JUDGMENT : Mr Justice Walker : Commercial Court. 4th July 2008

Introduction

1. This is a dispute between banks. They disagree both as to the substance of the dispute – whether certain things happened and what consequences should follow if they did - and as to where it should be tried.

2. The claimants are UBS AG, a Swiss bank, and UBS Securities LLC ("UBS LLC", formerly named UBS Warburg LLC), a United States subsidiary of UBS AG. In this judgment I shall refer to them together as "UBS". They began the present proceedings ("the English claim") seeking negative declaratory relief against the defendant, a German bank which I shall refer to as "HSH", by issuing a claim form on 25.2.08. Particulars of claim have been prepared in draft but, in circumstances which I describe below, have not yet been served.

3. Also on 25.2.08 HSH began proceedings *("the New York claim"*) in the Supreme Court of the State of New York, County of New York City ("the New York court") against UBS. For this purpose HSH filed a complaint ("the New York complaint") identifying 8 causes of action. UBS have filed a motion in New York *("the Motion to Dismiss")* for an order dismissing the New York complaint on substantive grounds, alternatively dismissing or staying the action on jurisdictional grounds. This is supported by both an initial "*Memorandum of Law"* and a "*Reply Memorandum"*. The New York court has heard argument on the Motion to Dismiss and its decision is awaited.

4. HSH has in the meantime applied in the English claim for an order that this court has no jurisdiction to try the claim which UBS seek to make in these proceedings. In the alternative HSH asks the court to decline to exercise jurisdiction on the grounds that the courts of New York are the natural and proper forum for the resolution of the dispute. The parties are agreed that this court should determine the procedural questions which arise in the English claim without awaiting the decision on the Motion to Dismiss. For that reason I have heard argument and proceed to give judgment now, without intending any discourtesy to the New York court.

The Transaction

5. It is common ground that on 5 March 2002 a transaction ("*the Transaction*") took place between UBS and Landesbank Schleswig-Holstein ("LB Kiel"). HSH was established on 2 June 2003 as the result of the merger between Hamburgische Landesbank and LB Kiel, and thereby assumed all material assets, rights and obligations of LB Kiel. It is in that capacity that HSH brings the New York claim against UBS and is the subject of the English claim brought by UBS.

6. Both sides agree that the background to the Transaction is accurately summarised in paragraph 6.1 of the draft particulars of claim: "*[LB Kiel] wanted to obtain exposure to certain credit products such as real estate related credit and asset backed securities ("ABS") which, at the time of the Transaction, were viewed in the market as having outperformed similarly rated corporate securities, following analysis published in January 2001 by each of the three principal rating agencies, Standard & Poor's, Moody's and Fitch. …*"

7. The Transaction is not easy to summarise. Helpful explanations were given in the written and oral submissions of Mr Andrew Henshaw on behalf of HSH and Mr David Railton QC and Ms Sonia Tolaney on behalf of UBS. What follows is my own attempt at a broad brush picture.

8. The precise structure of the Transaction had been under discussion for some months beforehand. It involved a Cayman Islands company named North Street Referenced Linked Notes, 2002-4 Limited. This company was set up by UBS. I shall refer to it as *"NS4"*. In the event NS4 issued notes ("*the NS4 Notes*") which were denominated in United States dollars ("$") and which I can conveniently classify into 3 categories. The first category comprised $500m of floating rate notes of classes A to D ("the Class A to D NS4 Notes"). They were issued to and purchased by UBS so that UBS could sell them to LB Kiel as part of the Transaction. The second and third categories comprised $25m floating rate notes of class E ("*the Class E NS4 Notes*") and $49m fixed rate income notes ("the NS4 Income Notes"). They also were issued to UBS but were not involved in the Transaction.

9. On 23.1.02 UBS LLC and LB Kiel signed a letter agreement ("the Letter Agreement") superseding prior discussions. This stated that LB Kiel and UBS had confirmed the purchase and sale of the Class A to D NS4 Notes subject to acceptable documentation. Clause 1 recorded a mutual expectation that the structure of the Transaction would be substantially as described in a Term Sheet dated January 2002 ("the Letter Agreement Term Sheet"). However it also recorded that the final structure would be as described in the final offering memorandum relating to the Class A to D NS4 Notes. Clauses 2 to 5 dealt with various aspects of the Transaction and the parties' involvement in it. Under clause 6 the Letter Agreement was governed by New York law. The Letter Agreement was silent as to jurisdiction.

