leaves open the question how far the same considerations apply to non-criminal acts, such as breaches of civil statutory duties, or torts actionable at the suit of third parties, or breaches of contract or fiduciary duty. These are liable to raise more complex problems. Compliance with the criminal law is a universal obligation. By comparison, legal duties in tort or equity will commonly and contractual duties will always be specific to particular relationships. The character of these relationships may vary widely from case to case. They do not lend themselves so

> readily to the formulation of a general rule. Breaches of civil statutory duties give rise to yet other difficulties. Their relevance may depend on the purpose of the relevant statutory provision, which may or may not be consistent with its deployment as an element in the tort of conspiracy. For present purposes it is unnecessary to say anything more about unlawful means of these kinds."

495. This does not necessarily provide the clearest possible signposting. In the end, despite Mr Woolgar's skilful and engaging submissions I conclude that the provision in this case does not fall the right side of the line and that *Khrapunov* makes no difference. Whilst L30 submitted that the Supreme Court did not expressly state that non-actionable non-criminal statutes cannot constitute unlawful means, they also did not state that they did. The key point here is that *Khrapunov* does not really deal with the specific issue; while it leaves the door open for a breach of a civil statutory duty to be an unlawful act, it most certainly does not say that Morgan J was wrong in *Digicel* when he held that a non-actionable breach of a civil statute could not give rise to a claim in conspiracy. This answer also makes perfect sense in the context of the broader themes highlighted by the Supreme Court: although it would appear that the Irish regime is intended in broad terms for the protection of investors, investors cannot themselves action it and they have a separate mechanism for seeking compensation. In those circumstances the remedy in conspiracy is unnecessary and it is not squarely within the sort of duties that the Supreme Court envisaged might be an unlawful means for the purposes of a conspiracy. Accordingly I find that the claim in conspiracy fails.

496. Had I concluded otherwise I would then have had to decide whether CS would be liable under either of the Irish Regulations, i.e.:

   i) The issue of Irish Law as to whether CSI and CSSU are within the class of persons liable under the Irish Regulations, either as offerors or having sought admission of the prospectus;

   ii) Second, whether the Series Memorandum failed to provide the required information i.e. all information necessary to enable an informed assessment of the rights attached to the Notes,the issue of the relevant materiality threshold.

497. As to the former, it is hard to see how the purchase of the Notes could have been "on the faith of" i.e. "in reliance on" either the Series Memorandum (which Mr Schirmer did not regard as a prospectus and which was finalised after the agreement to purchase) or the draft Series Memorandum which was a draft and not a document which should be captured by the legislation. In addition this was not an offering to the public, so on this basis too the transaction would not be caught by the Irish legislation.

498. On this basis I do not need to decide the materiality point and will not do so.

499. Finally it was contended that the conspiracy claim must also fail given the fact that the elements of combination and intent were not put to CS's witnesses. I am

not persuaded of this argument. In many cases it may be necessary or at least prudent to put these points. However I see no reason why combination cannot be spelled out from documents alone in some cases. Intent to injure is more difficult, but as I noted in *FMCP v Marino* inferring it from primary facts is possible and (for example) in the cases where intent to injure is the obverse of intent to promote one's own interests, it may well not be necessary to be addressed discretely. There was however force in Mr Field's point that, regardless of the necessity of putting the case to the witnesses, the evidence on intent at least was lacking.

CONCLUSION

500. I therefore conclude that L30's claim in misrepresentation fails, for the various reasons given above, and that the alternative claim in conspiracy also fails.

APPENDIX 1: RMBS MISCONDUCT (DETAILED FINDINGS)

Relevant background

501. The case on RMBS Misconduct has to be considered against the relevant factual background. This is complicated because each RMBS would contain thousands of loans.

502. The main parts of the background which are necessary to understand the disputes in this area of the case are as follows.

503. The business model of CS' Structured Products group on the RMBS side (the "RMBS Group") during the Relevant Period was to acquire loans through various acquisition channels and then either to package these loans into RMBS, which CS sold to investors, or to sell them as part of a portfolio of loans to other financial institutions through "whole loan sales".

504. Originators (i.e. original lenders to residential borrowers) offered their loans for sale, either individually or in "pools", to CS and transferred the loan files, containing the underlying documentation on the borrower, the loan and the property so that CS could review the loans and conduct due diligence. CS contracted with third-party companies to carry out due diligence on the loans or pool of loans, either individually or on a sampling basis. If CS purchased the loans, they were then held on CSSU's inventory where they earned interest.

505. The creation of an RMBS involved (i) a "Sponsor", i.e. the CS entity which acquired the loans (CS used DLJ Mortgage Capital, Inc ("DLJ") for this purpose); (ii) a 'Depositor', another CS entity which acquired the loans from the Sponsor – CS used CS First Boston Mortgage Acceptance Corp. and CS First Boston Mortgage Securities Corp for this purpose ("CSFB"), and (iii) an RMBS Trust, into which the Depositor transferred the loans.

506. CS' business of acquiring (or originating) loans onto its own book was known as the Conduit. The Conduit had four separate "channels",

507. CS acquired loans through four acquisition channels, known as (1) the "Bulk Channel"; (2) the "Mini-Bulk Channel"; (3) the loan-by-loan channel ("LBL Channel"); and (4) the "Wholesale Channel". The Bulk Channel involved the acquisition of large pools of loans originated by third parties which had been underwritten to the originator's underwriting guidelines and were priced for sale as a package. The Mini-Bulk Channel involved the acquisition of smaller pools of loans generally under $5m originated by third parties. The LBL Channel involved the acquisition of individual loans originated by third parties to CS' underwriting guidelines that were priced and processed on a loan-by-loan basis. The Wholesale Channel was CS' own origination platform through which it originated its own loans as a lender.

508. The word "Conduit" was used in different ways at different times. In particular, sometimes it was used to mean only three of the above channels (excluding the Bulk Channel), whereas at other times it meant the RMBS business, including all four channels.

509. CS acquired loans in the Relevant Period through two affiliate entities: DLJ for the Bulk, Mini-Bulk and LBL Channels, and CS Financial Corporation (“CSFC”) for the Wholesale Channel.

510. In respect of loan pools in the Bulk and Mini-Bulk Channels, acquisition was processed by CS “Trading Desks”. Trading Desks sat within “Agency”, “Non-Agency”and “Secondary Credit”. Each Trading Desk kept their own book of business and was responsible for the acquisition of different profiles or characteristics of loans, such as “prime”, “subprime”, “Alt-A”, “jumbo” and “second lien”.

511. The process of acquiring pools of loans through the Bulk and Mini-Bulk Channels involved sellers sending “collateral tapes” to CS. These contained the loan information of the pool sellers were marketing for sale. The Collateral Analysis Group at CS “cracked” the tape by uploading the loan data into CS’s internal “RPM” system, performing checks on the loan data, populating a pricing model and producing reports for the appropriate Trading Desk, which depended on the loan profile of the package. The Trading Desk then produced a bid price for the loan pool which was offered to the seller.

512. If the bid was accepted by the seller, then CS carried out due diligence on the loan package. Sometimes sellers imposed stipulations (called “trade stips”) on which the sale of the pool was conditional, such as certain due diligence requirements.

513. As a result of the due diligence results, which were sent to the seller and Trading Desk, certain loans might have been added to or removed from the loan package. CS and the seller agreed a final ‘settlement tape’ of the pool of loans it would purchase and the Trader made any appropriate adjustment to the payment price for the package.

514. Through the LBL Channel, approved sellers could access an online CS portal (known as “CWS”) and upload the loan characteristics for loans they expected to close within the next 5 to 60 days. An automated process compared the seller’s input loan characteristics with CS’s acceptable loan parameters and automatically produced to the seller a denial or a purchase price for the loan. If the seller accepted the purchase price, they could “lock” the loan (i.e. confirm it for purchase).

515. The Wholesale Channel process of CS originating its own loans began when an approved mortgage broker inputted the prospective loan characteristics into CS’s online portal (known as “WHS”). An automated process compared the input loan characteristics with CS’s loan parameters and automatically issued either an initial approval (with or without conditions) or a denial. If the loan was approved, the broker would be instructed to send the full loan file to the Fulfilment Center designated to underwrite CS’s Wholesale loans. If the loan was approved, WHS was updated and the broker could lock the loan.

516. Other than the Wholesale Channel, where CS was the underwriter, CS performed preacquisition due diligence on loans. CS’s due diligence process varied by acquisition channel:

i) In the Bulk Channel, due diligence was carried out by DD Vendors, such as Clayton Group ("Clayton") and Bohan Group ("Bohan"). Due diligence was carried out on a sample basis, meaning that only a sample of the pool of loans acquired would be subject to due diligence. The approach to sample size which CS represented it would take, and the sample size it did in fact adopt, was a matter of dispute in various respects.

ii) In the Mini-Bulk Channel, due diligence was carried out by "Fulfilment Centers", principally Ocwen Fulfilment Operations LLC ("Ocwen") and Lydian Data Services LLC ("Lydian"). Due diligence was also carried out on a sample basis, with the sample varying from 10%-100%.

iii) In the LBL Channel, due diligence was carried out on 100% of the loans by the Fulfilment Centers; principally, Lydian and Ocwen.

