Neutral Citation Number: [2024] EWHC 3022 (Comm)

Case No: CL-2023-000118

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

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

Date: 04/12/2024

Before :
MR JUSTICE ANDREW BAKER

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Between :

BANCO DE SABADELL, S.A.	**Claimant**
- and -	
(1) CERBERUS GLOBAL NPL ASSOCIATES, L.L.C. **(2) CERBERUS GLOBAL NPL FUND, L.P.** **(3) CERBERUS INSTITUTIONAL ASSOCIATES III, LTD.** **(4) CERBERUS INSTITUTIONAL PARTNERS VI, L.P.**	**Defendants**
- and -	
PROMONTORIA HOLDING 266 B.V.	**Third Party**

- -

James Collins KC, Matthieu Grégoire and Akash Sonecha (instructed by **PCB Byrne LLP**) for the **Claimant**
Andrew Scott KC and Andrew Trotter (instructed by **Kirkland & Ellis International LLP**) for the **Defendants**
Alex Barden (instructed by **Latham & Watkins LLP**) for the **Third Party**

Hearing dates: 28, 29, 30, 31 October and 1 November 2024

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Approved Judgment

This is a reserved judgment to which CPR PD 40E has applied.
Copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. By Investment Agreements concluded in July 2018 (the 'Coliseum IA' and 'Challenger IA') and August 2019 (the 'Rex IA'), the claimant ('Sabadell') with some of its affiliates (together, 'the Sellers') contracted with the third party ('the Investor') to establish and conduct joint venture business by which portfolios of Spanish real estate owned assets ('REOs') held by the Sabadell group would be transferred to the joint venture vehicle. The defendants ('Cerberus') guaranteed certain of the Investor's payment obligations. The Investor was joined to the litigation by Cerberus pursuant to CPR Part 20 and is separately represented, but it aligned itself entirely with Cerberus.

2. The IAs were priced from agreed Global Contribution Values ('GCVs') for the REO portfolios of €1,200,000,000 (Coliseum IA), €2,560,000,000 (Challenger IA) and €284,009,602.34 (Rex IA). The GCV for each IA was the aggregate of Allocated Values ('AVs') agreed for the REOs and set out in a spreadsheet for each IA, referred to as the Data Tape for that IA. There were around 70,000 individual REOs, each with its own agreed AV, across the three IAs.

3. The AVs, and therefore the GCVs, valued the REOs, and thus the portfolios, at specified Cut-off Dates. The Cut-off Date for the Coliseum and Challenger IAs was in June 2018; for the Rex IA, it was in March 2019. The IAs provided for a primary completion at an Effective Date, on which most of the REOs would be contributed into the joint venture structure. In the event, the Effective Date for all three IAs was 20 December 2019.

4. One main feature of the deal was the deferral of payment of part of the price to the second anniversary of the Effective Date, called the Maturity Date. Each IA also provided for the possibility of a further deferral to the Extended Maturity Date, one year after the Maturity Date. What was deferred in that case is in dispute. In relation to the deferred payment element of the deal, the IAs used the term Deferred Purchase Price, which I shall often abbreviate to 'DPP'.

5. The further payment deferral at the Maturity Date, if the condition for it arose, was in Sabadell's option. The condition for it arose under each IA, and Sabadell opted to extend. The parties fell into dispute from November 2022 (I reject Cerberus' case that this dispute arose earlier) over what was or would be due for payment. In the event, the circumstances arising in December 2022 meant that the dispute did not affect what happened under the Coliseum IA, but it did affect, and this litigation now concerns, the Challenger and Rex IAs.

Commercial Background

6. REOs might be affected by one or more impediments to or difficulties with any ready realisation of value. One such impediment or difficulty was if the relevant Seller (the Sabadell group company holding the REO in question) did not have registered title to the REO, making it, in the terminology used in the IAs, an Unregistered REO. Another category of REOs, in that terminology, was that of Singular REOs, being REOs identified as such in the Data Tapes because they were affected by pre-emption or redemption rights in favour of public authorities. A Singular REO might or might not be an Unregistered REO.

7. Sabadell had a strong commercial imperative to move the entire Coliseum and Challenger REO portfolios off its books, as an important element of dealing with huge exposure to non-performing real estate lending arising *inter alia* from its acquisition of other banks as part of Spain's response to the global financial crisis of 2008-2009, most significantly the acquisition of Caja de Ahorros del Mediterraneo in 2012 and Banco Gallego in 2013. That meant that including the Unregistered REOs in any sale was, for Sabadell, "*a condition sine qua non*", as it was put in evidence by Mr Jaume Oliú Barton, who was the commercial lead for Sabadell in the negotiation of the IAs. I do not accept a submission by Cerberus in closing that Mr Oliú was evasive in his evidence about the reasons behind that pre-requisite, but what matters is that it was there, it was evident to the Cerberus deal team, and it was appreciated by the Sabadell deal team that it was known to Cerberus.

8. There were important time constraints for Sabadell in relation to the Coliseum portfolio, because the Coliseum REOs benefited from a Spanish asset protection scheme, the Esquema de Protección de Activos. There was a deadline for deal approval from the scheme fund (Fondo de Garantía de Depositos) if Sabadell's consequent losses on the underlying non-performing loans were to qualify for partial loss recovery under the scheme. This too was explained to Cerberus by Sabadell.

9. Cerberus had an objective to realise value from the REOs quickly. They were not looking for a longer term buy to hold investment. As a result, and in any event, Cerberus were not keen to pay for Unregistered REOs, because of the negative impact a lack of registered title might have on the prospects, timescale or cost of realising value from the REO in question. That commercial concern was evident to the Sabadell deal team, and it was appreciated by the Cerberus deal team that it was known to Sabadell.

10. Mr Scott KC for Cerberus submitted that those general commercial factors limited Sabadell's negotiating position. That is a statement of the obvious in one sense – Sabadell was willing to entertain only deal structures providing for full de-consolidation of the REOs off the Sabadell group balance sheet. But it was not shown that that meaningfully weakened Sabadell's bargaining position, if the submission was intended to go that far. I could not find that the pre-requisite referred to in paragraph 7 above limited interest in or competition for the opportunity to bid for the portfolios; and there was evidence that Cerberus were, and told Sabadell that they were, very keen to be the successful bidders and willing to be flexible in finding solutions on points requiring negotiation.

The Dispute

11. The dispute turns ultimately on the first sentence of the first paragraph of Clause 2.2.2(B)(ii) of each IA, the title of which is "*Determination of the Fair Market Value of Unregistered REOs*". That sentence was as follows:

    (i) in the Coliseum and Challenger IAs: "*Either on the Maturity Date, or any quarter thereafter (if the Sellers so notify by written notice to the Investor no later than ten (10) Business Days prior to the Maturity Date or such quarter), or on the Extended Maturity Date, the Deferred Purchase Price shall become due and payable (as [sic.] such time as set forth below) in the amount corresponding to the fair market value of the then outstanding Unregistered*

*REOs (the "**Fair Market Value**"), the Sellers relinquishing any portion of the Deferred Purchase Price over and above the Fair Market Value.*";

(ii) in the Rex IA: "*Either on the Maturity Date, or on the Extended Maturity Date, the Deferred Purchase Price shall become due and payable (as [sic.] such time as set forth below) in the amount corresponding to the fair market value of the then outstanding Unregistered REOs (the "**Fair Market Value**"), the Sellers relinquishing any portion of the Deferred Purchase Price over and above the Fair Market Value.*"

12. For precision in what I say in this judgment, I shall find it convenient to use the following defined labels of my own:

- 'AV(U)' for the aggregate AV of Unregistered REOs from time to time;
- 'FM(U)' for the fair market value of Unregistered REOs as might be agreed or determined pursuant to Clause 2.2.2(B)(ii), where it applied;
- 'A(P)' for the amount becoming due and payable under the key provision quoted in paragraph 11 above, if it applied, and 'A(R)' for the amount correspondingly foregone;
- 'DPP(FM)' for "*the Deferred Purchase Price*" as referred to in that key provision. An aspect of the dispute is how fixed a meaning the term Deferred Purchase Price had, as it was used by the parties in the IAs. In particular, as Mr Collins KC acknowledged, Sabadell's case includes the argument that as used in the key provision, and in some other places, "*the Deferred Purchase Price*" in the IAs, properly construed, means something quite different from, and more limited than, the 21% portion of the price earned up to the Maturity Date, payment of which was deferred to that Date, to which I shall refer as the 'Maturity Date DPP';
- 'Paid DPP' for any amount of DPP that fell due for payment prior to the date at which a fair market value appraisal is required by the key provision quoted in paragraph 11 above.

13. Using those defined terms, the parties' cases may be summarised as follows:

(i) Sabadell says that:

$$A(R) = AV(U) – FM(U) \text{ only, because}$$

$$DPP(FM) = AV(U) \text{ and/or}$$

$$A(P) = DPP(FM) – (AV(U) – FM(U)) = DPP(FM) – AV(U) + FM(U);$$

whereas

(ii) Cerberus say that:

$$A(R) = \text{Maturity Date DPP} – FM(U), \text{ alternatively}$$

$$A(R) = (\text{Maturity Date DPP} – \text{Paid DPP}) – FM(U), \text{ because}$$

DPP(FM) = Maturity Date DPP or Maturity Date DPP – Paid DPP, and

A(P) = FM(U).

It may be noted that if Sabadell is correct about DPP(FM), the result on its case as to A(P) simplifies to match the result on Cerberus' case as to A(P).

14. The overall effect, if Clause 2.2.2(B)(ii) applies, on Sabadell's case, and once all payments due under the IAs have been made, will be that fair market value only (expected to be below AV) will have been paid for REOs that are still Unregistered REOs at the Date as at which Clause 2.2.2(B)(ii) required a fair market value appraisal of then Unregistered REOs, but AV will have been paid in full for all other REOs contributed to the joint venture. The effect of substance (as distinct from timing) is to adjust the Price, which in general is aggregated from the AVs of all contributed REOs, by marking to market the contribution to the Price of the most stubbornly Unregistered REOs.

15. Cerberus' case, by contrast, means that the overall effect, if Clause 2.2.2(B)(ii) applies, is to write off either the whole of the Maturity Date DPP as at the operative Clause 2.2.2(B)(ii) Date, or all of the Maturity Date DPP not already payable under some other provision, in either case to the extent it exceeds the fair market value of the stubbornly Unregistered REOs. The effect of substance is both to apply a mark-to-market adjustment to what is ultimately paid for those Unregistered REOs, and also to apply (with limited and arbitrary exceptions) a 21% discount to the whole of the rest of the portfolio.

16. That is why on Sabadell's case at least c.€358m plus interest became or will become due and payable by the Investor, whereas on Cerberus' case nothing is or will become due and payable and on Cerberus' primary case most of c.€54.3m of Paid DPP under the Challenger and Rex IAs (c.€44.9m and c.€9.4m respectively) is now or will become repayable by the Sellers.

17. I have considered carefully all of the documentary evidence adduced at trial and all of the witness evidence, written and oral, factual and expert. I have taken into account all of the parties' submissions at trial, written and oral. That is so even if I do not identify or address every point raised or submission addressed in the course of this judgment, which sets out why I have concluded that Sabadell is correct, and Cerberus and the Investor are wrong, as to the proper interpretation of the IAs, and therefore as to their meaning and effect in the circumstances that arose.

18. I summarise my conclusions from paragraph 163 below onwards, where I also address what relief should be granted. Those are my conclusions applying the rules of Spanish law set out in the next section of this judgment, taking into account all of the available evidence as to the parties' evident contractual intention as required by those rules. That involves, as befits detailed, complex written contracts entered into by sophisticated parties professionally represented in their contract negotiations and drafting, paying close attention to what can be taken from the terms of the contracts themselves (see from paragraph 31 below) and reviewing the extrinsic evidence as required by Spanish law (from paragraph 65 below), to see what, if any, contractual intent is conclusively demonstrated. Any written judgment is necessarily linear, addressing one aspect or

point at a time. The conclusions I express below, I therefore emphasise, were reached only after standing back and considering all parts of the analysis, taken together.

Spanish Law

19. Each IA is expressly governed by Spanish law and provides for the courts and tribunals of the city of Barcelona to have exclusive jurisdiction. The Cerberus guarantees are governed by English law and provide for the English courts to have exclusive jurisdiction. Since this Claim was brought by Sabadell against Cerberus pursuant to the guarantees, this court has jurisdiction. Since the substance concerns the meaning and effect of the IAs, the merits are effectively governed by Spanish law.

20. The question that divides the parties concerns the meaning and effect of Clause 2.2.2(B)(ii), and related other provisions, of each IA. It is an issue of contractual construction, to be answered by applying the rules of Spanish law for the construction of commercial contracts. The parties' statements of case disclosed differences between them as to those rules. Case management directions were therefore made for expert evidence of Spanish law, pursuant to which Sabadell and Cerberus adduced expert evidence from Francisco Málaga Dieguez of White & Case LLP (Madrid) and Jorge Mario Angell Hoefken of L C Rodrigo Abogados (Madrid), respectively.

21. The differences between the experts' opinions, as set out in their expert reports and joint memorandum, were quite narrow, and in some respects matters of emphasis or nuance only. They were of some real potential significance nonetheless. For example, Mr Angell's evidence afforded a basis for Cerberus to submit that recourse to extrinsic material could not be had under Spanish law, for the purpose of interpreting a contract, unless there was a lack of clarity in, or doubt as to the parties' intentions derived from, the contractual language taken by itself. Mr Málaga firmly disputed that proposition.