10. The final offering memorandum relating to the Class A to D NS4 Notes – and also to the Class E NS4 Notes and the NS4 Income Notes - was a document described as an "offering circular" dated 1.3.02 ("the Offering Circular"). It described features of the NS4 Notes which came to be embodied in an Indenture ("the Indenture") dated "as of March 5, 2002." Among other things the Offering Circular described how the performance of the Class A to D NS4 Notes was to be linked, through a credit swap with UBS AG, to the performance of assets forming a US$3 billion notional amount reference pool ("the Reference Pool"). Under the credit swap NS4 would be obliged to make payments ("Credit Protection Payments") to UBS AG in the event of defaults on the assets, and the Offering Circular explained that such payments would give rise to corresponding reductions in the unpaid accrued interest on the NS4 Income Notes and thereafter the principal balance of the NS4 Notes, working progressively upwards from the NS4 Income Notes through classes E, D, C, B and A. The Indenture provided that the NS4 Notes were governed by New York law and it contained a New York jurisdiction clause.

11. Accompanying the Offering Circular was a "Summary of Terms". This explained in relation to the Reference Pool that UBS would designate a portfolio of "Reference Entities", and that with respect to each Reference Entity, it would designate one or more "Reference Obligations". The Summary of Terms also noted that UBS would have the right, subject to certain conditions, to make changes to the Reference Pool.

12. Contemporaneously with the Transaction, and in accordance with the Offering Circular, UBS and NS4 entered into a credit swap ("the Credit Swap"). Under the Credit Swap UBS purchased credit default protection from NS4 with respect to the Reference Pool. In consideration of such protection, a total premium of US$574 million - subject to reduction in certain events - was to be paid by UBS to NS4 as periodic premium payments over the life of the swap. The Credit Swap provided for Credit Protection Payments as described in the Offering Circular. It was governed by English law and contained a jurisdiction clause in favour of the English courts.

13. The Transaction involved a number of contracts between LB Kiel and one or both of UBS AG and UBS LLC. They included:

    i) an agreement dated "*as of March 5, 2002*" between UBS and LB Kiel, known as the *"Reference Pool Side Agreement*" or *"RPSA",* which HSH says provided LB Kiel with important protections regarding UBS's management of the portfolio comprising the Reference Pool. This agreement was subject to New York law and contained a non-exclusive New York jurisdiction clause.

    ii) the issue on 5 March 2002 by LB Kiel to UBS of $500 million of *"puttable"* medium term notes. I shall refer to them as "*the Kiel Notes",* although the parties sometimes refer to them as "the Kiel MTN Notes" or simply the "*MTN Notes"*. They were *"puttable"* in the sense that the principal amount of each note with accrued interest would become payable to a noteholder on any business day at the noteholder's option subject to written notice being given 5 business days in advance. The detailed arrangements for these notes, and certain other matters, were the subject of two documents. One was described as a "*pricing supplement*" ("the Pricing Supplement"). It was signed by LB Kiel and was dated 5 March 2002. The other was a document described as a "*dealer's confirmation*" signed by UBS AG and also dated 5 March 2002. It was in effect an initial purchase agreement for the Kiel Notes and I shall refer to it as "*the Kiel Notes IPA"*. These documents were each governed by English law and each contained an exclusive English jurisdiction clause. Immediately upon issue by LB Kiel to UBS the Kiel Notes were transferred by UBS to NS4 in exchange for the issue by NS4 to UBS of the Class A to D NS4 Notes. This transfer was envisaged by the Offering Circular, which explained that payments of principal under the Class A to D NS4 Notes, along with Credit Protection Payments affecting those notes, would be funded by NS4 exercising its option to redeem the Kiel Notes.

    iii) the sale by UBS to LB Kiel of the Class A to D NS4 Notes in exchange for the issue to UBS of the Kiel Notes. This sale was envisaged by the Letter Agreement Term Sheet. It is common ground that pursuant to this sale the Class A to D NS4 Notes, upon issue by NS4 to UBS on 5 March 2002, were immediately transferred by UBS to LB Kiel. It is also common ground that, unlike other parts of the Transaction, the sale was not the subject of any new contract post-dating the Letter Agreement. Mr Henshaw submitted, and Mr Railton did not dispute, that the sale should be treated as having taken place pursuant to the Letter Agreement. It follows that the sale was subject to New York law but did not involve any express term as to jurisdiction.