517. Due diligence reviews principally involved three main elements: (1) a credit review; (2) a compliance review; and (3) an appraisal review. In the Bulk Channel, loans were allocated an "event level grade" referred to as EV1, EV2 and EV3 in respect of their credit and compliance review.

518. In the Bulk Channel, as a loan underwent due diligence, data on the loan and the due diligence conducted was added to a spreadsheet and uploaded to CS's LoanApprove system. The outcome of the due diligence review was to designate a loan as either "eligible" or "ineligible", but it was open to CS to purchase loans designated "ineligible" in any event. The results of due diligence were therefore considered as being advisory.

519. In the Mini-Bulk, LBL and Wholesale Channels, a loan would be approved or denied for acquisition. The Fulfilment Centers could raise "exception requests" with the CS Credit and Underwriting Group if a loan failed due diligence but appeared to have relevant compensating factors – these were determined by Mr Salomon, Ms Lombardi and Ms Baird. Once acquired, loans from all channels were held on the CS inventory. CS's RPM system had a field showing whether a loan held on its inventory was "sourceable" or "unsourceable", which determined whether a loan was eligible for securitisation. "Sourceable" meant that a loan could be securitised, "unsourceable" meant that it could not.

520. CS executed securitisations through both (1) principal transactions – i.e., CS acting as the issuer and underwriter of the RMBS using loans from its own inventory, via a CS-affiliated depositor selling into the RMBS Trust, and (2) third party transactions, where CS served as underwriter. L30's case is limited to the principal transactions.

Overview and discrete issues

Overview

521. There are six strands to L30's case as regards the RMBS Misconduct. The first was in relation to the Sovereign Transaction and the alleged purchase of ineligible loans, L30 criticised and/or accused CS of misconduct on a number of bases

(including the acquisition of “EV3” loans and the ‘use of “trade stips”) (“RMBS Misconduct 1: Loan Compliance”).

522. The second element of the RMBS fraud arises from six examples of bulk pools (or groups of pools) where L30 claims that CS agreed to a trade stipulation which limited the size of the pre-closing sampling which CS would undertake as part of its due diligence process. It is alleged that the existence of these stipulations falsifies a series of Underlying Representations (“RMBS Misconduct 2: Due Diligence”).

523. Third, it is accepted that CS represented to investors that all final loan decisions were made by senior CS underwriters, not third-party contractors (the “Approval Representation”). The crucial questions are whether this representation: (i) was materially false; and (ii) were made fraudulently.

524. Fourth, it is said that CS’s conduct in relation to Fulfilment Centres falsified certain Loan Compliance Representations in that the Fulfilment Centres adopted inadequate processes to assess the quality of the loans and, allegedly, knew of the true value of the loans that they were acquiring and nonetheless approved them for acquisition by L30 (“RMBS Misconduct 4: Fulfilment Centres”).

525. Fifth, it is said that CS made a number of representations concerning the LTVs of properties securing the loans it was securitising, the essence of which was that the LTVs published in the Offering Documents were accurate and therefore that none of the loans had an LTV exceeding 100%. L30’s case in this regard is that CS was aware of and concerned about the risk of appraisals being too high and through its DD processes it had learned that the appraisals may be too high and that it had nevertheless applied tolerances and purchased loans within those tolerances and that the court should infer that those loans were securitised and falsified the alleged LTV, <100 LTV and/or Accurate Appraisal Valuation Representation. L30 also relied on alleged manipulation of Broker Price Opinion (“BPO”) values as falsifying these alleged Reprsentations (“RMBS Misconduct 5: LTV”).

526. Sixth, it is said CS represented that it had conducted Quality Control (“QC”) reviews, the overall purpose was to approve the quality of the loans that had been securitised. This form of RMBS Misconduct encompasses two separate allegations. First, that the QC findings showed that loans acquired by CS had critical defects, which falsified the Applicable Laws Representation and the Rigorous DD Representation and second that the QC Representation was false because the purpose of QC was not to improve the quality of the loans acquired or securitised (“RMBS Misconduct 6: QC”).

527. There are also a number of themes running through the case on RMBS Misconduct, which can sensibly be dealt with discretely.

<u>Presentations</u>

528. The first is the making of representations via the presentations. L30, in order to succeed on various of the Underlying Representations, must show that the presentations conveyed the precise meaning alleged by way of representation. In

one respect – the Approval Representation – it is conceded that the presentations were clear enough to accomplish this. In other respects however it is contended that the presentations were not so clear, or so final.

529. Several arguments were raised in the proceedings as to the nature of the words used, both written and then in the oral presentations which accompanied the slides. Aside from the Approval Representation when one stands back from the actual presentations themselves and looks at the context, one can readily see that:

i) The presentations are in one sense fairly normal presentations in that the slides are not an exhaustive record of what was said. Any reader will be familiar with the use of Presentation Slides to highlight, summarise or orient fuller presentation and discussion. In most respects the slides appear to be of exactly this nature. Often they are in bullet point format as headings or summaries. The evidence was clear that they would have been supplemented with oral explanation, so without the slide being positively wrong, it will often have been only part of what is said, which might not be capable of accurate summary in the bullet point form. The meaning to be taken from the slides comes from the amalgam of both written and oral material. But L30 cannot say what was said orally and overall CS's witnesses were clear that they did not mislead in the presentations;

ii) Then there is the context for the presentations. These are very high level and complicated presentations, dealing with highly sophisticated investors. To say that investors and rating agencies who were shown the slides would have understood them to have been disclosure documents, on which reliance could have been placed takes the documents out of their commercial context;

iii) Further there were, and these recipients would know that there were detailed contract documents to be produced later in the timeline. These Presentation Slides could not be offering materials under the relevant regulations. In many respects this further hinders the argument that a sophisticated investor, could take parts of these slide decks to have been a representation;

iv) The slides were treated as ephemera; they were generally not given to customers to take away. This makes them an unlikely location for a representation;

v) Both of the above points pull against L30's analysis of the presentations being essentially a bundle of representations which have to be retracted or withdrawn if CS is not to be fixed with them;

vi) The supposed representations often cannot reliably be said to convey (as they must) a precise meaning. Often the wording used is significantly different to the representation alleged. Where reliance is placed solely on the document and not an accompanying oral "gloss" or amplification, a similar gist cannot be enough.

530. The net result is that – aside from the Approval Representation – where Underlying Representations are alleged to have been made in the presentations, I conclude that those representations were not made.

The status of the SoF

531. The status of the SoF was hotly contested. For the reasons already given I have concluded that it does not preclude CS from disputing the making of the bulk of the Underlying Representations.

The strands

RMBS Misconduct 1: Loan Compliance

532. L30's case is that there were four Loan Compliance Representations made by CS, the reason that they were false was due to the Sovereign/Countrywide Transaction and by reason of CS acquiring ineligible loans. In broad terms these representations went to whether the loans complied with applicable laws, or underwriting standards or to CS's due diligence and/or compliance processes.

533. The first stage to assess is whether these representations were actually made. L30 relies on the following representations: (i) the Underwriting Standards Representation; (ii) the Applicable Laws Representation; (iii) the Compliance Process Representation; (iv) the Rigorous DD Representation. L30's case is that the first two Representations derived from the Prospectuses or ProSupps and the second two Representations derived from presentations.

534. L30 alleges that the Underwriting Standards and Applicable Laws Representations were made in the Offering Documents for CSMC 2007-3 (specifically the Prospectus and the ProSupp).

535. In closing the case as to making of these representations L30 rested heavily on supposed admissions by witnesses. As indicated above I do not accept that the evidence relied on is relevant to this point, so this argument can be put to one side.

536. I conclude that no such representations were made.

537. As to the Underwriting Standards Representation:

  i) The representation alleged involves a convoluted stitching together of quotations from different documents which, when printed, sit more than 250 pages apart from each other;

  ii) One of these, the Prospectus, was a pre-contractual document subject to change. While that does not necessarily preclude the making of a representation it has to be shown to survive the subsequent final documentation (with disclaimers). This is not a hurdle cleared. Further, the wording of the passages relied upon within it are singularly inapt to produce a representation – dealing with expectation and intention;

  iii) The second, the ProSupp (which "supplemented" the Prospectus) describes the criteria for a specific originator for a specific deal;

  iv) In general, these documents were subject to very prescriptive regulation in the form of Regulation AB. This regulation set out detailed requirements as to what should be summarised and what risk factors should be highlighted as well as what disclosures must be made and where they should be placed. In particular, under item 1111: "Pool Assets":

> "(e) **Representations and warranties and repurchase obligations regarding pool assets**. Summarize any

> representations and warranties made concerning the pool assets by the sponsor, transferor, originator or other party to the transaction and describe briefly the remedies available if those representations and warranties are breached, such as repurchase obligations".

v) As a result, the Offering Documents simply set out general standards that are applied by originators and describe the representations and warranties that were actually contained in the PSA;

vi) The PSA then does set out the contractual terms on which the parties contracted and the loans were conveyed on these terms;

vii) In the light of this structure it is impossible to read the passages relied upon as containing representations. In context the passages relied on from the Offering Documents provided information required by law about the offering of securities, not representations or even repetition of representations as alleged by L30.