22. For closing argument, following cross-examination of the experts, Cerberus withdrew any reliance on Mr Angell's opinions to the extent that they differed or appeared to differ from Mr Málaga's, and the Investor confirmed that in that regard, as in every other respect, they adopted Cerberus' position. Mr Scott KC for Cerberus and Mr Barden for the Investor confirmed at the start of closing argument that as a result I am now asked to judge the case as if the only expert evidence as to Spanish law was that of Mr Málaga, taking together his expert report, his contribution to the joint memorandum, and his answers given during oral evidence. I consider that to have been a realistic concession.

23. The rules of Spanish law that fall to be applied may be summarised, therefore, on the basis of Mr Málaga's evidence, as follows.

24. Fundamentally, the exercise is one of ascertaining the evident intention of the contracting parties, judged upon all of the available evidence. That is the effect of the basic rule of contractual construction set out in Article 1281 of the Spanish Civil Code, which provides (in translation) as follows:

> "*If the terms of a contract are clear and do not leave any doubt as to the intention of the contracting parties, they shall abide by the literal meaning of its clauses.*

If the words seem contrary to the evident intention of the contracting parties, the latter shall prevail over the former."

That rule is complemented, not altered or overridden, for commercial contracts, by Article 57 of the Spanish Commercial Code, which says (in translation) that:

"*Business contracts shall be implemented and fulfilled in good faith, pursuant to the terms under which they were made and drafted, without misinterpreting them through arbitrary constructions of the correct, proper and usual sense of the words said or written, or restriction of effects naturally arising from the way in which the parties to the contract would have explained their will and contracted their obligations.*"

25. In applying Article 1281 and Article 57, Spanish law respects parties' freedom of contract (party autonomy), and (in Mr Málaga's words) "*prevent[s] under the pretext of interpretive work the modification of a statement that is truly clear and precise*". In that regard, Spanish law recognises a presumption that the ordinary meaning of the words used in a written contract is likely to reflect what the parties intended to agree. For a different construction to be adopted, again as Mr Málaga put it, there must be "*conclusive*" proof "*that the parties had an evident intention to say something different and they didn't*"; and in considering whether such proof exists, the "*literal interpretation [of the wording in the contract] would still play an important role*", i.e. the text of the contract as concluded remains an important source of evidence.

26. One effect of Article 57 is that the importance attached to what the language of the contract may appear to convey is at its highest where, as here, the parties are sophisticated commercial parties professionally represented in the negotiation and drafting of their contract. Nonetheless, and even in such a case, it is *not* necessary to identify from the contractual language taken on its own either a lack of clarity, or a cause for doubt as to the intention of the contracting parties, before reference may be made to extrinsic evidence (if any) bearing upon the parties' evident intent.

27. The nature and power of the basic principle under Spanish law seems to me, on the basis of Mr Málaga's evidence, to be captured well by paragraph 22 of Judgment No. 559/2010 of the Spanish Supreme Court (Civil Chamber, Division 1) of 21 September 2010, which reads as follows (in translation): "*In contrast to systems in which the interpretation of contracts must investigate the reasonable meaning of the terms in which the parties expressly agreed to be bound, so that it must basically adhere to what the parties said they agreed to, in ours it is the investigation of what the parties agreed, regardless of whether the literal wording of what was expressed does not literally conform to what was agreed, that takes precedence.*" That it is reasonable to consider, if contract terms are clear and unequivocal, that the parties' agreement will usually have coincided with that meaning (noted in the next paragraph of that Judgment) is an aspect of exploring and deciding what, in truth, the parties agreed.

28. For that, the extrinsic evidence to which reference may be made, is not limited by specific rules of construction. In particular, the conduct and communication of the parties *inter se*, before *and after* the conclusion of the contract may be taken into account; and that includes communications during or forming part of the negotiation of the contract.

29. Contracts are not construed properly by reading individual clauses or bits of wording in isolation: Article 1281 of the Civil Code calls for the terms (plural) of a written contract to be considered, and it was plain from Mr Málaga's evidence that this means all of the terms, read sensibly together; likewise, the focus of Article 57 of the Commercial Code's is on the terms (plural) of business contracts. It was also clear from Mr Málaga's evidence that that unsurprising proposition is confirmed and reinforced by Article 1285 of the Spanish Civil Code, albeit separate reliance on Article 1285 was not pleaded by the parties. Article 1285 reads as follows, in translation: "*Clauses in contracts shall be construed in connection with each other, attributing to any doubtful clauses the meaning resulting from the whole.*"

30. Finally so far as material, and as part of the analysis upon the available evidence of the parties' evident intention, an absurdity of a proposed construction may be taken into account, since by nature it will tend to point against the notion that the proposed construction was what the parties intended. That principle applies only where the posited construction produces an outcome "*highly unusual, rare and inexplicable*" (to quote Mr Málaga for a final time). It does not allow the contract, properly construed *inter alia* bearing the absurdity principle in mind, to be adjusted or revised upon some notion that it may not have been a sensible or good bargain.

The Terms of the IAs

Challenger IA

31. The Challenger and Coliseum IAs were in materially identical terms, save that the Challenger GCV was €2.56bn and the Coliseum GCV was €1.2bn.

32. Clause 2.1.2 provided for an Initial Effective Date Price for the Effective Date and an Initial Singular REOs Transfer Date Price for each Singular REOs Transfer Date, the payment of each such Initial Price being governed by Clause 2.2. Clause 2.1.2 provided for adjustments to those Initial Prices to calculate Effective Date and Singular REOs Transfer Date Prices, the payment of the difference between those Prices and the Initial Prices being governed by Clause 3.8.3, the terms of which do not have any bearing on the issues before me.

33. Ignoring elements in Clause 2.1.2 that are immaterial to the issues:

    (i) the Initial Effective Date Price was the GCV less the AV of Singular REOs that were not also Sold REOs and the AV of Committed REOs, the logic being that Singular REOs that were not also Sold REOs would be contributed later, after satisfaction of additional conditions precedent, on Singular REOs Transfer Dates, and that Sold REOs and Committed REOs were dealt with separately. The Effective Date Notice dated 12 December 2019 records that the aggregate AV of Singular REOs other than Sold REOs and Committed REOs was just shy of €800m for the Challenger IA, €230.8m for Coliseum and €101.9m for Rex; and

    (ii) an Initial Singular REOs Transfer Date Price was the AV of the Singular REOs contributed on a Singular REOs Transfer Date.

34. Clause 2.1.2 provided further that the Effective Date Price and any Singular REOs Transfer Date Prices taken together would comprise the Price; and Clause 2.1.3 provided that the Price was "*a fixed lump sum price*" notwithstanding that the Data Tape allocated an individual AV to each REO.

35. Clause 2.2.1 set out how the Price was to be paid to the Sellers. Clause 2.2.1(A) provided for the Initial Effective Date Price to be paid to the Sellers on the Effective Date, except that "*21% of the Initial Effective Date Price shall be deferred (the "**Deferred Purchase Price**") pursuant to the provisions of Clause 2.2.2 below and be borne by the Investor*". That meant payment of part of the Price equal to 21% of the AV of the REOs contributed on the Effective Date was deferred. That was so regardless of the magnitude of AV(U), in absolute or relative terms, at the Effective Date. This initial value for DPP at the Effective Date was just the primary financing element of the deal, Sabadell having agreed to fund 21% of the Price for the Investor/Cerberus for two years, and was not related in any way to whether contributed REOs were Unregistered.

36. Although the drafting technique of defining the term Deferred Purchase Price was used in Clause 2.2.1(A), one obvious effect of the IA terms read as a whole is that its meaning was not fixed as 21% of the Initial Effective Date Price. The operation of a number of other provisions rendered it a variable amount from time to time. The sense overall is that the defined term meant, and was used to connote, that portion or amount of the Price, payment of which stood deferred from time to time. Provisionally – any final conclusion requires all of the terms of the IAs, and any pertinent extrinsic facts, to have been taken into account – that seems to be sufficient to dispose of Cerberus' primary argument in which DPP(FM) = Maturity Date DPP such that Paid DPP might be relinquished, requiring repayment, after a fair market value appraisal of Unregistered REOs.

37. Clause 2.2.1(B) concerned Initial Singular REOs Transfer Date Prices. It was more complex than Clause 2.2.1(A) because a Singular REOs Transfer Date might be on or before, or after, the Maturity Date:

    (i) Clause 2.2.1(B)(i) dealt with Singular REOs Transfer Dates on or before the Maturity Date. It provided, for that case, that the Initial Singular REOs Transfer Date Price would be paid immediately, save that 21% would be "*added to the amount of the Deferred Purchase Price and be settled in accordance [with] Section (C) (Deferred Purchase Price) and be borne by the Investor*". As with Clause 2.2.1(A), that operated without reference to whether the Singular REOs in question were Unregistered REOs when contributed. It was, again, simply the implementation of the primary financing deal – 21% of these extra portions of Price, as earned during the primary financing period, fell to be financed by Sabadell until the end of that period on the Maturity Date.

    (ii) Clause 2.2.1(B)(ii) dealt with Singular REOs Transfer Dates after the Maturity Date. It divided Singular REOs thus contributed between those that were then Unregistered REOs and those that were not. Nothing was to be paid then for the former, their AV being "*added to the amount of the Deferred Purchase Price [to] be settled in accordance with Section (C) (Deferred Purchase Price)*"; whereas the AV of the latter (Singular REOs with registered title, as contributed) was to be paid in full.

38. Unless an intention to draw arbitrary distinctions is assumed, Clause 2.2.1(B)(ii) indicates that after the Maturity Date, payment of the Price was intended to be deferred only in an amount equal to the AV of then-Unregistered REOs. In that regard, it would be arbitrary on the face of things to draw a distinction between Singular REOs contributed after the Effective Date but by the Maturity Date (which, in material respect, were treated in the same way as non-Singular REOs contributed on the Effective Date), and Singular REOs contributed only after the Maturity Date.

39. Clause 2.2.1(C), as anticipated by Clauses 2.2.1(A) and 2.2.1(B), provided that the Investor was to pay "*the Deferred Purchase Price as specified in the Effective Date Notice and in each Singular REOs Transfer Date Notice, on the Maturity Date or such later dates as stated in Clause 2.2.2 below*".

40. Clause 2.2.2(A) set out the "*Terms of the Deferred Purchase Price*", providing for daily accrual of interest and making other provisions that treated the deferral of payment of the Price functionally as a loan by the Sellers of the amount standing deferred from time to time. The final paragraph of Clause 2.2.2(A) provided that, "*On the basis of the nature of the Deferred Purchase Price, the Investor will be entitled to structure and document the Deferred Purchase Price as a loan or debt acknowledgement (with the same terms and conditions).*" The first paragraph of Clause 2.2.2(A), providing for interest, stated that "*The Deferred Purchase Price shall accrue day-to-day interest … [until] the date on which the Deferred Purchase Price is paid …*", but in context the parties plainly did not mean to charge interest on the entire amount of the Maturity Date DPP until (if at all) it was paid in full. That is an example of the point made in paragraph 36 above.

41. Clause 2.2.2(B), entitled "*Payment of the Deferred Purchase Price*", had three sub-Clauses:

    (i) Clause 2.2.2(B)(i), "*Payment of the Deferred Purchase Price at the Maturity Date; extension of the Deferred Purchase Price to the Extended Maturity Date*";

    (ii) Clause 2.2.2(B)(ii), "*Determination of the Fair Market Value of Unregistered REOs*"; and

    (iii) Clause 2.2.2(B)(iii), "*Payment of the Deferred Purchase Price at the Extended Maturity Date*".

42. Clause 2.2.2(B)(i) was in these terms (with paragraph numbering added):

    "*[(1)] Not later than 23:59 hours (C.E.T.) on the date following twenty four (24) months from the Effective Date (or, if not a Business Day, on the next immediate Business Day) (the "**Maturity Date**"), the Investor shall pay the Deferred Purchase Price.*

    *[(2)] If on the Maturity Date the sum of the Allocated Values of the then outstanding Unregistered REOs is equal to or lower than €7.5 million (the "**Unregistered REOs Threshold**"), the Investor (as foreseen in Section (E) below [sic., there was no Clause 2.2.2(E)]) shall pay to the Sellers the Deferred Purchase Price in its entirety; otherwise the Sellers shall decide to either (a) extend the payment of the Deferred Purchase Price until the third (3rd) anniversary of the Effective Date (the "**Extended Maturity Date**")*

or (b) trigger the process to determine the amount of the Deferred Purchase Price that should then be repaid based on the Fair Market Value of the Unregistered REOs as explained in paragraph (B)(ii) of this this [sic.] Clause 2.2.2.

*[(3)] In case the Deferred Purchase Price is extended, on a quarterly basis following such an extension, the Deferred Purchase Price shall be paid (a) in the amount equal to the Allocated Values of any Unregistered REO becoming registered over the relevant quarter or (b) in its entirety if the sum of the Allocated Values of the then outstanding Unregistered REOs is equal to or lower than the Unregistered REOs Threshold (the entire amount of the Deferred Purchase Price being paid in this paragraph (b) shall be hereinafter named the "**Earlier Paid-off DPP**"). In the latter case, the Unregistered REOs Threshold shall be reduced in [sic.] the Earlier Paid-off DPP.*"

43. At first blush, Clause 2.2.2(B)(i)(2)(a) might be thought to provide for payment of the Maturity Date DPP to be deferred. That is what a decision on the Maturity Date "*to extend the payment of the Deferred Purchase Price*", read in isolation, might most naturally convey. However, contracts are not to be construed by reading individual phrases, sentences or clauses in isolation, and there is clear tension between that possible reading of Clause 2.2.2(B)(i)(2)(a) and the intent seemingly evinced by Clause 2.2.1(B)(ii) (see paragraph 38 above), one of the provisions giving meaning to the Deferred Purchase Price.