14. The upshot was that UBS through the Credit Swap had the benefit of credit protection from NS4. That protection would be achieved through the fulfilment of obligations to make Credit Protection Payments which could be categorised into six tranches, the bottom two corresponding to the principal amounts of the NS4 Income Notes and the Class E NS4 Notes. So far as the Transaction was concerned, LB Kiel provided security for the top four tranches of NS4's obligations to make Credit Protection Payments, in the sense that NS4 would be able to redeem the Kiel Notes in order to fund Credit Protection Payments after the bottom two tranches had been exhausted. In exchange LB Kiel had the benefit of the Class A to D NS4 Notes. On the basis that all went well, the payments to be made by NS4 on maturity of those notes would match and cancel out the payments LB Kiel would be obliged to make on maturity of the Kiel Notes. In the meantime NS4, on the same basis, would – utilising UBS's premium payments under the Credit Swap – make regular payments under the Class A to D NS4 Notes to LB Kiel at a substantially higher interest rate than the rate applicable to the Kiel Notes. I shall refer to the amount of the difference as "*the NS4 Kiel margin*".

15. Since 5 March 2002 regular payments of the NS4 Kiel margin have been made by NS4 to LB Kiel and subsequently by NS4 to HSH. In recent times, however, there have been defaults on assets in the Reference Pool. These defaults have not yet reached the top 4 tranches of the obligations to make Credit Protection Payments. HSH is nevertheless concerned at what may happen in future. Those concerns have led it to review the circumstances in which LB Kiel entered into the Transaction and the way in which the Transaction has been put into effect. Following that review a dispute – which I describe in more detail below - has arisen between HSH and UBS.

English jurisdiction: the Regulation and the Issues

16. The ability of UBS to invoke the jurisdiction of this court is governed by Council Regulation (EC) 44/2001 ("the Regulation"). None of UBS AG, UBS LLC or HSH is domiciled in England. The only way in which UBS seek to say that they can sue HSH here is in reliance on the jurisdiction clauses found in the Kiel MTN Notes IPA and the Pricing Supplement.

17. Article 23 of the Regulation provides:

    23 (1) If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or may arise in connection

> *with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:*
> *a. In writing or evidenced in writing; or…..*

18. It is common ground that HSH is domiciled in Germany, which is a Member State, and that the jurisdiction clauses found in the Kiel Notes IPA and the Pricing Supplement are in writing and confer jurisdiction on this court, which is a court of a Member State. Accordingly if the dispute which has arisen falls within those clauses then this court has jurisdiction under Article 23(1).

19. Here two issues arise, one as to the existence of jurisdiction, and the other as to what this court should do if it has jurisdiction. What I shall call Issue 1 is whether the dispute falls within the jurisdiction clauses found in the Kiel Notes IPA and the Pricing Supplement. What I shall call Issue 2 arises only if HSH fails on Issue 1. In that event HSH submits that this court can and should stay these proceedings in favour of the New York claim, while UBS submit that it cannot do so, or if it can then it should not do so. Before turning to these Issues I shall deal with certain aspects of the RPSA, the Kiel Notes IPA and the Pricing Supplement. I shall also say something about the way in which HSH described the dispute in the New York Complaint, along with proposed revisions to that complaint, and the way in which UBS has described the dispute in their claim form and draft particulars of claim.

The RPSA

20. Under article II of the RPSA there was an obligation on UBS which in broad terms required the creation of a "*Commitments Committee*" to monitor the credit quality of the Reference Pool. The Commitments Committee was to meet on a daily basis or as necessary. Article IV gave Kiel a power of veto in certain specific circumstances.