538. The Compliance Process Representation and Rigorous DD Representation were said to be made in the Presentations. As already explained these documents were not generally apt to give rise to representations and there is nothing in these representations which takes them outside the norm. More specifically the Compliance Process Representation effectively said no more than that CS had a process to check that loans complied with applicable laws. It did not say (as it would need to) that CS had a process which guaranteed that all loans complied with applicable laws.

539. Specifically;

i) The Compliance Process Representation relies on a seven word bullet point from the Presentation Slides which read as follows:

> "Compliance Review
>
> Verify loan complies with all applicable laws"

ii) L30's case is that, from this bullet point, there has been a representation that CS has undertaken a process to ensure compliance with all applicable laws and reasonably believed there was such a compliance. However, this is not what investors were actually told;

iii) If anything, what can be taken from this is that CS had a compliance review whereby it sought to verify the loans which were subject to that review, as to whether they complied with all the applicable laws. There has been nothing adduced to suggest that this representation was not true.

540. Similarly, as regards the Rigorous DD Representation. The representation is said to be that CS had rigorous due diligence processes in place in respect of the loans it securitised. The point made by L30 is that the wording was within Presentation Slides between Q4 2004 and Q1 2007 which highlighted that CS had an industry

leading mortgage platform, which achieved a level of loan performance better than its competitors through a "*rigorous due diligence process and superior servicing*".

541. However:

i) There is no actionable representation from this. The phrase pleaded by L30 does not mention anything about loans that were securitised, which is a key part of the pleaded representation;

ii) Furthermore, taking the language ("rigorous") and context in which this statement was made (preceded by aspirational wording about intending to achieve above industry standards), one cannot say with confidence that this is a statement of fact. If anything, it is either a "mere puff" which cannot be tested or verified – one person's rigour is another person's laxity – or a statement of opinion.

542. Furthermore, the representations cannot be said to have been false. There are two strands to this. The first is based on the Sovereign/Countrywide Transaction and the second is based on the purchase of ineligible loans.

543. L30 contends that the Sovereign/Countrywide Transaction compromised the due diligence process through CS agreeing that it would only "kick" loans for fraud and subject to a 5% cap. Yet this was a "one off" transaction. This was due to the fact that Sovereign needed to sell off a very significant part of its inventory to raise capital and had to do so quickly. The fact that this transaction was unique supports CS' submission that one cannot extrapolate CS's processes generally based on this one-off transaction. The suggestion that it was not an isolated incident but happened with some frequency is simply unsupported by evidence (eg by way of Loan Level Analysis – an assessment of individual loans, by reference to their individual underlying loan files containing the original loan and due diligence documentation relied on by CS at the time, to establish whether they were in fact in breach of any particular laws or guidelines).

544. As regards the ineligible loans, L30's case is based on two examples from the 100,000s of loans purchased by CS, of which one was apparently not purchased by CS and was certainly not securitised. Purchase is only the first step; to have any relevance in this context the ineligible loans would need to be securitised. The allegations that this was routine as part of CS' business model therefore lack merit. As already indicated the basis for the inference of systemic flaws is lacking. It is not adequate to say "*that must be the case because the Department of Justice wouldn't have procured or wouldn't have got a $5 billion payment from this bank if these were just a few mistakes made on the way, just a handful of mistakes in two and a half years.*"

545. As regards the knowledge of the falsity, there was nothing significant adduced in evidence that would suggest that any of the RMBS employees were aware of this alleged falsity. Much of the knowledge of falsity case simply hinges on knowledge of the content of the Presentation Slides. The high point appears to be that Mr Nordyk knew that ineligible loans were on occasion purchased. But that goes nowhere without a link to securitisation, and if (as appears from the

documents relied on) what Mr Nordyk knew about was the odd occasion – a situation some distance from the allegation of routinely securitising loans CS knew had been rejected.

546. More specifically:

i) Mr Nordyk: see above.

ii) Mr Daniel:

a) His knowledge of alleged fraud in relation to the Sovereign/Countrywide Transaction depends upon two emails in the course of which he spoke of the deal being "*plugged with the worst of paper*" (a comment directed to performance not compliance with standards) and he knew of the trade stipulations. There is no evidence that he knew that any loans which breached underwriting standards or applicable laws were securitised;

b) On FCs, while the emails are colourfully worded even L30 can say no more than that Mr Daniel was "involved" with them and a fair reading suggests an involvement geared towards improving processes (eg Mr Vibert's "*How do we address this?*" and Mr Daniel's recommendation on 25 April 2007 to stop salespeople talking direct to underwriters);

c) With Mr Daniel generally L30's position is that the evidence is enough that an adverse inference should be drawn (see [474]).

iii) Mr Kaiserman: again knowledge of falsity depends on two emails, one of which is the same as is relied upon against as Mr Daniel. The fact of trade stipulation is uncoupled from securitisation, and is subject to the detailed explanations given by Mr Kaiserman;

iv) Mr Sacco: fraud is pleaded against Mr Sacco here on the basis of a single document where Mr Sacco is being asking for guidance on how to exercise more control over the Sovereign pool including the line "*Do you have any additional ways I can liberally define 'fraud' so as to give us more areas to review, and if necessary to reject loans*". Given the content and the lack of link to securitisation it is hard to understand how this can be maintained as a basis for a case of fraud. It was notable that in oral submissions L30 did not respond to CS's submissions on this point and that the case against Mr Sacco on Loan Compliance Misconduct amounted to nothing more than knowledge of the details of the Sovereign/Countrywide Transaction and the purchase (not securitisation) of ineligible loans;

v) Mr Dodman: the case in fraud against him is manifestly inadequate, based on a handful of emails said to give rise to knowledge of purchase of ineligible loans and an adverse inference from his absence.

RMBS Misconduct 2: Due Diligence

547. The relevant representations for this section all concern due diligence. They include the Rigorous DD Representation, which has already been found not to have been made from the above.

548. The other representations involved were: (i) 100% Subprime; (ii) 100% HEAT; (iii) Variable Sample Size; (iv) Model; and (v) Model Threshold. It is fair to say that L30 did not press these particularly hard noting in closing that "*there may be some scope to debate some of the Schedule 2 Representations*", only picking out the Rigorous DD Representation as being one about which there should be no dispute.

549. Each of these representations are said to have been made in the Presentation Slides. For the reasons already given I conclude that no such representations were made. More particularly:

i) The alleged admissions via witnesses go nowhere;

ii) 100% Subprime: Mr Sacco gave unchallenged evidence that an oral qualification was given regarding exceptions for large pools. The unqualified representation alleged was therefore not made;

iii) 100% HEAT: The vast majority of slides were qualified by saying that "generally" CS did 100% due diligence in relation to HEAT deals. There is one example of a bullet point which says in terms that CS does 100% due diligence; but this is a classic example of the kind of point which would be expected to be a headline for more full/nuanced presentation – none of which has been adduced by L30;

iv) Variable Sample Size: The relevant wording is taken from what is obviously a summary table with 60 entries entitled "Due Diligence Methodology". It says in that table that credit sample size and compliance sample size "varies by Product". In the context this is (despite the evidence of Mr Sacco who in broad terms accepted that a representation was made) not an actionable representation, lacking as it does clarity and the kind of presentation which would indicate it was (despite being in a presentation) intended to be relied upon;

v) Model/Model Threshold: The case as to the making of these representations relies upon a very selectively quoted email (which when read in full absolutely does not support the representations alleged) and Presentation Slides which (apart from their general issues) do not contain the necessary words to spell out the representation. The wording used "*Proprietary model developed focussing on …*" is not remotely the same as "*Proprietary model exclusively used to determined…*". The schematic diagram also relied on is even less apt to give rise to a representation.

550. As to falsity, L30 claims that there were pools of entirely subprime loans, which were not subject to 100% due diligence, which falsified the 100% Subprime Representation. L30 further claims that because of the fact that the loans in these

pools were securitised into HEAT RMBS, it inherently falsified the 100% HEAT Representation.