44. Furthermore, the contrast drawn by Clause 2.2.2(B)(i)(2) is not between paying the Deferred Purchase Price and not paying the Deferred Purchase Price, it is between paying the Deferred Purchase Price "*in its entirety*" or not, suggesting at any rate the possibility that the intention is not 'all or nothing' at the Maturity Date, but rather 'all or something less than all'.

45. Next, Clause 2.2.2(B)(i)(3) provides for quarterly payments of DPP after the Maturity Date, if Clause 2.2.2(B)(i)(2)(a) has applied. It introduces the notion of Earlier Paid-off DPP, being the entirety of the DPP outstanding at a quarter date after the Maturity Date, if there is one, on which AV(U) is at or below the €7.5m threshold. Consequences of Earlier Paid-off DPP falling due are set out by Clause 2.2.2(B)(iii), one part of which applies "*Should any Earlier Paid-off DPP have been paid by the Extended Maturity Date (i.e., because the Deferred Purchase Price was below the Unregistered REOs Threshold)*". That directly equates "*the Deferred Purchase Price*" with AV(U) when the Earlier Paid-off DPP became payable; and that conveys, in terms, that after the Maturity Date, DPP and AV(U) are one and the same (as was suggested by Clause 2.2.1(B)(ii), see again paragraph 38 above).

46. There is a further, complex, point arising from Clause 2.2.2(B)(i)(3) and Earlier Paid-off DPP. The last sentence of that Clause says that where there has been Earlier Paid-off DPP (which will be at a quarter date during the year after the Maturity Date), "*the Unregistered REOs Threshold shall be reduced in [sic.] the Earlier Paid-off DPP*". The sense is surely "*in the amount of*", or "*by*", and the evident purpose is to ensure that if new DPP arrives (which would occur if there was a Singular REOs Transfer Date contributing Unregistered REOs after the quarter date that generated the Earlier Paid-off DPP), the portion of the Threshold paid out as Earlier Paid-off DPP is no longer available. But once all that is understood, it can be seen that the Earlier Paid-off DPP itself must have been AV(U) as at the relevant quarter date; and in the Clause, Earlier

Paid-off DPP is defined to be the entirety of the DPP then outstanding. That again, therefore, having unpacked it, directly equates post-Maturity DPP with AV(U).

47. The combined effect of all the considerations above is that, on the one hand, the literal meaning of the words in Clause 2.2.2(B)(i)(2)(a), taken in isolation, may seem to be that, if that sub-Clause applied, the whole of the Maturity Date DPP was deferred, but the surrounding provisions, individually and in combination, suggest strongly that what was intended to be deferred thereby was only an amount of DPP equal to AV(U).

48. Clause 2.2.2(B)(ii), then, was in these terms, so far as material, again with paragraph numbering added:

"*[(1)] Either on the Maturity Date, or any quarter thereafter (if the Sellers so notify by written notice to the Investor no later than ten (10) Business Days prior to the Maturity Date or such quarter), or on the Extended Maturity Date, the Deferred Purchase Price shall become due and payable (as [sic.] such time as set forth below) in the amount corresponding to the fair market value of the then outstanding Unregistered REOs (the "**Fair Market Value**"), the Sellers relinquishing any portion of the Deferred Purchase Price over and above the Fair Market Value. For the purposes of determining the Fair Market Value, the following criteria should be taken into consideration: (a) the likelihood to obtain the registration of the REO, (b) the legal process and timing to obtain the registration of the relevant REO, (c) the costs involved, and (d) the value of the underlying REO. The Unregistered REOs Threshold will be reduced to €0 if the valuation procedure foreseen in this Clause is carried out.*

[(2)] [... provision for independent expert determination of Fair Market Value in default of agreement, the detail and language of which does not matter here ...]

[(3)] Payment (and, as the case may be, relinquishment) of the Deferred Purchase Price shall take place within the twenty (20) Business Days following the determination of the Fair Market Value.

[(4)] The provisions in this Clause on the determination of the Fair Market Value and the payment (and, as the case may be, relinquishment) of the Deferred Purchase Price shall apply if there is any Deferred Purchase Price outstanding on the third (3rd) anniversary of the Effective Date, which will be the case if the Maturity Date is not extended and Unregistered Singular REOs are acquired after the Maturity Date.

..."

49. Although Clause 2.2.2(B)(ii)(1) does not say so, it was obviously supposed to apply only where some other provision required. Otherwise, a nonsense would be made of the provisions defining circumstances in which DPP was to be paid in full, without adjusting it by reference to any fair market value assessment. Furthermore, although (read literally and in isolation) it might be thought that Clause 2.2.2(B)(ii)(4) was seeking to define exclusively the circumstance in which the fair market value process was triggered, again that is plainly not the intention, reading Clause 2.2.2 as a whole.

50. The most important words, for my purposes, are those of Clause 2.2.2(B)(ii)(1) providing (implicitly, only if the fair market value process has been triggered) that "*the Deferred Purchase Price shall become due and payable [on the relevant date] in the*

amount corresponding to the fair market value of the then outstanding Unregistered REOs ...". Those words, read literally on their own, convey no more than that the parties intended A(P) and FM(U) to relate to each other in some way, and therefore also for A(R) to be related to FM(U).

51. It is not possible to say just from the words of Clause 2.2.2(B)(ii)(1) whether the intended relationship was that of equality, A(P) = FM(U), or something else. Looking beyond Clause 2.2.2(B)(ii)(1) itself, however, it can be said, firstly, that where the parties elsewhere referred to something that had to be or was supposed to be equal to something else, the word used was indeed 'equal' (or 'equals'), and, secondly, that in Clause 2.2.2(B)(i)(2)(b) also, A(P) is not said to be equal to FM(U). There, A(P) is said to be an amount that will be "*based on the Fair Market Value of the Unregistered REOs*".

52. That is a seemingly deliberate choice to say something other than that A(P) = FM(U), and because that sub-Clause continues, "*as explained in paragraph (B)(ii) of this this [sic.] Clause 2.2.2*", it seems to be a confirmation that Clause 2.2.2(B)(ii), in saying that A(P) is the amount "*corresponding to*" FM(U), was intended to convey that A(P) will be an amount "*based on*", i.e. derived in some way from, FM(U), rather than simply being equal to FM(U).

53. I put Sabadell's case in algebraic form in paragraph 13(i) above and noted its overall effect in paragraph 14 above. If that was the intended contract, I consider it a natural use of language to say that A(P), the DPP amount to be paid, is the amount "*corresponding to*" or "*based on*" the fair market value of the still-Unregistered REOs, in contrast (in context) to an unadjusted DPP amount that would "*correspond to*", or be "*based on*", the AV of those REOs.

54. I noted in paragraph 15 above the overall effect of Cerberus' case. If that were the effect of Clause 2.2.2(B)(ii)(1), I consider the result would be arbitrary, inconsistent for no reason as between Singular REOs contributed after the Maturity Date and all other contributed REOs (including other Singular REOs). Furthermore, at any AV(U) amount above the €7.5m threshold, on Cerberus' interpretation, the more Unregistered REOs that remain Unregistered, rendering the portfolio the more problematic for Cerberus, the more the Investor would have to pay. In short, the less it got, the more it would have to pay, and the more it got, the less it would have to pay. Indeed, in substance, on Cerberus' construction the Unregistered REOs threshold was not something commercially rational or explicable, but in effect a €600m+ gamble (by both sides). I consider that to be highly unusual, rare and inexplicable in the sense explained by Mr Málaga.

55. In his argument for Cerberus that the entire Maturity Date DPP amount was (i) deferred by Clause 2.2.2(B)(i)(2)(a), and (ii) relinquished in excess of FM(U) by Clauses 2.2.2(B)(i)(2)(b) and 2.2.2(B)(ii), Mr Scott KC noted, as is correct up to the Maturity Date, that DPP was not AV(U) or, in truth, anything to do with the Unregistered REOs in the portfolio as contributed or the magnitude of their AV. Rather, as he submitted, it was simply 21% of the Price. He submitted, as is also correct up to the Maturity Date, that "*it was <u>never</u> the case that the DPP withheld represented the 'Allocated Values' of the Unregistered REOs from time to time, or that it would be incrementally decreased each time a property was registered*" (original emphasis). Mr Scott argued that,

therefore, it "*makes no sense to characterise the sum of Allocated Values of the outstanding Unregistered REOs at any particular point as 'part of' the DPP.*"

56. I part company with the argument there. In my view, it misses the point. What makes no sense, in part precisely because up to the Maturity Date the DPP was simply the agreed method by which the parties implemented the primary deal for Sabadell to finance 21% of the Investor's obligation to pay the Price, would be to defer that 21% payment obligation beyond the period of that financing, or to put that entire amount at risk by reference to something that bore no relation to it.

57. Mr Scott KC's argument also overlooked that, treating the initial DPP funding arrangement up to the Maturity Date as a cashflow reality out of which an agreed solution for removing or discounting AV(U) as an element of the Price might conveniently be fashioned (which, as it happens, is exactly how this all came about, see paragraph 88 below), it might be a natural use of language, between these parties, in the context of this deal, to speak of 'the Deferred Purchase Price' after the Maturity Date, being the part of the Price that even after the Maturity Date does not yet have to be paid, as the AV of the Unregistered REOs. Further, after the Maturity Date, as Mr Scott's argument imagined one would find if DPP = AV(U), DPP was "*incrementally decreased each time a property was registered*", by the AV of the REO in question (with quarterly invoicing and payment of the incremental decreases, aggregated for that quarter). Further again, after the Maturity Date, DPP was incrementally increased if any Singular Unregistered REOs were transferred in, by the aggregate AV of those REOs, but not if Singular REOs were transferred in that were not Unregistered REOs, their AVs being payable in full. (Reflecting all of that, as it happens the parties did in fact speak in terms of the Maturity Date DPP amount being comprised, after the Maturity Date, of conceptually separate amounts: an amount referable to REOs that were still Unregistered REOs, being their full aggregate AV; the rest, being therefore debt associated with the rest of the portfolio, earned in full and not contingent on anything.)

58. I shall not lengthen this judgment by setting out or discussing further provisions of the IA. A number of other Clauses were referred to at trial, but for the most part I did not find in any of them language or apparent effects that might bear on the issues at hand. The exception is that the provisions on repurchase by the Sellers of Defective, Reputational and Affected REOs provide further support for Sabadell's case as to the evident intent of the parties concerning DPP(FM) (see paragraph 127 below).

59. Prior, then, to taking into account extrinsic facts beyond the general commercial background summarised at the outset, my provisional conclusion from the way the parties expressed themselves in the Challenger IA is that their evident intent was not as Cerberus would have it. I would say further, again provisionally:

    (i) that the better reading of the relevant provisions as a whole is that DPP(FM), the DPP amount to which the fair market value regime is applied, in the various circumstances in which it is applied, was intended to be AV(U) only, not the entire Maturity Date DPP (or Maturity Date DPP less Paid DPP), and

    (ii) that the relationship created by Clause 2.2.2(B)(ii) between A(P) and FM(U), and therefore also between A(R) and FM(U), is given by paragraph 53 above, as submitted by Sabadell.

60. I acknowledge that (i) above would read "*the Deferred Purchase Price*" in Clause 2.2.2(B)(i)(2)(a)/(b), and in Clause 2.2.2(B)(ii), as meaning the portion of the Price referable to the Unregistered REOs (being, in fact, AV(U)), but that would be necessary to give effect to the evident intent of the parties if my provisional conclusion as to that intent were the final conclusion, and for these parties in the context of this transaction I do think it plausible that that is how they were using the term in those Clauses (paragraph 57 above). The drafting could have put the point beyond doubt, e.g. "*extend the payment of the Deferred Purchase Price in the amount of that sum*" in Clause 2.2.2(B)(i)(2)(a) and "*that part of the Deferred Purchase Price*" in Clause 2.2.2(B)(i)(2)(b) (my additions underlined). It is already clear, read in context, that "*the Deferred Purchase Price*" in Clause 2.2.2(B)(ii)(1) refers back to Clause 2.2.2(B)(i)(2)(a) or (b), as might be applicable.

Rex IA

61. The key provisions of the Rex IA differed from those of the Challenger IA because in commercial terms the Unregistered REOs threshold was nil rather than €7.5m or any other positive value. For the detailed contract drafting, that meant there was no Unregistered REOs Threshold under the Rex IA. Provisions drafted by reference to, or taking into account the existence of, the Unregistered REOs Threshold were stripped out or amended accordingly.

62. As a result:

    (i) Clause 2.2.2(B)(i)(2) became, "*If on the Maturity Date there are any Unregistered REOs, the Sellers shall decide …*" (*cf* paragraph 42 above), and on Sabadell's interpretation Clause 2.2.2(B)(i)(2)(a) is to be read (adding words to spell it out) as deferring "*the Deferred Purchase Price in the amount of the Allocated Values of those Unregistered REOs*", or similar (*cf* paragraph 60 above);

    (ii) Clause 2.2.2(B)(i)(3) became, "*In case the Deferred Purchase Price is extended, on a quarterly basis following such an extension, the Deferred Purchase Price shall be paid in an amount equal to the Allocated Values of any Unregistered REOs becoming registered over the relevant quarter*" (*cf* again paragraph 42 above), so that *inter alia* there was no concept of Earlier Paid-off DPP;

    (iii) Clause 2.2.2(B)(ii)(1) became, "*Either on the Maturity Date, or on the Extended Maturity Date, the Deferred Purchase Price shall become due and payable …*" and the final sentence of Clause 2.2.2(B)(ii)(2), talking of reducing the Unregistered REOs Threshold to €0, was removed (*cf* paragraph 48 above);

    (iv) there was no Clause 2.2.2(B)(iii) (*cf* again paragraph 48 above).

63. In turn that means, for the Rex IA, that:

    (i) as regards the subject matter of deferral under Clause 2.2.2(B)(i)(2)(a), and therefore DPP(FM), there is again the tension referred to in paragraph 43 above, and the point referred to in paragraph 58 above, but the points in paragraphs 44 to 46 above are not available to assist in resolving it;

(ii) as regards the relationship between A(P) and FM(U) created by Clause 2.2.2(B)(ii), the discussion in paragraphs 49 to 53 above is unaffected;

(iii) the point on absurdity (paragraph 54 above) applies again, scaled to the parameters of the Rex IA transaction (a €50m+ bet on whether every single Unregistered REO in the portfolio would become registered rather than a €600m+ bet on whether Thresholds would be hit);

(iv) there is the additional point that since the drafting changes are all readily explicable as necessary amendments to implement the decision to have no Unregistered REOs Threshold, a natural inference that the parties will most likely have intended to replicate the existing deal is not displaced by the fact that the contract terms are not identical.

64. On balance, my provisional conclusions for the Rex IA are therefore the same as those for the Challenger IA, as stated in paragraph 59 above.

Extrinsic Matters

Factual Witness Evidence

65. In the usual way, the contemporaneous documentary evidence is apt to be a more reliable guide to the course of events, especially on matters of date or detail, than the recollections even of honest witnesses. In this case, that is particularly true of the pre-contractual events and negotiations from the summer of 2018, now over six years ago. It may be less starkly true for the most recent post-contractual events relied on at trial, which occurred two years ago, in the autumn of 2022, and initiated the litigious dispute.

66. That said, I consider it plausible to suppose that those who negotiated in July 2018, or who were at the meeting on 4 November 2022 that sparked this dispute, may have reliable recollections, as regards commercially significant elements of the deal, of whether they were or were not a subject of discussion, negotiation or contention between the parties.

67. Sabadell adduced factual witness evidence from five witnesses, four of whom gave oral evidence and were cross-examined: Mr Oliú; Mr Joel Eduard Grau; Mr Sergio Palavecino Tomé; and Mr Eduardo Ramos Millan. Cerberus and the Investor notified Sabadell that its other witness, Mr Aaron Lopez Fabregas, was not required. Under trial management directions agreed between the parties, that meant it was not open to Cerberus or the Investor to challenge the honesty of Mr Lopez's trial witness statement as an account of events as he honestly believes he remembers them, but the accuracy or reliability of that recollection could be challenged as long as the substance of the challenge was put to one of Sabadell's other witnesses without Mr Lopez having to be called and separately challenged on his account.

68. I am satisfied that all of Sabadell's witnesses were witnesses of truth who sought to assist the court by providing, to the best of their ability, an honest account of what they perceive as recollection of events and of their thought processes and understanding at the material time.

69. When the IAs were negotiated, Mr Oliú was Head of Sabadell's Real Estate Investment and Non-Performing Assets division. He led for Sabadell in the negotiation of the commercial terms of the IAs. Mr Grau was the senior member of the deal team for the IAs at Alantra CPA, Sabadell's advisors. He is and was the Managing Partner of Alantra. Mr Lopez, a qualified Spanish lawyer, was part of the deal team on Sabadell's side as an in-house lawyer from Sabadell's Legal Corporate M&A Team.

70. Mr Ramos was Director of Portfolio Management for foreclosure assets at Sabadell and, from 2021, managed a team within Sabadell that supervised the outsourced work of seeking to obtain title registrations for Unregistered REOs. Mr Palavecino was Head of Financial Planning and Investor Relations at Sabadell and, from February 2021, took over Mr Oliú's responsibilities in relation to the IA portfolios, including the management of the relationship with the Investor/Cerberus and, through Mr Ramos, the team supervising registration work.

71. Cerberus adduced factual witness evidence from one witness, Mr Daniel Dejanovic, a Senior Managing Director and Head of Real Estate Advisory for EMEA at Cerberus who led for Cerberus in the negotiation of the commercial terms of the IAs and at the November 2022 meeting. For closing argument, Cerberus withdrew reliance upon any part of Mr Dejanovic's evidence that was not consistent with the testimony of Sabadell's witnesses. The Investor followed suit. I consider that also to have been a realistic concession.

72. Mr Dejanovic's trial witness statement provided cause for concern as to whether its content represented factual witness testimony he was in a position to give or would have given if examined in chief. Cross-examination demonstrated to my satisfaction that the trial statement was in fact nothing of the sort, on contentious points, but was, rather, a narrative constructed for the litigation in the misguided hope that it might be accepted as fact or at least as reason to doubt the narrative put forward by Sabadell and confirmed by its witnesses.

73. I regret to say that I came to the conclusion not merely that Mr Dejanovic's counter-narrative could not be regarded as reliable, but also that he had sworn to it not believing it to be true and in fact well aware that in its key contentious elements it was not the truth but to the contrary Sabadell's witnesses were telling the truth. I find that the possibility of arguing that the contractual language had the effect now contended for by Cerberus first occurred to Mr Dejanovic, or was suggested to him, in late 2022, when he wanted to negotiate a very substantial discount on what both he and those with whom he was then dealing at Sabadell thought would be the Investor's debt falling due under the IAs in December 2022. In my judgment, the false counter-narrative given to the court was created in an attempt, that negotiation having failed and this litigation having followed, to justify or bolster an argument that the effect contended for by Cerberus had been discussed and agreed when the IAs were being negotiated and had a sensible commercial rationale, though Mr Dejanovic knew that neither of those is true.

Coliseum and Challenger IAs

74. In what follows, I refer in places to points being agreed or accepted between the parties from time to time during the negotiations. By that I mean only that there was agreement in principle and subject to contract, not that anything binding came into existence, or that the parties ever intended anything binding to be in existence, prior to signing final

written IAs. Moreover, it was evidently the case that both sides expected and intended that any agreement they reached in negotiations to which they intended to become legally bound would be set out in the detailed terms of the final written IAs.

75. Set against the general commercial background summarised at the outset, the deal chronology begins in May 2018, with the submission by Cerberus of non-binding offers to purchase the Coliseum and Challenger REO portfolios in response to Sabadell's invitation to bid. On 8 June 2018, Uria Menendez, a Spanish law firm and Sabadell's deal counsel, circulated initial draft IA terms as part of an invitation to Cerberus to submit binding offers, to be accompanied by a mark-up of the draft IA terms.

76. Cerberus submitted binding offers on 2 July 2018, with marked-up draft IA terms. They were in materially similar terms. I shall focus on the terms offered for the Challenger portfolio if (as in the event occurred) Cerberus was accepted by Sabadell for both portfolios. The binding offer for the Challenger portfolio in that case was: €2.38bn for a Scenario 1 in which Spanish Bidco, wholly owned by the Investor, would acquire the assets; or €2.56bn for a Scenario 2, in which Sabadell would put the assets into a new subsidiary, REOCo, Spanish Bidco would acquire REOCo, and Spanish Bidco in turn would be owned 80% by the Investor, 20% by Sabadell.

77. Both prices were offered on the basis that payment of 20% would be deferred, to be structured as a loan from Sabadell to the Investor (or, at its option, its immediate holding company) payable 24 months after closing, with interest at 1.75% over 12-month Euribor, secured by *inter alia* guarantees from Cerberus funds or accounts to be identified.

78. On 4 July 2018, replacement binding offers were submitted, at Sabadell's request, offering, for each of Scenario 1 and Scenario 2, an option for full payment up front rather than 20% deferred payment. For that option, Cerberus offered €2.27bn for Scenario 1 and €2.45bn for Scenario 2.

79. The negotiations thereafter focused on Scenario 2, with 20% deferred payment, at the price Cerberus offered, €2.56bn in the case of Challenger, and that is what the IAs implemented. Spanish Bidco came to be referred to as HoldCo.

80. The binding offer letter itself did not say anything about Unregistered REOs, and the 20% DPP arrangement was not related in any way to such REOs. In the IA mark-up, Cerberus included a Clause 3.2 entitled "*Unregistered REOs Title Review*" that provided for REOs that were still Unregistered REOs at a longstop date to be divided into REOs with Title Registration Issues and Registrable REOs, with an independent expert determination process if the parties could not agree the division. REOs with Title Registration Issues would become Excluded REOs not contributed to, or taken back from, REOCo, their AVs then being deducted from the price. Registrable REOs would stay in the portfolio and be paid for in full (i.e. at their respective AVs).

81. That did not become the agreed solution, but it is material because it expressed an intention on the part of Cerberus to accept, and pay a price that included full AVs for, all REOs except only a particular sub-set of those that were stubbornly Unregistered, namely the stubbornly Unregistered REOs that were agreed or determined not to be Registrable. That gives the lie to a basic premise asserted by Mr Dejanovic in his written evidence in chief for his false counter-narrative, namely that Cerberus had insisted

throughout that it would not or did not want to pay anything ever for Unregistered REOs.

82. In the mark-up, that possible Clause 3.2 was prefaced with a "***Note to Sabadell***" stating that: "*although our proposed treatment of the Unregistered REOs diverts from the Sellers' proposal, we are open to discuss the mechanics for the contribution and payment of the purchase price of the Unregistered REOs to accommodate whatever concerns the Sellers might have with our proposed structure.*"

83. On 5 July 2018, in preparation for a conference call that evening, Fernando Fernández-Kelly of Alantra sent an email to the Cerberus team listing Sabadell's "*main concerns*" on Cerberus' mark-up. One of those was:

"*Reclassification of the "pending writ" REOs to a wider category of "unregistered REOs" [an aspect of the drafting technique used to give effect to the Clause 3.2 proposal]. The risk of pending writ REOs and unregistered REOs should pass on to the Companies, in a definitive manner (i.e., no way back). The transaction needs to be non-reversible. Hence, pending writ REOs should qualify as Particular REOs (i.e., to be synthetically contributed [viz., the benefit and burden transferred as between the contracting parties even though ex hypothesi full legal title could not be] and paid on Effective Date and remain in the perimeter of the Transaction no matter how long the issuance of the final writ of adjudication takes).*"

84. That objected to the notion of a rump of unregistrable Unregistered REOs being defined at any point in time so as to be stripped out of the deal, and offered no discount on the AVs to be paid for such REOs, thus effectively proposing that they would still be payable in full.

85. The next day, 6 July 2018, and further to the conference call, Rafael Molina of Linklaters SLP (Madrid), Cerberus' deal lawyers, sent an email to the Alantra team, stating:

"*... this is what we propose as regards the Unregistered REOs:*

...

- *The unregistered REOs would be synthetically contributed ... on closing as Banco Sabadell proposes to do with the Particular REOs. The transfer of legal title would [be] conditional on the registration of the REOs at the relevant Land Registry.*

- *The purchase price of the Unregistered REOs would be payable at closing.*

- *If the sum of the Allocated Value of the Unregistered REOs at the maturity date of the DPP is higher than [€2.5m], the repayment of the DPP in an amount equal to the sum of the Allocated Value of the Unregistered REOs will be extended for as long as Banco Sabadell wishes until the Unregistered REOs are registered.*"

(The square brackets around the figure of €2.5m are in the original, marking it as a sub-proposal for discussion/negotiation within the overall proposal.)

86. Following a further conference call on 8 July 2018, Mr Molina emailed the Alantra team "*With respect the points discussed ... earlier today*", stating on the material point that:

"*With respect to the unregistered REOs, we are prepared to increase the threshold that triggers the extension of the DPP from €2.5m to €7.5m.*"

87. The plain meaning and effect of Cerberus' 6 July proposal was:

(i) to accept, subject to (ii) below, Sabadell's insistence that Unregistered REOs be contributed, definitively and irreversibly, such that the full deal price, inclusive of the AVs of all Unregistered REOs, would be earned at closing (i.e., for each REO, when it was contributed, either at the Effective Date or on a subsequent Singular REOs Transfer Date);

(ii) at the Maturity Date, to extend payment of AV(U), i.e. an amount equal to the sum of the AVs of REOs that were still then Unregistered REOs, if that amount was above a threshold, for which €2.5m was suggested in the initial proposal, increased to €7.5m on 8 July after the conference call that day; and

(iii) for that further extension to last "*for as long as Banco Sabadell wishe[d] until the Unregistered REOs are registered*". That did not make clear (a) what it was proposed would happen if, when Sabadell in its option brought this further financing period to an end, there was still at least one Unregistered REO, or (b) whether AV amounts would be payable as registrations continued to be achieved before Sabadell called time on any further financing.