551. As regards the 100% Subprime Representation, Mr Sacco gave evidence that there was an oral qualification to investors regarding large pools. Based on the evidence that was shown to this court, subprime pools were generally subject to 100% DD, with a small number of exceptions for very large pools from large originators to which Mr Sacco gave an oral qualification. Thus, what was actually stated to investors was substantially true.

552. As regards the 100% HEAT Representation, it was true. The only pleaded instance on this representation being made was in June 2005, with the latest HEAT deal having been HEAT 2005-4 (HEAT 2005-5 closed on 1 July 2005. According to the Agreed Structured Data Guide ("ASDG"), 100% of the loans in each of HEAT 2005-1, 2005-2 and 2005-3 were diligenced, and 99% of the loans in HEAT 2005-4 were diligenced. There was a raft of communications by CS with investors and rating agencies which pointed out the pools exempt from its 100% DD policy.

553. Otherwise as regards the Due Diligence Representations, it is alleged that these have been falsified due to a series of "trade stipulations" which limited DD in some way. The case L30 had to prove was whether this falsified what was said to investors or rating agencies about its DD processes. But the thrust of the evidence was that such trade stipulations were rare/very unusual (the suggestion being maybe half a dozen trades), and where the trade stipulations were present, there was nothing wrong with them, nor were they against what CS had actually told investors. They more generally limited "kicks" than sample size and where they did they did not change the way the DD was conducted on the loans that were sampled.

554. As regards the Model/Model Threshold Representations, the communications made (which cannot sensibly be read to say more than that CS used the model to help select the sample) were true.

555. As regards the knowledge of the falsity of the representations, the only place where this argument might gain traction would be with the 100% representations, where falsity and knowledge might be said to go hand in hand. The case on knowledge here hinges on establishing the full breadth of the 100% representations (i.e. that there were absolutely no exceptions). Nothing else will do for L30. There is no case on knowledge which can survive that. But as those representations were not even strongly pressed, that is neither here nor there.

556. In relation to the main target, the Rigorous DD Representation there is no adequate case that those accused of knowledge had knowledge of falsity. The headline point is that there was no motive adduced by L30 which would suggest a reason why Messrs Sacco or Nordyk would lie.

557. At a more granular level:

i) Mr Sacco:

a) Involvement in preparation of the Presentation Slides and hence making of the Due Diligence Representations/Evidence supposedly accepting the making of the representations. This however goes to making of the representations and not to knowledge of falsity;

b) Knowledge of the Wells Fargo Pool, the American Home Pool and the information in the Structured Data. This all goes to showing that not all subprime loans and not all loans indicated by the model were subject to due diligence. But:

(i) Mr Sacco was clear that CS generally did do 100% sub-prime DD on bulk pools;

(ii) the documents tended to show that these were some of the rare exceptions and that CS were seen as being at the thorough end of the scale;

(iii) Mr Sacco was quite clear that in presentations the exceptions were explained.

c) Oral evidence: in particular stress was put on the fact that he said:

(i) He was aware that not all subprime loans were subject to due diligence and this is said to be inconsistent with the truth of the 100% HEAT and 100% Subprime representations;

(ii) He knew that the model was not always used to mandate which loans were sampled; again that is said to correlate to knowledge of falsity of the Model Threshold Representations;

(iii) However this evidence was entirely consistent with Mr Sacco's evidence as to what was actually said and done in particular as to the explanations given. He was clear

ii) Mr Nordyk: the case on his knowledge rests on:

a) Similar matters to Mr Sacco, though Mr Nordyk's evidence was that he had no involvement in giving presentations to investors or ratings agencies;

b) Knowledge of other pools such as a Suntrust pool – where sampling was based on a trade stipulation. The point made is essentially the same as is made in respect of Mr Sacco;

c) Oral evidence: again the point made largely replicates that made for Mr Sacco (other than as to actual giving of presentations) and stands or falls with that.

iii) Mr Schoen: the case on knowledge by him rested on similar (but more limited) matters as Mr Sacco combined with an adverse inference from failure to give evidence. The case against him adds nothing to the case against Mr Sacco and Mr Nordyk.

iv) Mr Dodman: the case on his knowledge is essentially identical to the case against Mr Schoen and fails for the same reasons.

RMBS Misconduct 3: Approval

558. In relation to the Approval Representation, it is agreed between the parties that a statement in terms of the Approval Representation was made in the Presentation Slides. The Approval Representations come out of a single bullet point in a series of Presentation Slides.

    i) "*CSFB senior underwriters make final decision on purchase eligibility*" (the First Approval Representation)

    ii) "*Credit Suisse senior underwriters make final loan decisions, not contracted due diligence firms*" (the Second Approval Representation).

    iii) "*All Credit and Compliance decisions are made by CSFB Employees*" (the Third Approval Representation).

559. The unique element of this representation is that following the DoJ SoF, CS essentially admits falsity. CS admits these to be false not because of the clarity of meaning of these statements, but because in the SoF it agreed: "*Credit Suisse represented to investors, ratings agencies, and others, that "Credit Suisse senior underwriters make final loan decisions, not contracted due diligence firms." For Conduit loans, these representations were false.*"

560. It is therefore accepted that objectively those representations meant: all final loan decisions were made by CS senior underwriters, not third party contractors.

561. The question of whether the representation was materially false remained live.

562. What would certainly be material would be if decisions were made by FCs if there was any judgment to be exercised. On this the evidence given in court highlights the limited ambit of the FCs' remit and the ample scope for those reading the slide to have interpreted it differently. The reality was that the FCs had no authority to approve loans outside guidelines/matrices which required an "exception". They could turn down and refer risks within their guidelines; but they could not approve risks outside their guidelines. Where judgment had to be exercised it is common ground that such a loan had to be escalated to CS underwriters. They therefore operated within an underwriting "cage" with essentially no scope for independent decision making. This was reflected in the evidence, in particular Mr O'Driscoll's evidence was that the fact a loan went through an FC would not necessarily mean it was a "*good or bad thing*", nor did Mr Kaiserman take that to be the case. In terms of what one might term content materiality therefore, the misrepresentation was unlikely to be material.

563. Materiality overall turns not just on content but also on the sheer statistical fact that it appears that over 90% of the loan decisions were made by the FCs. I have considered very carefully whether this must lead to the conclusion that the representation was materially false. I am ultimately persuaded that it was materially false.

564. This is not a straightforward decision, given that where it was false the FCs were making the decision precisely because the decision was formulaic and the risk

fell within prescribed parameters. It was, in essence, a decision which was no more than a box ticking exercise. The problem essentially lies in the mistakes which demonstrably were made by the FCs. It was such errors which caused the discussions which are the subject of the next allegation of misconduct. Although in the abstract one might say it was a box ticking exercise, it was not a straightforward box ticking exercise. As CS said in closing, dealing with the correspondence on FCs: "*the FCs were performing a very complicated and difficult job with real scope for human error.*" And the proof of the pudding was in the eating: there were mistakes, and not just of one sort. If there was scope for such a range of mistakes by FCs, it seems to follow that fact that the percentage of decisions being taken by the FCs was so high is a fact which would be material.

565. The question of deceit is therefore critical here. It is worth rehearsing the target at which L30 must aim. It is that set out by Lord Hughes in *Ivey v Genting Casinos* [2017] UKSC 67, [2017] 3 WLR 1212 [74]:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

566. One must then consider what the words on the various slides could reasonably be thought to mean, in particular whether, although objectively bearing the agreed meaning, they were ambiguous such that the individuals at CS who were said to have acted dishonestly must be taken to have subjectively understood them to say that which was untrue.

567. On this I am satisfied that the words used in the presentations were capable of more than one interpretation:

i) The Presentations Slides – did not come with definitions. We do not know how the recipients of the presentations interpreted them, but the evidence illustrates that many of those involved at CS seem to have interpreted the bullet point in different ways;

ii) On one view (see above) anything which required "underwriting" in the sense of independent decision making did remain with CS - that was Mr Kaiserman's view: he maintained that CS did make the "final loan decision" in all cases because, although the FCs conducted underwriting/due diligence on loans and "approved" them from that perspective, there were certain further steps and checks thereafter which had to be completed satisfactorily before any loan could be funded;

iii) A similar but not identical approach (demonstrating the nuance capable of being involved) was seen in Mr Sacco's evidence where he stressed both the word "underwriting" and the potential different levels at which that could operate – policy (his area) or individual loans;

iv) A slightly different potential interpretation appearing from an email from Mr Othman was that the meaning of "final loan decision" is that the slide (in context) was actually concerned with the "grey area" around guidelines and/or involving exceptions – i.e. those cases where a loan was not either clearly "in" or clearly "out" but where there was a judgment call (the "final decision") to be made.