88. The firm joint expectation was, and so the Cerberus proposal assumed, that AV(U) would be below, very probably far below, the Maturity Date DPP. That is why the DPP financing already contemplated provided a cashflow mechanism through which to give effect to Cerberus' idea for deferring payment beyond the Maturity Date of an amount equal to AV(U).

89. On its terms and in its context, the 6 July proposal could not reasonably have been read, and on the evidence I am confident that it was not read at the time by anyone, as proposing that payment of the deferred part of the AVs of REOs that were then no longer Unregistered REOs would be deferred beyond the Maturity Date, or would depend in any way on whether the AV(U) threshold was hit. Mr Dejanovic claimed in his evidence to have intended and understood the 6 July proposal in that way, such that payment of the whole Maturity Date DPP was at risk if the AV(U) threshold was not reached. I judge that to have been a lie as part of Mr Dejanovic's concocted narrative.

90. On 9 July 2018, in reply to the email from Mr Molina referred to in paragraph 86 above, Mr Grau sought written confirmation from the Cerberus team "*on some of the points that have been clarified over the phone these days*". The first of those was set out in these terms:-

"***1. Reclassification of the "pending writ" REOs to a wider category of "unregistered REOs".***

- *The pending writ REOs would be synthetically contributed to the Companies on Effective Date as Banco Sabadell proposes to do with the Particular REOs. Unregistered REOs not being pending writ REOs (e.g., REOs in need of title chain update -reanudación de tracto-, etc.) will not be affected by these rules. The transfer of legal title to the Companies would be conditional on the issuance of the award of a non-appealable writ (decreto o auto firme).*

- *The purchase price of the pending writ REOs would be paid at Effective Date.*

- *If the sum of the Allocated Value of the pending writ REOs at the maturity date of the DPP is higher than €7.5m (the "Pending Writ REOs Franchise"), repayment of the DPP in an amount equal to the sum of the Allocated Value of the pending writ REOs at the time in excess of the Pending Writ REOs Franchise will be extended for as long as Banco Sabadell wishes until the award of the non-appealable writ (the extended DPP being repaid pro rata to the Allocated Value of each REOs obtaining non-appealable writ over the sum of the Allocated Values of the Pending Writ REOs as of Maturity Date). Such repayment will take place on monthly batches … . At any time following the first extension of the DPP, Banco Sabadell may elect to have the extended DPP fully repaid by relinquishing [50]% of its then outstanding amount and assigning to the Companies the underlying loans or credit rights, relating (or inherent to) the REOs that lack the non-appealable writ … . For the avoidance of doubt, the synthetic transfer of the pending writ REOs cannot (and shall not) be totally or partially reversed.*"

91. Once the detail of the third bullet point is absorbed, in context it can be seen readily enough that this possible structure differed from Cerberus' 6 July proposal in two respects: it limited the REOs that would be subject to this extra element of the deal to a sub-set of the Unregistered REOs, *viz.* the Pending Writ REOs; and it limited the extended financing amount to the excess of their aggregate AV over the €7.5m threshold. In addition, it proposed to resolve the ambiguities to which I referred in paragraph 87(iii) above, (a) by providing that if Sabadell called time on the extended financing when there was still at least one Unregistered REO, it would accept a discount on the AV of each such REO, a discount of 50% being suggested, and (b) by making clear that there *would* be periodic payments, monthly being proposed, during any extended financing period such that the AVs of Pending Writ REOs that were registered during that period became paid up in full.

92. Mr Molina replied by email, later on 9 July 2018, with Cerberus' "*position on the points you raise in your email …*" On the first point, that position was this:

"***1.- Reclassification of the "pending writ" REOs to a wider category of "unregistered REOs".***

- *The unregistered REOs would be synthetically contributed to the Companies on Effective Date as Banco Sabadell proposes to do with the Particular REOs. The transfer of legal title to the Companies would be conditional on the registration of the REOs at the Land Registry.*

- *The purchase price of the Unregistered REOs would be paid at Effective Date.*

- *If the sum of the Allocated Value of the unregistered REOs at the maturity date of the DPP is higher than €7.5m, repayment of the DPP in an amount equal to the sum of the Allocated Value of the unregistered REOs at that time will be extended for as long as Banco Sabadell wishes until the unregistered REOs are registered. Such repayment will take place quarterly, with references to the unregistered REOS being registered in the previous calendar quarter. [**Note to BS**: We are open to discuss the concept of a long-stop date.]*" (original highlighting)

93. Thus, Cerberus were sticking to their proposal that the extended financing should affect all still-Unregistered REOs, and that its amount should be AV(U), not just the excess of that amount over the threshold. The principle of paying AV(U) down as continuing progress was made with registrations was accepted, but with a counter-proposal for quarterly rather than monthly payments. Finally, instead of the idea that Sabadell could at any time opt to take a 50% haircut on the then remaining balance, to bring the extended financing to an end, Cerberus suggested, for discussion, the idea of a long-stop date, without saying what they proposed in relation to the AV of any REOs that were still then Unregistered.

94. Mr Grau sent a holding email in response later that night, thanking Mr Molina for his email and saying that he would review it with Sabadell and revert.

95. On the basis of that exchange of emails, then, both parties were proposing an extended financing arrangement relating to the aggregate AV of REOs that were still Unregistered REOs at the Maturity Date, if and only if that aggregate AV exceeded €7.5m, but they needed to discuss with a view to finding agreement, if they could:

(i) whether any extended financing should concern all Unregistered REOs at the Maturity Date or only Pending Writ REOs as at that Date;

(ii) whether the amount to be financed should be the full aggregate AV of those REOs, or only the excess of that amount over the €7.5m threshold;

(iii) the period for periodic payments of the amount financed, by reference to continuing registrations achieved (monthly or quarterly, or something else); and

(iv) what if any provision to put in for terminating the extended financing short of registration being achieved for every single relevant REO.

96. To illustrate (ii) above, for the Challenger portfolio, the DPP was going to be of the order of €500m. Suppose that at DPP maturity the aggregate AV of the REOs to be compared against the threshold was €50m. Then the point of difference under (ii) above, as at 9 July 2018, was that under Cerberus' original proposal and again under its reply to Sabadell's counter-proposal, the extended financing period would be for €50m, but under Sabadell's counter-proposal the extended financing would be limited to €42.5m. There was no thought or suggestion on either side that payment of the rest of the Maturity Date DPP, in my example an amount of the order of €450m, would be further deferred, or at any risk of not being paid. That is not at all what the parties were talking about. Again, I regret to say but have no doubt that Mr Dejanovic was not being honest in claiming to have thought at the time that anything like that was ever on the table.

97. Following that exchange of emails, in the late evening of 10 July 2018 Alantra circulated revised draft IAs prepared in marked-up form by Uria Menendez, in preparation for in person negotiations later that week. 10 July 2018 was a Tuesday and the parties met in person from the Thursday, 12 July 2018.

98. That 10 July 2018 mark-up, so far as material, provided for 20% DPP to be payable not later than the Maturity Date, two years after the Effective Date, and dealt with the Unregistered REOs by:

    (i) accepting Cerberus' position on paragraph 95(i) above, with a note in the draft where some of the defined terms first appeared saying "***Note to Cerberus**: Unregistered REOs category acceptable to the extent there is a Deferred Purchase Price structure*", but otherwise reiterating Sabadell's proposals, in that:

    (ii) it provided that if AV(U) exceeded €7.5m, payment of the excess (only), defined as Extended DPP, would be "*further extended until the registration of the relevant Sellers' title over the outstanding Unregistered REOs at the Land Registry*";

    (iii) Extended DPP was to be paid on a monthly basis pro rata (based on AVs) to the Unregistered REOs that had ceased to be such; and

    (iv) Sabadell could elect on 10 days' notice "*to have the Extended DPP fully repaid … by relinquishing 50% of its then outstanding amount …*".

99. The Extended DPP definition, and drafting based on it, was evidently designed to give effect to the proposal that any extended financing be restricted to the excess of AV(U) over the €7.5m threshold. It was removed when that proposal was rejected. That removal does not evidence, as Mr Scott KC sought to argue, that the parties no longer had in mind an extended financing limited to AV(U) but had instead moved to the radically different idea of extending financing for the whole Maturity Date DPP.

100. How to deal with points (ii) to (iv) in paragraph 98 above was one of the main topics discussed and negotiated on 12 and 13 July 2018, in person in Madrid. The issues discussed, and thus the matters to be addressed in any re-drafting of the draft IAs, all concerned what was to happen if the €7.5m threshold was not achieved, and were: whether there should be a fixed long-stop date for the financing of the Unregistered REOs' AV; what options Sabadell should have to terminate that financing; and how much, if anything, would be paid for REOs that were still Unregistered REOs at the end of the extended financing period.

101. On the witness evidence, and in the light of the pre-meeting correspondence, I am sure that the parties' terminology on that last aspect was that of how much of the AV of an REO that was still Unregistered when any extended financing ended would be paid or, to the contrary, given up. At every stage the joint idea was to build any solution into the DPP financing provisions of the IAs. The evident intent, in other words, was that whatever level of discount off the AVs of stubbornly Unregistered REOs was finally agreed, would be achieved, as a matter of machinery, by taking that off DPP otherwise falling due for payment.

102. All of the pre-meeting exchanges proposed that the AVs of Unregistered REOs that became registered by the Maturity Date, or after the Maturity Date but prior to the end of any extended financing period, would be paid in full, one way or another. Cerberus never sought, and Sabadell never offered, any discount on, let alone relinquishment of, the AVs of REOs on which registration was achieved before any long-stop date. I accept the evidence of Mr Oliú and Mr Grau that that continued to be the position through the discussions in Madrid on 12 and 13 July 2018.

103. The limited grain of truth within Mr Dejanovic's evidence about this aspect of the negotiations is that Cerberus' negotiating position was to seek an end result in which it paid nothing *for REOs that remained Unregistered REOs to the end*. Sabadell was at no time happy to agree to such a full waiver of associated AV, but its proposal for a uniform 50% haircut was not acceptable to Cerberus, and Cerberus explained as much, because they felt it was not appropriate to use a uniform rate and if, despite that, there had to be a uniform rate, it should be a lot bigger than 50%.

104. The breakthrough in the negotiations, which Mr Grau remembered exactly in that way, as a breakthrough moment, was when the proposal emerged to use a fair market valuation of stubbornly Unregistered REOs as the means by which to determine how much should ultimately be paid for them, with a long-stop for any extended financing of one year (hence the Extended Maturity Date, three years after the Effective Date). Both deal teams were happy with that solution. I accept in part a criticism advanced by Mr Scott KC of Mr Grau's evidence on this. His written evidence in chief was muddled as to the detail and timing of the Sabadell proposal, not agreed, for a uniform 50% haircut, and the fair market valuation solution that unlocked negotiations. Nonetheless, I judged that he had a genuine, reliable recollection that the mark-to-market idea for stubbornly Unregistered REOs was indeed the breakthrough, and it is clear on the documents that it arrived, and was agreed in principle, during the negotiation meetings over 12-13 July 2018.

105. The different proposals exchanged prior to those meetings did not include or hint at anything like the mark-to-market solution; and it is apparent from the documents that that solution arrived prior to the weekend of 14-15 July 2018, after which in person negotiations continued. A revised draft for the IAs was prepared by Uria Menendez on Saturday 14 July 2018 and circulated late that evening. It removed the 10 July drafting for Extended DPP of the balance of AV(U) in excess of the Unregistered REOs Threshold, and the 50% haircut at a long-stop date or earlier date elected by Sabadell. It inserted, for the first time, drafting for a fair market valuation of stubbornly Unregistered REOs, with detailed machinery for it.

106. The 14 July re-draft was circulated under cover of an email describing it as a "*revised draft*", sent in versions "*both clean and compared against the latest draft circulated on Tuesday [i.e. the 10 July draft]*" and saying that "*Given the time constraints, we are circulating this draft simultaneously to all parties. It therefore remains subject to our clients' comments and sign-off.*" The tenor of that covering email is that Uria Menendez were proffering a draft to reflect where the parties had reached at the meetings, and from the witness evidence I am confident that that is both the truth of it and how this 14 July re-draft was understood on both sides. That is to say, it was evidently not intended to contain, nor was it presented as containing, new ideas; it was intended to implement, and presented as an attempt at implementing, that which had been discussed and agreed in principle at the meetings.

107. Much of the 14 July re-draft is materially similar, for my purposes, to that of the final IAs. Some changes of substance did come later, however:

(i) The primary DPP financing was still 20%, but that became 21% in the final version.

(ii) If AV(U) exceeded €7.5m at the Maturity Date, effectively Sabadell could opt for any date, up to the long-stop of the Extended Maturity Date, as at which a fair market value appraisal would be conducted for the then still Unregistered REOs, whereas in the final IAs that became a series of four options, one at the Maturity Date, to trigger the fair market value appraisal immediately, with no extended financing, and then, if Sabadell opted to extend, a further option once per quarter thereafter to terminate the extended financing at the end of that quarter.

(iii) The final version included provision for the fair market value process not to be required after all, but any remaining DPP to be payable in full at the Extended Maturity Date, if the Unregistered REOs Threshold was achieved by then, which was not in the 14 July re-draft.