568. As regards the knowledge of the falsity, this was pleaded against a range of people. The headline figures are probably Mr Sacco (primarily as L30 submitted) and Mr Othman. As to them:

i) Mr Sacco:

a) Did not recall but was probably present when the relevant slide was used and had updated the pages on which it appeared;

b) He considered the words used regarding underwriting decisions could be interpreted "*in a number of different ways*". Certainly his evidence did not justify a conclusion he intended the representation to mean what it is agreed objectively to mean;

c) He was asked about whether he knew the Approval Representation was false and clearly and convincingly denied it. He was clear that "*The only thing I can say is we were truthful in what we explained in our meetings to them*;"

d) I accept that bearing in mind the scope for the representation to be read differently to the objectively agreed meaning Mr Sacco did not know the representation was false when made;

e) Less convincing was Mr Sacco's evidence that as far as he was concerned he did not know whether CS employed the people working at the Fulfilment Centres – he said that it was his understanding that at least some were, but it was not clear how that could be.

ii) Mr Othman:

a) Mr Othman was a discussion leader for some slides – but not the relevant slide with the Approval Representation. Nonetheless he would have been aware of the representation being made;

b) Although Mr Woolgar submitted that the transcript of Mr Othman's deposition demonstrated knowledge of falsity, this is not correct. The transcripts show that Mr Othman knew the process, but not that he knew that what was said in the representation was false – that point was not addressed.

c) In the circumstances, and particularly given the fact that Mr Othman no longer works for CS and resides in the US, and that he was asked if he was willing to give evidence, it would not be appropriate to draw an adverse inference against CS on the basis of his absence.

569. The evidence of the other lesser players not only cannot make good this deficiency; also the elements where the evidence is the same points up the frailty of the evidence even against the so called key players:

i) Mr Fallacara:

a) His knowledge of the making of the representation hinges on a single email in which he is copied in on the provision of documents used in a presentation, which he probably did not attend. That does not establish on the balance of probabilities that he knew the representation was made;

b) In any event there is no evidence (even pleaded) of his knowing that the representation was false. If there were it would come up against the potential for different readings discussed above;

c) In the circumstances, and particularly given the fact that Mr Fallacara also no longer works for CS, lives in the US and was approached to give evidence it would not be appropriate to draw an adverse inference against CS;

ii) Mr Salomon. There is no evidence that he knew that the Approval Representation was being made. Like Mr Othman, nor does his testimony grapple with knowledge of falsity at all;

iii) Mr Schoen:

a) As to making of the representation Mr Schoen was involved in giving the presentations and therefore knew the representation were being made;

b) There is no evidence that he knew the representation was false. He is in a similar position to Mr Fallacara.

iv) Ms Baird: there was no pleaded case that she knew that the representation was being made. The "cut and paste" formulaic approach to the allegations of fraud here is evident in that written closings say: "*Due to Ms Baird's failure to give evidence, the prima facie case against him is unanswered and is made out; and/or an adverse inference should be drawn against him …*"

570. Consequently the case on knowledge of falsity fails.

RMBS Misconduct 4: Fulfillment Centres

571. This strand was based around the proposition that the FCs and their role falsified certain of the representations which also figure in other strands.

572. The Underlying Representations relevant for this stage are: (i) the Underwriting Standards Representation; (ii) the Applicable Laws Representation; (iii) the Compliance Process Representation; and (iv) the Rigorous DD Representation. All of these have been considered and found not to have been made. This point therefore fails at the first hurdle.

573. Nevertheless, as regards the falsity element, L30's case is built around a number of different types of document in which criticism was made of the FCs. In particular L30 relies upon:

    i) The 2004 Audit Report (which was known about by Mr Kimura, Mr Marriott and Mr Fallacara) and Ms Lombardi's 2006 report into FCs (which was known about by Mr Sacco);

    ii) Defects identified by QC reports (which were known about by Mr Marriott, Mr Sacco, Mr Sack and Mr Vibert);

    iii) The identification of large numbers of problem loans which were 'kicked' by other banks in whole loan sales, when they should have been spotted by the FCs (which were known about by Messrs Kimura, Fallacara, Sacco, Daniel, Vibert, Othman and Salomon);

    iv) Internal discussions about the poor performance of FCs, and particularly complaints by Mr Daniel and Mr Vibert (which were known about by all the witnesses other than Mr Fallacara).

574. The Affidavits of Diane Johnson (of Ocwen) and Ron Szukala (of Lydian) (deriving from the MBIA Proceedings) were originally relied upon heavily by L30 but formed no real part of the case as closed. Although not technically dropped (as Mr Lord made clear) they were not pressed. There was a good reason for that, which was that they did not really cohere with L30's own case. L30's case was predicated on lamentable performance by the FCs, known to CS. Perhaps unsurprisingly Messrs Johnson and Szukala, who worked for the FC told a tale which had the FCs being beyond reproach. Certainly to the extent that these statements were relied on I did not find them persuasive, given the fact that they were not explored at trial and the apparent tension between them and documents which I did see.

575. L30's case in this regard is that these communications highlight the systemic problems at FCs. In short, their complaint lies in the alleged fact that CS took no action to fix these issues and this thus rendered various Underlying Representations false.

576. The problem with this is that taken in any form of context these are isolated documents. On the whole they are documents authored by individuals who had limited involvement in due diligence and where the passages relied upon form

one part of a wider (and often different) context. Nor do the communications show that there were systemic problems, but rather, as alleged by CS, "human error" within a business where the volume of loans being considered meant that it was completely inevitable that things would go wrong. So, for example – the Audit Report did give the RMBS and Conduit and Wholesale Channel a rating of C4 (almost as bad as it could be) but there was no notation of Significant Reputational Risk Issues and the issue (lack of documentation) was noted as "Agreed and completed". Ms Lombardi was conducting a system review of an FC centre. QC reviews were looking at QC. Mr Vibert was a trader.

577. Furthermore, the allegation by L30 that CS did nothing to "fix" the matters identified and were unbothered by them goes against the documentary evidence that was produced at trial. For example, the very correspondence relied on repeatedly indicates a concern to do things better. The colourful language which L30 highlights as indicating a problem also indicates concern – even when the problems are not systemic. See for example Mr Othman's "*we need to start doing a better job… it is imperative that you take this email VERY seriously*" in the context of stated income loans. Or one might highlight Mr Vibert's "fulfillment process is broken" email which is plainly designed to seek improvements, and proposes some (albeit based on limited understanding of the underwriting process). There was plainly a spreadsheet which scored underwriters performances and from which underperformers were identified. It was clear that CS had produced training slides which highlighted "*Recent Findings – QC, Whole Loan Sales, Repurchase*".

578. There is also a problem with the attempted "read across" from a loan being rejected in a whole loan sale to breach of loan level representations in the PSA. It does not necessarily follow given that different standards would be applied; this is an "apples and oranges" comparison. To ascertain whether the read across was valid one would need to look at each loan individually to identify the reason for the "kick": and thus whether that kick was a measured response and whether that should have been picked up by the FC at the time of their review.

579. As regards the knowledge on the part of the falsity, there was no knowledge of the RMBS employees of the alleged falsity. A wide range of people are said to have the relevant knowledge: each of Messrs Kimura, Marriott, Fallacara, Sacco, Sack, Othman, Salomon, Daniel and Vibert. However the evidence does not bear out the point for any of them. Some of them had very limited involvement in DD, though others had more. Again for some of those who were alleged to be fraudulent much hinges on the inadequate base of the Presentation Slides.

580. The most obvious targets here (other than Mr Sacco) are Mr Othman and Mr Vibert – because they were the authors of some of the liveliest emails. As to them:

    i) Mr Othman: Aside from the Johnson and Szukala Affidavits (which, as noted above, were not specifically relied on in closing) the case on fraud essentially depends on the existence of a handful of strongly worded emails and an adverse inference based on nonattendance. These were essentially highlighting cases where the systems had resulted in ineligible loans being purchased, including an exchange with Mr Sacco where he speaks of "pushing back to the FCs with some of this garbage". At most Mr Othman

knew of issues or learned of problems (using L30's terminology). None of it evidences or realistically permits an inference of knowledge of a breach of any of the representations. None of it reaches a standard where an adverse inference might be appropriate, particularly given Mr Othman's location and the fact that he no longer works for CS and is unwilling to give evidence. It is telling that in closing L30 dealt with Mr Othman's evidence generically, with no attempt to isolate a "smoking gun".

ii) Mr Vibert: The case against him was in reality even thinner. He had less knowledge of the presentations and hence of any representations which were made. Again the case made against him was entirely generic with allegations cut and pasted from the case against Mr Kimura without changing the name ([223]).