108. Mirroring their argument on the final IA terms, Cerberus argued that the 14 July re-drafting had the effects that (a) the entire Maturity Date DPP, not just an amount equal to AV(U), would be deferred at the Maturity Date if extended financing was triggered, and (b) A(P) = FM(U), so that the fair market value process, if it applied, would discount the Price not by AV(U) – FM(U), a mark-to-market adjustment on still-Unregistered REOs, but by Maturity Date DPP – FM(U), i.e. something like 20% of the entire Price. The further argument then was that the 14 July re-draft, likewise the final IA text developed from it, so clearly had those effects, that:

(i) given paragraph 106 above, the court should find that those effects had been discussed and agreed between the deal teams prior to the weekend; and/or

(ii) since neither side raised any objection to the drafting, rather the parties jointly adopted and developed it in finalising the IAs, the court should conclude that their evident intention was or became to contract for those effects.

109. I do not accept the premise of that argument. For the same reasons as I set out, above, when considering the final IA text, the material drafting, by itself, is dense, complex, unclear, and, despite the professional draughtsmanship, not always precise. It does not support either the inference urged by Cerberus, as to what was discussed prior to the weekend, or the conclusion advanced by Cerberus, as to contractual intent. Furthermore, as to what was discussed prior to the weekend, there is nothing in the covering email by which the 14 July re-draft was circulated indicating any intention to create either of the effects for which Cerberus contend, nor any other hint in any contemporaneous document that Sabadell had just bargained away (albeit contingently) up to something like €700m; and I accept Mr Oliú's and Mr Grau's evidence that nothing of the sort now suggested by Cerberus was proposed or discussed at the meetings, and that any such proposal would never have been acceptable to or knowingly accepted by the Sabadell deal team.

110. Mr Dejanovic's written evidence in chief included contrary evidence that naturally featured, in anticipation, in Cerberus' opening skeleton argument for trial, to the effect, in substance, that it was expressly proposed and agreed that no part of the primary funding of 20% of the price was to be payable unless the Unregistered REOs Threshold was achieved. But that was dishonest evidence, by which Mr Dejanovic was pretending that what became Cerberus' stance only in late 2022, for negotiation and litigation purposes, had been discussed and agreed back in 2018. Witnesses who lie may do so for any number of reasons, and it would not be right to make positive findings of fact in favour of Sabadell wholly or mainly because Mr Dejanovic was willing to lie about this. But I did judge that he was lying here because he in fact remembered full well that nothing of the sort was discussed, and that, to the contrary and as Sabadell has always said, the fair market valuation process was proposed and agreed at the meetings in Madrid as no more than a mechanism for setting the discount to be applied to the AV of REOs that remained Unregistered REOs to the bitter end. Mr Dejanovic's dishonesty on the point therefore can and in my view does corroborate the relevant testimony of Sabadell's witnesses.

111. Thus I find that neither of the effects contended for by Cerberus (paragraph 108 above) was proposed for discussion or agreement between the deal teams before the 14 July re-draft by Uria Menendez. Nor, I find, was it identified between the deal teams as possibly having been introduced by the re-drafting. That is to say, neither side identified to the other during the further negotiations in person in Madrid, after that weekend, or at any time prior to the finalisation and signature of the Coliseum and Challenger IAs, any thought or understanding that the provisions of or developed from the 14 July re-draft might do anything more than it had been agreed in principle prior to the weekend should be done through a fair market value process, namely fix how much of AV(U) might come to be waived and not paid.

112. In reaching that conclusion, I have not overlooked the fact, relied on by both Mr Scott KC for Cerberus and Mr Barden for the Investor, that Sabadell's case was pleaded initially, here and in certain Spanish proceedings, with a focus on what should have been paid at the Extended Maturity Date that either expressly or implicitly may have treated the full Maturity Date DPP amount as having been not only unpaid in fact but also deferred as a matter of contract (to the Extended Maturity Date). I cannot make a specific finding as to how that came about. As with the fact, referred to below, that Mr Palavecino apparently has that understanding of the contract, it does not in my view create any real doubt about what was and was not discussed and agreed in Madrid. It does not outweigh the evidence I had the benefit of being taken through and hearing at trial, and the analysis I have now set out of its effect and implications.

113. The increase in the primary DPP percentage, from 20% to 21%, came out of the final negotiations between the deal teams after the weekend. The first draft IA reflecting it was sent by email by Linklaters for Cerberus to Uria Menendez for Sabadell in the middle of the day on 17 July. In the Header text, the marking up is confusingly dated 15 July; but it is clear from the covering email that it was done on 17 July to build on discussions the previous day. It drafted the possible extended financing as a matter in Sabadell's option, if the €7.5m threshold was not met at the Maturity Date, with no option thereafter to terminate it any earlier than the Extended Maturity Date.

114. I accept Mr Grau's evidence about the 21%, which was that it was his proposal as a *quid pro quo* for Cerberus' acceptance of the fair market value mechanism as the means

by which to fix what would be paid for REOs that were still Unregistered REOs to the end. As Mr Grau explained, it was common knowledge between the deal teams that Cerberus would be funding the deal mostly through borrowing from external lenders. The increase from 20% to 21% of the main two-year price funding generated a material reduction in the equity funding Cerberus would require, and a material improvement to Cerberus' anticipated rate of return. That evidence further corroborates my conclusions as to the evident intent of the fair market value process. By that element of the deal, Cerberus was agreeing to pay FM(U), rather than nothing, for the final rump of stubbornly Unregistered REOs, requiring a final price adjustment of AV(U) – FM(U). It was logical for Sabadell to offer a sweetener of some kind elsewhere in the deal for that. If as Cerberus now contend the fair market value process put the entire primary DPP financing at risk for Sabadell, it would have been crazy for Sabadell to be offering to increase that risk by increasing the main pre-Maturity DPP percentage.

115. That is how it could be that internal authorisation was sought within Sabadell for the increase to 21%, as it was, on the basis that it was a measure agreed "*in order to maximise the outcome of the transaction*" rather than (as Cerberus would have it) a measure by which Sabadell had put €37.6m at risk of never being paid. Indeed, more generally, it is inconceivable that the communicated understanding or intent at the meetings in Madrid could have been as Cerberus now claim, yet no mention was made when seeking approval for the deal within Sabadell that the proposal to mark stubbornly Unregistered REOs to market could wipe anything up to c.€750m off the combined Coliseum/Challenger price (20% of (€2.56bn + €1.2bn) is €752m).

116. I do not accept Mr Dejanovic's suggestion, which I judged to be an invention during his oral evidence, that the increase to 21% arose because of a change of some sort after the weekend of 14-15 July 2018 in respect of the costs of carrying Unregistered REOs that would be shifted off Sabadell's books into the new holding structure. There was no material change on that and this was, I regret to say, another part of Mr Dejanovic's effort to argue that there was a sensible commercial rationale for the bargain Cerberus now claim was struck.

117. Early on 18 July 2018, Uria Menendez circulated a further draft (in which the Header text dated the marking up as 17 July). This draft introduced the quarterly options in Sabadell after the Maturity Date, to accelerate the end of the extended financing to the end of the quarter, that were in the final IAs, and the provision to which I alluded in paragraph 107(iii) above (with related amendments).

118. In the late evening of 18 July, Alantra sent Linklaters a set of worked examples to illustrate the effect of the extended financing arrangements, as they (Alantra) understood them. Linklaters were asked to have Cerberus look at them to "*see if they are happy*". Linklaters forwarded the worked examples to the Cerberus deal team, saying that Alantra might wish to attach them to the IA and asking: "*Could you please review as well and tell us if you are comfortable?*". Mr Collins KC for Sabadell submitted that it was overwhelmingly likely that the Cerberus team, and Mr Dejanovic in particular, will have looked at those to make sure they *were* happy before the IAs were signed the next day. I agree. In his evidence, Mr Dejanovic claimed not to have looked at them, but I consider that to have been another lie, put forward because he knows he was happy at the time that the examples reflected accurately the deal negotiated in Madrid, but he realises that they are directly inconsistent with Cerberus' case as to what that deal was.

119. The inconsistency is that in the worked examples, (a) the amount of DPP that might be deferred beyond the Maturity Date is always given as AV(U), never Maturity Date DPP, and (b) the amount of debt forgiveness, i.e. relinquishment of DPP, following a fair market value appraisal was always given as (only) the excess of AV(U) over FM(U), never the excess of Maturity Date DPP over FM(U), which would have run to hundreds of millions of Euros. None of the worked examples modelled exactly the scenario that ultimately arose on the Challenger IA, namely AV(U) > €7.5m both at the Maturity Date and at the Extended Maturity Date. But that does not detract from the force of what I have just said about the inconsistency with Cerberus' case.

120. Throughout the negotiations, there was a measure of confidence on Sabadell's side that getting AV(U) down to the €7.5m threshold by the Maturity Date, or failing that by the Extended Maturity Date, might be achievable. But it was at all times appreciated on both sides, and it was the context of all the discussions about what to do with stubbornly Unregistered REOs, that it might well not be achieved. Another invention of Mr Dejanovic's which I reject was the notion that Sabadell consistently expressed unwavering complete confidence that the threshold would be hit. Yet again, that was Mr Dejanovic weaving a narrative in which it might be explicable that Sabadell would agree an arrangement in which if the threshold was missed, even by €1, Sabadell would give up something like 20% of the entire purchase price.

121. The Coliseum and Challenger IAs were finalised and signed on 19 July 2018.

Rex IA

122. The Rex IA was signed on 2 August 2019. It related to a further portfolio of REOs that was put together alongside work that was done to fulfil the conditions precedent allowing the Coliseum and Challenger transactions to move to completion. The AV(U) threshold for the Rex portfolio was set at nil and the IA terms were correspondingly simplified, as I mentioned above.

Completion

123. Initial completion was achieved with an Effective Date of 20 December 2019. The REOs to be contributed that were not Singular REOs at the Effective Date were contributed then, and the non-deferred part of the price referable to those REOs was paid.

124. Subsequent completions occurred on three Singular REOs Transfer Dates (in March, June and December 2020). On each of those Dates, REOs that had been Singular REOs on the Effective Date were contributed, and the non-deferred part of the price referable to those REOs was paid.

125. The Effective Date Notice and the Singular REOs Transfer Date Notices also recorded the AVs of the REOs that were to be excluded pursuant to certain terms of the IAs with which I am not directly concerned. For example, in the Effective Date Notice the parties agreed that REOs with aggregate AV of €95,876,650 were to be excluded from Challenger.

126. In addition, Sabadell repurchased some REOs. The IAs and a Clarification Letter dated 12 December 2019, executed alongside the Effective Date Notice, provided for

Sabadell to repurchase, in certain circumstances, Defective REOs (under Clause 9.5.1 of the IAs), Reputational REOs (under Clause 9.9 of the IAs), and Affected REOs (under Clauses 2.4.1 and 2.4.6(B) of the Clarification Letter).

127. For repurchased REOs, the Sellers were to pay 100% of their AVs (adjusted pursuant to Clause 9.5.1(A)-(E) of the IAs to reflect income and costs associated with those REOs). In the case of Affected REOs, Clause 2.6 of the Clarification Letter provided that, at the same time, the Investor was to pay down DPP in an amount equal to 21% of their AV (subject to the same adjustments). There was no corresponding provision in the IAs for Defective and Reputational REOs repurchased by Sabadell, meaning that 21% of their AV continued to contribute to the running DPP balance up to the Maturity Date. I agree with Mr Collins KC's submission that, objectively, that makes sense only if that deferred 21% was to be unconditionally payable at the Maturity Date.

128. There were Repurchase Letters under those provisions dated 11 June, 15 October and 14 December 2020, 26 March, 25 June, 29 September and 20 December 2021, and 30 March, 30 June and 30 September 2022. Each of the Repurchase Letters recorded in terms thus agreed between the parties the then "*current aggregate Deferred Purchase Price of the [IAs] (the "**DPP**")*", tabulated so as to break that total down by IA and as between the Effective Date and each Singular REOs Transfer Date, all after taking into account any "*partial repayments of the DPP*" pursuant to prior Repurchase Letters, exclusions, or, in 2022, quarterly payments of DPP as a result of registrations of Unregistered REOs that quarter. Those DPP balances were and remained very large, because Sabadell did not invoice or otherwise demand payment of any part of the Maturity Date DPP apart from those quarterly amounts from new registrations and amounts arising from repurchases. Whether those very large running totals support the case that the parties' evident contractual intention was for the entire Maturity Date DPP to be extended at the Maturity Date is therefore bound up with the question of what that failure to demand payment indicated. I deal with that below.

Registration of Unregistered REOs

129. Obtaining title, and the registration of that title, involved a number of steps. The achievement of registered title was partly in the hands of Courts, the Land Registry, and (in some cases) local authorities across Spain. Therefore, though on a practical level Sabadell was closer to what was happening than Cerberus were, progress generally, and, in particular, getting AV(U) down to €7.5m for Coliseum and Challenger or eliminating it for Rex, was not within Sabadell's control.

130. Clause 3.3.2 of each IA required the Investor and the Sellers to appoint a Registration Team, and jointly to appoint and pay for a Registration Service Firm. The Registration Team was to determine what actions should be taken to expedite registrations; and Clause 3.3.2(B) also provided that the Investor and the Sellers were to have regular meetings to monitor and discuss progress and were to adopt such additional measures or actions that may be required. I accept Mr Ramos' evidence that the Registration Team was quite informal at first but became more formal; that it consisted of representatives from Sabadell, Cerberus, Cerberus European Servicing ('CES', a Cerberus-owned services company), and Solvia Servicios Inmobiliarios ('Solvia', the Registration Service Firm); that it met on a monthly basis at Cerberus' Spanish offices; and that it involved the presentation of reports about the registration process.