581. As to the other individuals:

i) Mr Kimura, Mr Marriott and Mr Fallacara. The case against them all is essentially the same (to the extent of text being cut and pasted in L30's closing without a name being changed ([219]): the case rests on Presentation Slides (which go to making, not falsity), the 2004 Audit Report and emails identifying issues, as well as the adverse inference point. The same points made on knowledge in relation to RMBS Misconduct 1 are equally applicable.

ii) Mr Sacco: the case is the same;

iii) Mr Sack: the case is a sub-set of the case against Messrs Kimura/Marriott and Fallacara (minus the Audit Report);

iv) Mr Salomon: the case against him is similar to that against Mr Othman;

v) Mr Daniel: his alleged knowledge is a still smaller subset: knowledge of Loan Compliance Representations, some involvement with emails concerning problems with FCs and adverse inference.

RMBS Misconduct 5: LTV

582. This element of this misconduct concerns the manner in which CS reported the valuations it received in respect of the properties underlying the loans it securitised. It hinges on four separate representations: (i) the LTV Representation; (ii) <100% LTV Representation; (iii) the Accurate Appraisal Value Representation; and (iv) the Rigorous DD Representation. The LTV Representations were said to be made in the Offering Documents by reason of the inclusion in Offering Documents of tables of LTVs for the relevant mortgage loans for that securitisation.

583. This element of the case was dealt with for CS by Mr Brock whose confident and clear presentation brought much needed focus to an argument whose complexities had swept by at some speed in the course of trial.

584. I can start by noting that the Rigorous DD Representation has been found not to have been made.

585. As regards the LTV Representation and the <100% LTV Representation, CS submits that these representations are irreconcilable with the actual words that have been used in the Prospectus/ProSupp, which states in terms that:

i) The "value" part of the LTV is calculated using either the sale price or the "*appraised value determined in an appraisal obtained by the originator at origination*";

ii) The ProSupp provided information about the expected composition of the mortgage pool whilst expressly noting that "*[p]rior to the closing date, mortgage loans may be removed from the mortgage pool, and other mortgage loans may be substituted*", adding that the "*depositor believes that the information…relating to the mortgage loans to be included in the mortgage pool as currently constituted is representative of the characteristics of the mortgage loans as it will be constituted at the closing date, although some characteristics of the mortgage loans in the mortgage pool may vary*";

iii) The ProSupp warned: "*No assurance can be given that the value of the mortgaged property has remained or will remain at the level that existed on the appraisal or sales date. If residential real estate values overall or in a particular geographic area decline, the LTV ratios might not be a reliable indicator of the rates of delinquencies, foreclosures and losses that could occur…*"

586. I accept the submission that on any fair reading of these documents the statements as to value and composition were not representations of fact but statements as to the expected make-up of the trust. The statement as to actual value was within the PSA which represented that the information in Schedule 1 (the "Mortgage Loan Schedule" or "MLS"), a spreadsheet containing details, including LTV, of each loan actually transferred, was "*complete, true and correct in all material respects*".

587. It follows that the LTV Representations were not made.

588. As regards the Accurate Appraisal Value Representation, this again too was not made. L30 attempts to make an argument that the Accurate Appraisal Value Representation concerned the accuracy of the appraisal at the time it took place, but this is even more difficult when the steps taken by CS as part of valuation due diligence were not geared to value at the time of origination. In order to find an implied representation it needs to follow (as L30 accepts) as a matter of necessary implication from the reporting of LTV values to investors. But since the LTV values were (as set out above) not reported to investors qua values, but simply as an indication of expected (and subject to change) composition, it is impossible that the Accurate Appraisal Value Representation can be a necessary implication. The L30 case on this is made still worse by the fact that the implication is one which has to be into the Prospectus/ProSupp, which was as already noted a detailed document into which had doubtless gone days if not weeks of careful legal draftsmanship.

589. That conclusion is consistent with the fact that it took L30 some considerable time to discern and plead this apparently necessary and obvious implied representation. This argument is not saved for L30 by the submission that Mr Sacco and Mr Nordyk accepted that such a representation was made. Those "acceptances" were (as noted elsewhere) not matters on which the witnesses' answers can be determinative. They were also extracted by a process of putting to them points in a generic way, out of full context – and even then the answers were somewhat hedged. So Mr Nordyk says "*if we are putting forth an LTV…*"

590. As regards falsity of the representations via appraisal inflation (the awareness of the risk of overhigh appraisals combined with the application of "tolerances"), and BPO manipulation L30 puts forward the argument that the internal communications in CS showed that the appraisals were significantly inflated, as well as that the Structured Data showed that BPO values were being manipulated to comply with CS's permitted variances. There are a number of problems with this. The first on appraisal inflation is that L30 does not allege that the LTV ratios in the LTV tables were calculated wrongly according to the definition in the ProSupps. L30's revised case is that LTVs meant something else via the Accurate Appraisal Value Representation. This is not a convincing argument, but even on its own terms it hits problems. The difficulties with this argument are (i) that CS had in place DD processes in order to mitigate the risk that the property's appraised value could not be reasonably supported and (ii) the purpose of the DD was to test the reasonableness of the original appraisal, not to test the value of the property at the time of the DD. The DD had a different function to the one which L30 alleges. Further these claims proceed from the false predicate that BPOs were more accurate than appraisals (when – as Mr Brock illustrated - they were "drive by" exterior valuations not performed to the same standards required of an appraisal - and so likely to be less accurate).

591. As regards falsity via the alleged BPO manipulation these allegations are a triumph of form over substance and are in any event unsupported by contemporaneous documentation, being based entirely upon the Structured Data. Even the structure of the allegation is lacking in credibility: the alleged form of the manipulation is one carried out by hundreds of BPO agents (i.e. not CS

employees), who had no (even suggested) motivation to carry out such a manipulation. The case on "primary" manipulation was clearly inconsistent with the documents which showed that the BPO agents were not aware of the original appraisal value. The case on secondary manipulation ignored the facts – manifest in the documentation, as Mr Brock demonstrated - that changes in BPOs were made following the broker having sight of the (more thorough but earlier) appraisal, which included information they would not have had. This was a point with which L30 failed to grapple. It also ignored the further fact – explained by Messrs Nordyk and Sacco - that CS did not need such manipulation to accept loans outside CS' tolerances' because a due diligence manager in CS could have accepted them as an exercise of discretion.

592. L30's case in opening on this very serious allegation was that that the "*numerical facts are so striking that the only sustainable inference is that the BPO values were being manipulated to fall within tolerance, and thereby enable CS to acquire and securitise those loans.*" In closing the case was maintained contending that "*the skewing of BPO results to the particular variances is evidence that BPOs were being manipulated to comply with those variances. The tables of data speak for themselves, and the Court will have seen from those tables the remarkable drop-off precisely around the applicable variances (0.85 and 0.9) at the relevant times.*" This was posed as a matter of pure assertion – with no expert evidence sought or offered to assist on how the data had been dealt with and whether the inference to be drawn was statistically permissible, let alone inevitable. Mr Brock's submissions indicated likely fallacies in the approach adopted by L30 – most notably (but not by any means solely) –selection bias. Those issues had been pleaded by CS but were never grappled with by L30, save to assert that there was nothing wrong with relying only on those pools which it sees as exemplifying the fraud. That does not, in my judgment, offer any real answer. A case in fraud based solely on statistical evidence would require a far more thorough grounding.

593. Finally the case on knowledge/fraud was again lacking. There was in effect no evidence which suggested that CS knew of the manipulation – not least because the case was entirely based on L30's own workings without any opportunity to look at the figures or put them in context. For many of those involved they would have had no link with the Bulk Channel such that they could be thought to have any knowledge of any manipulation (eg Messrs Salomon and Othman and Ms Baird).

594. Similarly, there was no knowledge of the alleged falsity of these statements by any of the RMBS employees.

595. L30 relied heavily on a number of emails as evidencing knowledge of falsity. For example:

i) An email chain of March 2007, which included 10 of the people named as having been fraudulent. In the first email, Mr Sacco proposed a revised "Appraisal Policy", in an email which stated:

> "Attached is an updated "Appraisal Policy" which I would like to implement immediately. It addresses the concerns/problems

> the market has had with acceptable value variances, some up to 20%.
>
> This policy, while lowering the acceptable value variances, still provides the underwriting/appraisal reviewer with the authority to make the final decision in most cases.
>
> The key differences are in the permitted variance for AMVs [sic] – previously 15% for <=75% CLTV and 12% for >CLTV. The change for BPO is the elimination of tiering by CLTV to a standard policy. This change will address the issue of inflated appraised values and one of the issues that create the high severity numbers we are seeing today."

ii) In the follow-up emails, Mr Fallacara said:

> "I'd like to see what % of our current production would be effected by the new guidelines versus the old guidelines. Also what like to see statistics on BPO variances over the last 6 months and values we ultimately used. I'm trying to gauge the volume impact and level of customer interaction that will be required with these changes."

iii) Emails in which Mr Sacco expressed concern about an originator called Accredited who he derided as having poor credit and inflated prices with an "unheard of" 20+% of values being >20% off.

596. But these emails were yet more emails addressing the points before the eyes of those involved – i.e. making the system work. They provide no evidence of knowledge of falsity and fraud. On the contrary they appear to show a robust and honest approach to stress testing and where necessary improving systems.