131. The Registration Team reported to Sabadell, Cerberus and HoldCo, including by circulating progress reports every two weeks to CES and HoldCo. Later in the process, there were also discussions about registration directly between Sabadell and HoldCo (and, on occasion, Cerberus Spain).

132. As of 30 November 2021, AV(U) was c.€139.5m in aggregate across the three IA portfolios. By letter dated 1 December 2021, Sabadell notified the Investor of its intention to opt to extend under Clause 2.2.2 of each of the IAs. The letter noted that the difference between that AV(U) total and the aggregate DPP across the IAs stood then at c.€493.2m, implying an aggregate DPP of c.€632.7m.

133. As evidenced by the December 2021 Repurchase Letter, that aggregate DPP balance was marginally lower at the Maturity Date. After taking into account the repurchase of REOs provided for by that Letter, the aggregate DPP across the IAs was €632,169,843.61, with Maturity Date DPP of: €392,975,600.00 for Challenger; €189,762,520.21 for Coliseum; €49,431,723.40 for Rex. As I note below, that was later confirmed to have been c.€499.7m above AV(U) at the Maturity Date, meaning that AV(U) was then c.€133.5m, down c.€6m from 30 November 2021.

134. Sabadell duly opted to extend the financing period under all three IAs, and did not exercise any of its quarterly options to terminate that period early. In the event, AV(U) in the Coliseum IA was brought down below the €7.5m threshold by the Extended Maturity Date, but:

    (i) AV(U) for the Challenger IA at the Extended Maturity Date was still some €34,383,359.50; and

    (ii) for the Rex IA, it was €3,731,775.36.

135. Cerberus have proposed that the fair market value at the Extended Maturity Date of that rump of stubbornly still-Unregistered REOs, might be, in aggregate, only 15% of AV. If that is about right, then for the Challenger IA, it would mean that to pay AV for those REOs would be to pay c.€29m above their fair market value. The unpaid balance of Challenger DPP at the Extended Maturity Date was c.€356m. To illustrate the parties' rival cases one more time, now by reference to the position in fact obtaining at the Extended Maturity Date and if Cerberus' 15% fair market view is about right, the fact that paying Challenger DPP in full would mean paying c.€29m above market for that rump of Unregistered REOs:

    (i) would mean, on Sabadell's case, that the €29m odd fell to be deducted, leaving c.€327m to be paid; whereas

    (ii) on Cerberus' case, it would mean that c.€351m was written off, and (in their primary argument) c.€36m plus interest would be repayable by the Sellers, being the amount of Challenger DPP that was paid under the quarterly payment regime during the extended financing period.

Refinancing Negotiations / IAs Extended

136. From October 2021, there were discussions between Sabadell and Cerberus regarding *inter alia* the possibility of extending the financing of the DPP that would otherwise

have to be paid at the Maturity Date in December 2021, and a put option in the associated Shareholder Agreements by which Sabadell could require to be bought out of HoldCo. No agreement was ever concluded.

137. It would have been obvious to all concerned, however, that the Unregistered REO thresholds were not going to be achieved by the Maturity Date. Yet the premise for all the discussions was that the vast majority of the DPP would be payable regardless. That was what, it was evident, Cerberus considered would need to be funded, hence their interest in further funding for it from Sabadell.

138. At a meeting on 26 October 2021, of which there is a contemporaneous note, there was discussion of the scenarios that could play out if no agreement was reached. Mr Dejanovic, who was not at the meeting, claimed in evidence that the interpretation of the IAs now put forward by Cerberus was raised. That is impossible to square with the recognition, at and after the meeting, most notably by Mr Molina, that the subject matter of the proposed refinancing was a very large DPP debt that would be liquid and assignable, due and payable irrespective of achieving (or not) the Unregistered REOs thresholds. Mr Lopez, who was at the meeting, remembers it as having been acknowledged and agreed in all of these negotiations that the outstanding DPP amount not referable to still-Unregistered REOs was due "*regardless of the volume of unregistered REO*".

139. Mr Dejanovic claimed in a supplementary statement to have been given an account of the meeting by Mr Molina that supported his contention as to what was said. There was no explanation in evidence for why, if that were true, Mr Molina was not giving evidence himself. Even if Mr Dejanovic had not been such an unsatisfactory witness, it would not have been appropriate to place any weight on that hearsay evidence about the 26 October 2021 meeting.

140. The contemporaneous record of the meeting evidences that Gonzalo Barettino (Head of Legal at Sabadell) noted that any new financing agreement should include an acknowledgment of liabilities by Cerberus, and Mr Molina confirmed his assumption that "*the debt associated with the registered assets will be recognised and therefore it will be liquid and payable*". That captures neatly and accurately the legal and accounting effect of Sabadell's interpretation of the DPP deal as it stood under the IAs: up to the Maturity Date, the DPP was 21% of the aggregate AV of all contributed REOs; at the Maturity Date, the impact of not having hit the Unregistered REOs thresholds was to split that very large debt into two parts, (a) the aggregate AV of the still-Unregistered REOs (my AV(U)), which would <u>not</u> be liquid and payable, because it would be either marked to market at the Maturity Date or deferred, and (b) the balance, naturally then described as "*debt associated with the registered assets*". It is that balance, therefore, to which Mr Harbach (senior in-house lawyer at Cerberus, then and now) was referring at the meeting when he is recorded as having said he had "*no problem allowing the liquid portion of the debt to be assignable …*".

141. I do not accept a submission by Mr Scott KC for Cerberus that the meeting was a settlement discussion of a dispute over whether payment of Maturity Date DPP in excess of AV(U) depended on whether AV(U) hit the IA thresholds. The meeting note records Mr Barettino as having opened by saying that it was in the interest of both parties "*to reach a speedy agreement on the DPP and the put option*", and that the two matters were "*closely linked, especially if [Sabadell] is forced to file a lawsuit in*

relation to the put option (since it would establish it is objectively impossible to come to an amicable settlement for the DPP, an aspect [Mr Harbach] agrees on (using the words "syndicated matters")." Although he was not at the meeting, I find that Mr Palavecino knew well the background to it at the time, and retains a good recall of that and of what he was told about the meeting by Messrs Barettino and Lopez immediately after it. I accept his evidence about that, which was that:

(i) Sabadell had exercised the put option so that the parties were supposed to be agreeing the price or appointing an expert to determine it;

(ii) in Sabadell's view, Cerberus were not dealing with that process properly and that was threatening to become a litigation dispute;

(iii) there was no dispute in relation to Maturity Date DPP, but DPP and the put option became linked because Cerberus were asking for financing terms to fund the very large Maturity Date payment obligation that was going to arise in respect of DPP, and wanted to resolve the put option issue in the same discussions, and Sabadell knew for its part that there would be a decision to make on whether to extend financing under the IAs as they stood if the discussions did not result in a revised deal, and the bad situation Sabadell felt that Cerberus were creating in relation to the put option might push Sabadell towards a commercial decision not to extend under the IAs.

142. The parties got as far as advanced drafts for a Facility Agreement to refinance the Maturity Date DPP. As the Maturity Date approached, the current version was a draft marked up by Cerberus and circulated on 10 December 2021. It provided for the entire Maturity Date DPP across all three IAs to be financed, i.e. (that would have been) the €632.2m referred to in paragraph 133 above. It provided for payment in instalments, the final one being €141,400,000, a little over the most recently notified aggregate of AV(U) for the three IAs of c.€139.5m (see paragraph 132 above). That last instalment alone would be subject to a defined set-off if the Unregistered REOs threshold was not achieved on all three IAs. Each IA where the threshold was not hit would contribute a set-off amount of the difference, for its portfolio, between AV(U) and FM(U). The AV(U) amount was referred to as contingent, the remainder to be financed as liquid or non-contingent.

143. In the event, discussion of such a possible refinancing continued into 2022, even after the Extended Maturity Date financing under the IAs as they stood had been triggered at the Maturity Date. That is important context when considering the implications of Sabadell's failure to invoice or otherwise demand payment for the major part of the DPP that, on its case, fell due for payment at the Maturity Date, namely the excess of the Maturity Date DPP over AV(U). The letter dated 1 December 2021 referred to in paragraph 132 above, having put that balance, in aggregate, at c.€493.2m as of 30 November 2021, said that on or around the Maturity Date, Sabadell would "*reach out … to, among others, inform you of any increase in the amount of the owed Deferred Purchase Price*". That indicated that Sabadell viewed that balance as falling due unconditionally at the Maturity Date, its amount being liable to have increased from c.€493.2m as at 30 November through further registrations, reducing AV(U), in the final three weeks before the Maturity Date.

144. In a letter to the Investor dated 17 March 2022, Sabadell referred back to that letter of 1 December 2021, notifying the Investor that "*the Allocated Values of the Unregistered REOs which were registered as at the Maturity Date (i.e., 20 December 2021) amount to circa EUR 499.7 million*". Read literally, that is not the update anticipated by the 1 December letter, but given the reference back to that letter, I think it was meant to be that update; and the letter of 14 December 2022 referred to in paragraph 160 below confirmed that indeed the figure of c.€499.7m was "*the net aggregate difference between the Deferred Purchase Price and the [AVs] of the Unregistered REOs as at the Maturity Date*". In other words, it *was* the "*owed Deferred Purchase Price*" in the 1 December 2021 letter, updated to the Maturity Date, or (to adopt Mr Molina's language from the October 2021 meeting) the "*debt associated with the registered assets*" at the Maturity Date.

145. The Investor responded to Sabadell's 1 December 2021 letter by letter dated 10 December 2021 stating that, if (as was then expected) the Unregistered REOs threshold was missed under all of the IAs at the Maturity Date and Sabadell opted to extend, "*no Deferred Purchase Price will be owed on 20 December 2021. The final amount of the Deferred Purchase Price will be determined in accordance with clause 2.2.2 of the Investment Agreements*". That created, for the first time, a difference between the parties over whether, if Sabadell opted to extend, payment of the Maturity Date DPP was deferred (as the Investor was now suggesting) rather than only payment of an amount equal to AV(U) (as Sabadell had indicated to be its understanding, and as had been the basis until then of the refinancing discussions between the parties).

146. Having said that, it is right to note that Mr Palavecino gave evidence under cross-examination that in 2021-2022 he thought, and today he still thinks, that under the IAs the entire Maturity Date DPP (as I have labelled it) was extended if Clause 2.2.2(B)(i)(2)(a) applied. He did not say that Cerberus or the Investor was ever told that, however. Nor was there any other evidence that they were told that was Mr Palavecino's view. Nor was Mr Palavecino involved at any stage with the negotiation or conclusion of the IAs, or at all with this transaction prior to February 2021. From all of the facts I have gone through to this point, I think it plain that was *not* Sabadell's evident view or intent at any time prior to the Maturity Date. I consider below the point that it did not seek payment of what it says was payable at the Maturity Date when the time came on and after 20 December 2021.

Events in 2022

147. Following the Maturity Date, Unregistered REOs continued to be registered, and payments of DPP were made in amounts equal to the aggregate AV of those registered each quarter, with accrued interest on those amounts up to payment. Final quarterly amounts for Q4 were not paid for the Challenger and Rex IAs, however, the dispute that is now the subject of this litigation had emerged by then, and on Cerberus' primary argument the payments made for Q1 to Q3 already exceeded in aggregate what Cerberus said would be the final liability of only FM(U).

148. Sabadell did not invoice for, or otherwise demand payment of, the Maturity Date DPP, less AV(U), for any of the IAs, at or during the months following the Maturity Date. Undoubtedly, as Mr Scott KC submitted, that is conduct capable of conveying an understanding that it was not yet due for payment. That in turn could imply an understanding that opting to extend under Clause 2.2.2(B)(i)(2), as Sabadell did, meant

deferring the liability to pay the Maturity Date DPP in its entirety. In that regard, I note again that Mr Palavecino said in his oral evidence that he thought at the time, and still thinks, that that is the position.

149. However, as I also noted above, there was no evidence that Cerberus was ever told that that was what Mr Palavecino thought. Moreover, it is not anything that was communicated as an intention or understanding during the negotiation and conclusion of the IAs. To the contrary, it was at all times then the parties' evident intent, as I have found, that only an amount equal to AV(U) would ever be deferred for payment beyond the Maturity Date. Furthermore, Sabadell had made clear in the correspondence in December 2021 and March 2022, referred to above, that it regarded the Maturity Date DPP as unconditionally earned and payable at the Maturity Date, and that was the agreed basis on which the refinancing negotiations proceeded until the Investor's letter dated 10 December 2021 suggested for the first time something different. Finally, the context was, in part, that those negotiations continued well into 2022, so that the failure to demand or press for payment of what should have been paid at the Maturity Date in the absence of a concluded refinancing is consistent with the taking of a commercial decision that it would not be helpful to do so rather than the holding of an understanding or contractual intention that nothing had fallen due for payment at the Maturity Date.

150. In my judgment, taking all of that into account, the failure to invoice or press for the payment that, on Sabadell's case, fell due at the Maturity Date, does not indicate that the parties' contractual intent under the IAs was that Maturity Date DPP was deferred in its entirety.

151. The provision of information relating to registrations continued during 2022. By mid-2022 the frequency of updates to Cerberus had increased to about weekly. A global view of Unregistered REOs was presented to HoldCo in October 2022 with a status breakdown at Week 40 showing AV(U) of c.€46m for Challenger, c.€17m for Coliseum and c.€6m for Rex. I agree with Sabadell that it was clear by then, and appreciated on both sides, that achieving the nil 'threshold' for Rex by the Extended Maturity Date of 20 December 2022 was out of the question, that it was very unlikely that the threshold of €7.5m could be achieved by then for Challenger, and that there was still real doubt over achieving it for Coliseum.

152. Despite that, the negotiation of the Facility Agreement continued without any material change to the proposed structure. A Sabadell list of open issues dated 3 November 2022 noted, for example, interest margin (Sabadell was seeking to increase that from 1.75% to 2.6%), and the price of the put option (which Sabadell was valuing at €151m and Cerberus at €141m), but no issue as to the basic economics of the transaction.

153. There was a meeting on 4 November 2022 between Mr Palavecino, the CFO of Sabadell (Leopoldo Alvear), Mr Dejanovic, and his Cerberus partner David Teitelbaum. Messrs Alvear and Palavecino noted that the total DPP outstanding, across the three IAs, was €574m, of which (as Mr Palavecino said in evidence it was put, echoing again Mr Molina's language), "*approximately €500 million were recorded [sic., registered] assets*". Mr Palavecino added (again as he said in evidence he put it), that "*unregistered assets, which had been significantly reduced, stood at between €60 and €70 million*".

154. In fact, the outstanding DPP across the three IAs then was c.€550m. The €574m figure mentioned by Mr Palavecino will have come from the then most recent Repurchase

Letter dated 30 September 2022 giving a figure of €573,974,441.55, but c.€24m of that had been paid down by the Q3 DPP payment.

155. Mr Palavecino referred to the global view amounts (paragraph 151 above), and told Mr Dejanovic and Teitelbaum that on those figures it would be impossible to meet the Challenger and Rex thresholds but that for Coliseum there were some large assets to be registered which might enable the threshold to be met.

156. On Sabadell's understanding of the deal, that all meant the Investor/Cerberus would need to fund a total obligation, including the option price, of at least c.€650m, and up to c.€700m depending on the size of any fair market value adjustment. Mr Dejanovic however proposed instead a payment, financed by Sabadell, of only €500m. He suggested this could be accounted for as DPP of €500m, valuing the still-Unregistered REOs at zero and the put option price at a nominal €1. That allocation was not of the essence of his proposal, however – it was certainly not his or Cerberus' position that the correct put option price was not in the range the parties had been discussing. In reality, Mr Dejanovic was asking for a discount of (up to) €200m on what he knew Sabadell thought would be due even if the Unregistered REO thresholds were not met.

157. Mr Palavecino's evidence, which I accept as reliable, continued thus:

"*27.Mr Alvear and I were very surprised at this proposal and asked why Cerberus thought that the Bank would be willing to consider a haircut of approximately €200 million on the debts that were owed to it. Mr Dejanovic then explained, for the first time, Cerberus's new interpretation of the contract. Specifically, Mr Dejanovic said that if any of the thresholds were not met in any of the portfolios then Cerberus would only have to pay the difference between the Allocated Values and the determined Fair Market Value for the unregistered REOs in those portfolios, and not the DPP for the registered REOs in those portfolios. Mr Dejanovic said that the Investment Agreements contained a heavy penalty for failing to meet the thresholds. I was shocked at this, as was Mr Alvear. Indeed, we were so surprised and dumbfounded that we asked Mr Dejanovic to explain Cerberus's position again (Mr Alvear required him to explain it a third time).*

28. Mr Alvear and I stated that the Investment Agreements did not say anything of the sort. I remember asking Mr Dejanovic why Cerberus was willing to pay €500 million, given the interpretation of the DPP clause which he had set out and the fact that the thresholds were not going to be met. I pointed out that, on Cerberus's interpretation, they would be paying hundreds of millions more than the amount which was contractually due. Mr Dejanovic responded that Cerberus was offering to pay a premium. I responded that I did not think Cerberus typically paid premiums and that he was in fact offering a haircut on a debt close to €700 million. I went on to say that the Bank could not even consider a haircut of €200 million which was contrary to the terms of the Investment Agreements."

158. The reality is that Cerberus sought at the November 2022 meeting to bargain for a discount of €150-200m on what both sides had previously been treating as unconditionally due, by claiming that the existing bargain entitled them to a discount of over €500m. As Mr Palavecino went on to say in his evidence, the attempt was rejected out of hand and brought the meeting to a close. He and Mr Alvear made clear

that Sabadell would treat Cerberus as in default if they maintained this new interpretation of the IAs and did not pay what Sabadell calculated to be due.

159. On 8 November 2022, the Investor adopted its 2021 Annual Accounts, as signed by five managing directors of the Investor on 19 September 2022. They recorded *inter alia* that: "*At 31 December 2021 the company has a debt to a credit institution amounting to EUR 633,073,068* ***being repayable in full on 20 December 2022****, being the extended maturity date as agreed between parties in the investment agreement. Consequently, the debt to the credit institution is presented as a current liability at 31 December 2021. The loan from the credit institution is comprised of the deferred purchase price owed to the seller of the shares in the indirect participation of the company …*" (emphasis added). There was nothing in the accounts to indicate that, as Mr Dejanovic claimed in his bargaining position at the meeting a few days earlier, the liability was thought to be conditional, or likely to be slashed by up to c.90% by operation of the same investment agreements.

160. On 14 December 2022 Sabadell wrote to the Investor and all guarantors noting that for the Coliseum IA, in the event, the Unregistered REOs threshold had been met. By that letter, Sabadell made clear that it therefore expected there to be payment of:

(i) the full outstanding DPP amount under the Coliseum IA, which it put at €177,145,327.56;

(ii) the balance of the outstanding DPP amounts under the Challenger and Rex IAs in excess of AV(U), which it put at €309,213,327.62 and €34,335,569.06, respectively, calculated (a) net of a DPP amount that was expected to fall due for payment separately under a final Repurchase Letter, and (b) without removing from AV(U) the Unregistered REOs that had been or by the Extended Maturity Date would have been registered during the then current final quarter;

(iii) in addition, because of (ii)(b) above, the aggregate AV of Unregistered REOs in the Challenger and Rex IAs that were registered during that current final quarter; and

(iv) in each case, interest at the IA rate on all sums to be paid.

161. That letter did not say anything about the fair market valuation process. It made it obvious, though, that Sabadell adhered to the position that that process had no bearing on liability for any of the amounts I have just listed, as it affected only how much of AV(U) would ultimately have to be paid.

162. In the event, at the Extended Maturity Date, AV(U) for Challenger was c.€33m, for Rex c.€4m. The Investor paid the Coliseum DPP in full but paid nothing in respect of Challenger or Rex DPP. Finally, as I mentioned in paragraph 147 above, when (on 22 December 2022) Sabadell quantified paragraph 160(iii) above, nothing was paid. The parties are also now in dispute over the expert determination process in relation to fair market value of the Unregistered REOs under the Challenger and Rex IAs at the Extended Maturity Date, and continue to be in dispute about the put option. Those matters are not before this court.

Decision

163. The material terms of the IAs, read sensibly and taken as a whole, are not in themselves clear as to whether, in the terminology I defined,

(i) as Sabadell contends, DPP(FM) = AV(U), or

(ii) as Cerberus claims, DPP(FM) = Maturity Date DPP, alternatively, Maturity Date DPP less Paid DPP.

164. However, the balance of indications in either direction that are available from the contractual language is in my view tipped distinctly in Sabadell's favour under the Challenger and Coliseum IAs. It is not tipped so clearly in Sabadell's favour under the Rex IA, simply on its own terms, but in that case there is additionally the inherent likelihood that the parties were not intending to change what had been agreed before for Challenger and Coliseum.

165. The extrinsic evidence demonstrates wholly convincingly that the parties' joint, communicated intention throughout the negotiation and conclusion of the IAs, and throughout their operation until the Investor first suggested something different by its letter dated 10 December 2021, was that, as Sabadell contends, the amount deferred at the Maturity Date, if Sabadell opted for the Extended Maturity Date arrangement where the AV of Unregistered REOs had not come down to the applicable threshold, was only to be that AV amount. That is to say, it was until 10 December 2021 the parties' evident joint understanding and intention that, in my terminology, DPP(FM) = AV(U).

166. Sabadell did not communicate after 10 December 2021 in any way so as to indicate it had come to the contrary view as to the effect of the IAs asserted by the Investor's letter of that date. The failure to invoice or otherwise demand payment of what had fallen due for payment at the Maturity Date, on Sabadell's reading of the IAs, in the circumstances obtaining at the time, was equivocal.

167. The material terms of the IAs, read sensibly and taken as a whole, are not in themselves clear as to whether, again in the terminology I defined,

(i) as Sabadell contends, A(P) = DPP(FM) – (AV(U) – FM(U)), or

(ii) as Cerberus contends, A(P) = FM(U).

168. It cannot be said, in my judgment, that the balance of indications available from the contractual language is tipped in favour of either side as to that, except that if (contrary to my conclusion, above) Cerberus were correct about DPP(FM), meaning that the subject matter of Clause 2.2.2(B)(ii) is the entire Maturity Date DPP, then were they also correct about A(P), the amount payable under Clause 2.2.2(B)(ii), the result would be an absurdity that is highly unlikely to have been the parties' intended contractual effect.

169. Either way (as to DPP(FM)), the extrinsic evidence shows convincingly that the parties' joint, communicated understanding and intention was that the fair market value process provided for by Clauses 2.2.2(B)(i)(2)(b) and 2.2.2(B)(ii) was an agreed mechanism through which to adjust the Price by deducting AV(U) – FM(U). It was intended only

to mark to market the contribution to the Price from the REOs in the joint venture structure that were still Unregistered REOs at the fair market appraisal date, using an independent expert determination in default of agreement, the balance of the Price derived from the AVs of all the other REOs contributed being unaffected.

170. That was the parties' evident intent at all times until 4 November 2022, when Mr Dejanovic shocked Messrs Palavecino and Alvear by advancing a different interpretation for the first time, as a negotiating tactic. Given the prior clarity and consistency of joint understanding, it is unsurprising that Messrs Palavecino and Alvear's immediate, spontaneous reaction was to dismiss Mr Dejanovic's negotiating tactic out of hand, object that it did not reflect in any way what the IAs said, and end the meeting on that note.

171. As regards any principal sum due and unpaid by the Investor by way of DPP, it was common ground that Sabadell is entitled to be paid by Cerberus under their guarantees. In the circumstances, Sabadell is entitled to judgment for principal amounts equal to:

(i) Maturity Date DPP less Maturity Date AV(U), net of any Paid DPP resulting from Repurchase Letters as opposed to quarterly payments of AV(U) amounts, calculated for each of the Challenger IA and Rex IA, being in each case an amount that fell due for payment on the Maturity Date, 20 December 2021 but was not paid at the time, or when demanded a year later, and no part of which has been paid since. Subject to correction by the parties, I understand those amounts to be:

(a) €309,213,327.62 for the Challenger IA; and

(b) €34,335,569.06 for the Rex IA.

(ii) Also for each of the Challenger IA and Rex IA, the aggregate AV of the REOs that were still Unregistered REOs at the Maturity Date but were registered during the fourth quarter of the year following the Maturity Date, being in each case a sum that fell due for payment at the end of that quarter, 20 December 2022 but was not paid then, and no part of which has been paid since. Subject to correction by the parties, I understand those amounts to be:

(a) €12,829,832.78 for the Challenger IA; and

(b) €2,124,667.35 for the Rex IA.

(iii) In total, therefore, if those figures are correct, €358,503,396.81.

172. Sabadell claims interest on that principal sum under s.35A of the Senior Courts Act 1981, claiming interest to the Extended Maturity Date of €7,037,224.64 and continuing interest thereafter until judgment. I shall need assistance from the parties when this judgment is handed down as to whether there is any issue about that or as to the terms in which any judgment can be entered in favour of Sabadell for interest.

173. In principle, there should at some stage be an entitlement to the fair market value as agreed or determined by an independent expert pursuant to the Challenger and Rex IAs of the respective REOs that were still Unregistered REOs at the Extended Maturity

Date, 20 December 2022. I do not understand the principle of that to have been in dispute between the parties, but it was not an aspect on which relief was sought in these proceedings. Whatever dispute there may be about the fair market valuation process is not presently before this court.

174. If I had concluded that Sabadell was right about the limited nature of the fair market value adjustment under Clause 2.2.2(B)(ii), but Cerberus were right that payment of the entire Maturity Date DPP had been deferred at the Maturity Date, there may have been a question whether *any* DPP amount was presently due and owing so as to justify a money judgment, given that the fair market value assessment process has not been completed. If there could not have been a money judgment, for that reason, the appropriateness and utility of granting suitably drafted declarations would have been self-evident. As it is, I shall ask for assistance as to whether, since there will be a money judgment granted on the basis of the decisions set out above, any declaratory relief should be granted under Sabadell's Part 7 Claim.

175. Cerberus' Counterclaim against Sabadell fails and will be dismissed.

176. As for Cerberus' Part 20 Claim against the Investor, the Investor aligned itself entirely with Cerberus on the disputed issues, and I understood it to be common ground between Cerberus and the Investor that if Cerberus are liable to Sabadell, as I have held them to be, then the Investor is liable to indemnify Cerberus. The parties can assist me there too as to what, if any, substantive relief should now be granted under the Part 20 Claim, Sabadell's claim against Cerberus having succeeded.