RMBS Misconduct 6: QC

597. This final strand of the alleged misconduct which relates to QC findings and quality control generally hinges on: (i) the Applicable Laws Representation; (ii) the Rigorous DD Representation; and (iii) the QC Representation.

598. The Applicable Laws and Rigorous DD Representations have already been considered at earlier facets of the RMBS Misconduct and found not to have been made.

599. The QC Representation alleged is: "*the Purpose of CS's QC Process was to increase the quality of the loans it securitised*".

600. However this representation cannot be made out. First, the representations were alleged to have been made from Q4 2006 and were said to derive from the "Post Close Quality Control" Slide, which states:

> "Objective – Increase the Quality of loans originated/acquired by testing loans diligence/not diligence".

601. In other words the base document for the representation refers to the quality of the loans that had been originated/acquired (not securitised). In addition, L30's case is that the bullet point alone encapsulates all elements of QC. However when taking the whole slide, in its proper context, it can be seen to refer to the "random" regular monthly 3-5% element of QC and not other (distinct) types of performance based QCs or targeted/ad hoc QC or 100% Wholesale Channel sub-prime QC. The documents demonstrate not just that this statement referred to one part of QC only but also that other elements of QC had different roles to play. So, for example, performance based QC was used to identify loans that might exhibit a breach of the representations and warranties made by a seller to Credit Suisse in a MPLA.

602. It follows that on no sensible reading of the material relied upon can a representation to the effect alleged be discerned.

603. It follows that RMBS Misconduct 6 fails at the level of making of the alleged representations.

604. As regards falsity, L30 alleges two types of falsity. The first is that QC findings showed that the Applicable Laws and Rigorous DD Representations were false. The issue here is that the L30 case assumes that a "critical finding" in a QC report necessarily means that there was a breach of either or both of the Applicable Laws Representation or the Rigorous DD Representation. Quite aside from the obvious point (not really addressed by L30) that there has to be room for differences in judgment in an evaluative process, there are more hard edged flaws. The QC and DD or originator guidelines were different and the QC process occurred later with later occurring information as part of the inputs. As Mr Sack said: "*what I had in mind, is if you do a third party QC and they say: we disagree with the credit decision, that's not actually an analysis of a rep and warrant repurchase*

obligation" – and this led him to seek changes to the QC system which would enable CS to put back loans using the QC finding.

605. The second element of falsity is based on the changes to the QC thereafter, which is said to have falsified the QC Representation when made. There are two points to make here. The first is that again L30 wrongly elides the different forms of QC process; the only type of QC that actually underwent any form of change was the performance-based element of QC, not the random element of QC. Secondly the material used by L30 to support its case is not material which goes to actual change, but only to discussions of potential changes. This could not therefore falsify anything. And thirdly in context it would appear that what was being debated was the possibility of using QC for extra purposes, not cutting it back or dispensing with it.

606. Thus this element of RMBS Misconduct fails at the second hurdle, as well as at the first.

607. Similarly to the other strands of misconduct, although fraud was alleged against a wide spectrum of individuals (Messrs Sacco, Nordyk, Sack, Kaiserman, Daniel, Salomon, Schoen, Fallacara, Othman and Vibert) there was nothing adduced in evidence which suggested any knowledge of the alleged falsity by the RMBS employees.

APPENDIX 2A: CDO REPRESENTATIONS (PLEADED)

Category (A): Express representations allegedly arising from Term Sheets & RMBS Spreadsheet (see RRRRAPOC ¶34; RRAD ¶52)		
A1	The Notes would carry a triple A credit rating on or shortly after the date of issuance (following data integrity checks on the reference obligations and feedback from the rating agencies).	Express Representation 1 in the RRAD
A2	Each of the RMBS in the Reference Portfolio carried a credit rating of A2 or above.	Express Representation 2 in the RRAD
A3	The Notes were suitable for sophisticated investors with the knowledge and experience in financial and business matters necessary to enable them to evaluate the risks and merits of an investment in the Notes.	Express Representation 3 in the RRAD
A4	The rate of defaults and losses on RMBS is affected by factors affecting the underlying residential mortgages and it was important that L30, as a prospective investor, should make its own determination of the value and credit quality of the Reference Obligations.	Express Representation 4 in the RRAD
A5	The information and opinions contained in the RMBS Spreadsheet, including as to the credit rating carried by the Twelve Credit Suisse RMBS and the LTVs in respect of the underlying pools of mortgage loans in relation to those RMBS, were obtained or derived from sources that Credit Suisse believed to be reliable.	Express Representation 5 in the RRAD
Category (B): Implied representations allegedly arising from Term Sheets & RMBS Spreadsheet (see RRRRAPOC ¶35-36; RRAD ¶53-54)		
B6	In supplying the termsheets referred to above, and in particular putting forward the information contained in section III of the termsheet, CS impliedly represented that CS was acting in good faith, that is, not knowingly putting forward information likely to mislead.	Implied Representation 1 in the RRAD

	Specifically, this implied representation relates to the statement in section III of the termsheet that the selection of the Reference Portfolio was conducted using "*disciplined portfolio construction*" and "*credit analysis*" which included "*fundamental analysis with internal ratings*".	
B7	Representation (A1) carried with it a representation that CS believed that the Notes would carry a triple A credit rating on or shortly after the date of issuance (following data integrity checks on the reference obligations and feedback from the rating agencies).	Implied Representation 8 in the RRAD
B8	CS impliedly represented that L30, as a prospective investor, would be able to make an informed determination of the value and credit quality of the Reference Obligations.	Implied Representation 9 in the RRAD
B9	Representation (A5) carried with it the implied representation that Credit Suisse had reasonable grounds for such belief.	Implied Representation 2 in the RRAD
Category (C): Implied representations allegedly arising from CS' proposal of the sale of the Notes and/or making the Category (A) representations (see POC ¶37; Defence ¶56-58)		
	In respect of any of the Reference Obligations that CS had itself structured, arranged, underwritten, issued, marketed or sold:	
C10	CS had no reason to believe that the offering documents in respect of any such reference obligation made any false or misleading representations relevant to a determination of the value and credit quality of the reference obligation.	Implied Representation 3 in the RRAD
C11	CS had no reason to believe that any matter relevant to a determination of the value and credit quality of any such reference obligation had been deliberately concealed from any offering document.	Implied Representation 4 in the RRAD

C12	CS had acted honestly in so doing.	Implied Representation 5 in the RRAD
C13	CS had no reason to believe that, in the process of procuring the credit rating for any of the Reference Obligations for which CS had itself procured the rating, Credit Suisse had (a) caused or permitted any false or misleading information to be given to the rating agency, (b) deliberately concealed from the rating agency any matters relevant to a determination of credit quality or (c) acted other than honestly in and about the procuring of the rating.	Implied Representation 6 in the RRAD
C14	CS had no reason to believe that, in the process of procuring (or assisting Magnolia to procure) the credit rating for the Notes, CS had (a) caused or permitted any false or misleading information to be given to the rating agency, (b) deliberately concealed from the rating agency any matters relevant to a determination of credit quality or (c) acted other than honestly in and about the procuring of the rating.	Implied Representation 7 in the RRAD
Category (D): Representations allegedly arising from the draft Series Memoranda (RRRRAPOC ¶32A, 37A; RRAD ¶50A, 58B)		
D15	On the relevant Issue Date, each of the Series 3A1 Notes will be rated “Aaa” by Moody’s Investors Service Limited or any successor to its credit ratings business (“Moody’s”) and “AAA” by Standard & Poor’s Rating Services, a division of The McGraw-Hill Companies, Inc. or any successor to its credit ratings business (“S&P”).	Express Representation 6 in the RRAD
D16	Investment in a Series of Notes is only suitable for investors who have the knowledge and experience in financial and business matters necessary to enable them to evaluate the information contained in this Series Memorandum and the merits and risks of an investment in such Notes in the context of the investor's own financial, tax and regulatory circumstances and investment objectives.	Express Representation 7 in the RRAD

D17	The Reference Obligations will consist of residential mortgage-backed securities ("RMBS Securities") backed by subprime, midprime and prime mortgage loans, which are subject to a variety of risks that may adversely affect creditworthiness and/or performance of the Issuer that in turn could adversely affect demand for the Notes generally. Each prospective investor must make its own independent determination of the value and credit quality of the Reference Obligations.	Express Representation 8 in the RRAD
D18	Save as provided below, the Issuer has taken all reasonable care to ensure that the information contained in this Series Memorandum is true and accurate in all material respects and that in the context of the issue of the Notes, there are no other material facts which would make misleading any statement herein or in the Programme Memorandum.	Express Representation 9 in the RRAD
D19	…to the best of the knowledge and belief of the Issuer (which has taken all reasonable care to ensure that such is the case), the information contained in this Series Memorandum is in accordance with the facts and does not omit anything likely to affect the import of such information.	Express Representation 10 in the RRAD
D20	In preparing, approving and supplying the draft Series Memoranda, CS impliedly represented that it was acting in good faith, that is, not knowingly putting forward information in the draft Series Memoranda that was likely to mislead.	Implied Representation 10 in the RRAD

APPENDIX 2B: CDO REPRESENTATIONS (REVISED FOR TRIAL)

	Representation	*Basis on which L30 alleges the representation arises*	*How falsified?*
Group (1): core representations of honesty relevant to the transaction			
	In respect of any of the Reference Obligations that CS had itself structured, arranged, underwritten, issued, marketed or sold:		
C10[1]	CS had no reason to believe that the offering documents in respect of any such reference obligation made any false or misleading representations relevant to a determination of the value and credit quality of the reference obligation.	This is implied from CS' conduct in proposing the sale of the Notes and/or making the express representations pleaded at POC §34: see POC §37.[2]	Any RMBS Misconduct
C11	CS had no reason to believe that any matter relevant to a determination of the value and credit quality of any such reference obligation had been deliberately concealed from any offering document.	This is implied on the same basis as stated in relation to C10 above.	Any RMBS Misconduct
C12	CS had acted honestly in so doing.	This is implied on the same basis as stated in relation to C10 above.	Any RMBS Misconduct
Group (2): representations regarding credit rating			
B7	Representation (A1) carried with it a representation that CS	This is implied from representation (A1). See	Literally true but falsified by

	believed that the Notes would carry a triple A credit rating on or shortly after the date of issuance (following data integrity checks on the reference obligations and feedback from the rating agencies).	POC §36(a), referring to POC §34(1).	concealment of any RMBS Misconduct
A2	Each of the RMBS in the Reference Portfolio carried a credit rating of A2 or above.	Express representation, drawn from the term sheets and Mr Stroobandt's email dated 16/05/07: see POC §34(2).	Literally true but falsified by concealment of any RMBS Misconduct
	In respect of any of the Reference Obligations that CS had itself structured, arranged, underwritten, issued, marketed or sold:		
C13	CS had no reason to believe that, in the process of procuring the credit rating for any of the Reference Obligations for which CS had itself procured the rating, Credit Suisse had (a) caused or permitted any false or misleading information to be given to the rating agency, (b) deliberately concealed from the rating agency any matters relevant to a determination of credit quality or (c) acted other than honestly in and about the procuring of the rating.	This is implied on the same basis as stated in relation to C10 above.	Any RMBS Misconduct
C14	CS had no reason to believe that, in the process of procuring (or assisting Magnolia to procure) the	This is implied on the same basis as stated in relation to C10 above.	Any RMBS Misconduct

	credit rating for the Notes, CS had (a) caused or permitted any false or misleading information to be given to the rating agency, (b) deliberately concealed from the rating agency any matters relevant to a determination of credit quality or (c) acted other than honestly in and about the procuring of the rating.		
Group (3): Ability to make informed determination of credit quality			
B8	CS impliedly represented that L30, as a prospective investor, would be able to make an informed determination of the value and credit quality of the Reference Obligations.	This is implied from the matters pleaded at POC 22(4), 24 and 34(4)[5], including the statement in the term sheet that: *"Each prospective investor must make its own independent determination of the value and credit quality of the Reference Obligations"*.	Any RMBS Misconduct
Group (4): Draft Series Memoranda			
D20	In preparing, approving and supplying the draft Series Memoranda, CS impliedly represented that it was acting in good faith, that is, not knowingly putting forward information in the draft Series Memoranda that was likely to mislead.	Implied representation as a result of preparing, approving and supplying the draft Series Memoranda: see POC §37A.	Any RMBS Misconduct

APPENDIX 3: RMBS MISCONDUCT ALLEGATIONS

Underlying Representation	Group(s)	Alleged Source	PoC Sch 7 Individuals
Applicable Laws Representation "*each of the loans included in the securitisation was compliant in all material respects with all applicable laws, including predatory lending laws*"	Loan Compliance Representations	Prospectus Documents	Michael Daniel Patrick Dodman Michael Fallacara Bruce Kaiserman Andrew Kimura Michael Marriott Jason Nordyk Eddie Othman Robert Sacco Peter Sack Henry Salomon John Vibert
Underwriting Standards Representation "*the loans were generally compliant with, or that CS reasonably expected that each loan was compliant with, the originator's underwriting standards*"	Loan Compliance Representations	Prospectus Documents	Michael Daniel Bruce Kaiserman Jason Nordyk Robert Sacco Patrick Dodman Eddie Othman Henry Salomon Peter Sack Michael Fallacara Andrew Kimura Michael Marriott

			John Vibert
Rigorous DD Representation "*that CS had a 'rigorous due diligence process' in place in respect of the loans it securitised*"	Loan Compliance Representations Due Diligence Representations Valuation Diligence Representations	Presentations	Cynthia Baird Michael Daniel Patrick Dodman Michael Fallacara Bruce Kaiserman Andrew Kimura Michael Marriott Jason Nordyk Eddie Othman Peter Sack Robert Sacco Henry Salomon Christopher Schoen John Vibert
Compliance Process Representation "*that CS had undertaken a process to ensure compliance with all applicable laws, and reasonably believed that there was such compliance*"	Loan Compliance Representations	Presentations	Michael Daniel Michael Fallacara Bruce Kaiserman Andrew Kimura Michael Marriott Jason Nordyk Robert Sacco John Vibert Patrick Dodman Eddie Othman

			Henry Salomon Peter Sack
100% Subprime Representation "*that 100% of subprime loans which CS acquired would be subject to due diligence*" (The Absolute 100% Subprime Representation) Or "*in the case of presentations from late 2006, that in relation to Bulk packages CS would generally undertake 100% due diligence for subprime loans*" (The General 100% Subprime Representation)	Due Diligence Representations	Presentations	Patrick Dodman Jason Nordyk Robert Sacco Christopher Schoen
100% HEAT Representation "*that 100% of loans securitised into HEAT RMBSs would be subject to due diligence*" (The Absolute 100% HEAT Representation) Or "*that 100% due diligence was generally used for the HEAT shelf*" (The General 100% HEAT Representation)	Due Diligence Representations	Presentations	Patrick Dodman Jason Nordyk Robert Sacco Christopher Schoen

Variable Sample Size Representation "*the sample size of loans subject to due diligence was determined by the product in question*"	Due Diligence Representations	Presentations	Patrick Dodman Jason Nordyk Robert Sacco Christopher Schoen
Model Representation "*the loans which would be sampled were determined by a proprietary model developed by CS*"	Due Diligence Representations	Presentations	Patrick Dodman Jason Nordyk Robert Sacco Christopher Schoen
Model Threshold Representation "*that all of the loans which were scored above the threshold determined by the proprietary model would be sampled*"	Due Diligence Representations	Presentations	Patrick Dodman Jason Nordyk Robert Sacco Christopher Schoen
Approval Representation[s] "*all final loan decisions were made by Credit Suisse senior underwriters, not third party contractors or the CS trading desk*"	N/A	Presentations	Cynthia Baird Michael Fallacara Eddie Othman Robert Sacco Henry Salomon Christopher Schoen
LTV Representation *[CS made representations]* "*reporting the distribution of loan-to-value ("LTV") ratios among the loans using 5%-10% bands*)"	Valuation Diligence Representations	Prospectus Documents	Cynthia Baird Michael Daniel Michael Fallacara Andrew Kimura

			Jason Nordyk Eddie Othman Robert Sacco Henry Salomon John Vibert Patrick Dodman Christopher Schoen
≤100 LTV Representation "*none of these loans [i.e. in the LTV tables in the Prospectus Documents] had a LTV ratio or combined LTV ("CLTV") ratio of over 100%*"	Valuation Diligence Representations	Prospectus Documents	Cynthia Baird Michael Daniel Michael Fallacara Andrew Kimura Jason Nordyk Eddie Othman Robert Sacco Henry Salomon John Vibert Patrick Dodman Christopher Schoen
Accurate Appraisal Value Representation "*where the LTV ratios reported in the Prospectus Documents were based on appraisal values, CS had no reason to believe that such appraisal values were inaccurate*"	Valuation Diligence Representations	Prospectus Documents	Cynthia Baird Michael Daniel Michael Fallacara Andrew Kimura Jason Nordyk Eddie Othman Robert Sacco

			Henry Salomon John Vibert Patrick Dodman Christopher Schoen
QC Representation "*[T]he purpose of CS's QC processes was to increase the quality of the loans it securitised*"	N/A	Presentations	Michael Daniel Michael Fallacara Bruce Kaiserman Jason Nordyk Eddie Othman Robert Sacco Peter Sack Henry Salomon Christopher Schoen John Vibert