21. Section 9.08 of the RPSA was entitled "*Governing Law: Consent to Jurisdiction and Service of Process.*" It included the following:

> *(a) This agreement shall be governed by, and construed in accordance with, the laws of the State of New York, without regard to principles of conflicts of laws.*
>
> *(b) ALL JUDICIAL PROCEEDINGS BROUGHT AGAINST [UBS] OR [LB KIEL] ARISING OUT OF OR RELATING TO THIS AGREEMENT MAY BE BROUGHT IN ANY STATE OR FEDERAL COURT IN THE BOROUGH OF MANHATTAN IN THE CITY OF NEW YORK AND ANY APPELLATE COURT FROM ANY SUCH COURT, AND, BY ITS EXECUTION AND DELIVERY OF THIS AGREEMENT, EACH OF [UBS] AND [LB KIEL] ACCEPTS FOR ITSELF AND IN CONNECTION WITH ITS PROPERTIES, GENERALLY AND UNCONDITIONALLY, THE NONEXCLUSIVE JURISDICTION OF THE AFORESAID COURTS AND WAIVES ANY DEFENSE OF FORUM NON CONVENIENS AND IRREVOCABLY AGREES TO BE BOUND BY ANY JUDGMENT RENDERED THEREBY IN CONNECTION WITH THIS AGREEMENT*
>
> (c) [designation of agent for service]…

The Pricing Supplement and the Kiel Notes IPA

22. There had for some years been in existence a programme which had been agreed between LB Kiel and its Dutch subsidiary LB Schleswig-Holstein Finance BV *("LB Finance*") on the one hand and a group of banks on the other. UBS AG was a member of this group of banks ("*the Dealers*"). On 11 September 2001 the parties signed an amended and restated programme agreement ("*the Programme Agreement*"). The Programme Agreement set out terms and conditions which would apply if either LB Kiel or LB Finance agreed with any Dealer for the issue and purchase of notes. Although the Programme Agreement did not say this, it is common ground that the normal practice would then be for the Dealer to sell the Notes in the secondary market. Clause 21 of the Programme Agreement dealt with governing law and jurisdiction: the Programme Agreement and every agreement for the issue and purchase of notes were to be governed by the laws of England, and LB Kiel and LB Finance agreed for the exclusive benefit of the Dealers that the courts of England were to have jurisdiction to settle any disputes which might arise out of or in connection with the Programme Agreement. An information memorandum also dated 11 September 2001 ("*the Information Memorandum*") set out terms and conditions of Euro Notes. It is common ground that the Kiel Notes, despite their denomination in $, fall within this category. Condition 19(b) of the Information Memorandum conferred jurisdiction on the English courts in similar terms to those of clause 21 of the Programme Agreement.

23. The Pricing Supplement explained that it was to be read in conjunction with the Information Memorandum. There were detailed provisions concerning, among other things, the interest rate of the Kiel Notes and the put option available to holders of the Kiel Notes. Clause 32 of the Pricing Supplement dealt with *"other terms or special conditions"*. It provided that Condition 19(b) of the Information Memorandum for Euro Notes was to be modified. The modification resulted in a jurisdiction clause ("*the Kiel Notes jurisdiction clause*") which read:

> *(b) Subject as provided [below], the parties agree that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with the …[Kiel Notes]… and the parties accordingly submit to the exclusive jurisdiction of the English courts… nothing contained in this condition shall limit any right of the … Noteholders… to take proceedings against [LB Kiel] in any other court of competent jurisdiction, nor shall the taking of Proceedings in one or more jurisdictions preclude the taking of Proceedings in any other jurisdiction, whether concurrently or not.*

24. A final clause in the Pricing Supplement was headed "*additional information*". It contained a separate undertaking on the part of LB Kiel in favour of NS4. This undertaking was that should there be specified decreases in the rating of the Kiel Notes then LB Kiel would take such steps as were necessary to create an enforceable, first priority fixed security interest in favour of NS4.

25. UBS AG in the Kiel Notes IPA confirmed agreement for the issue to UBS AG of the Kiel Notes pursuant to the terms of issue set out in the Pricing Supplement. The Kiel Notes IPA recorded that clause 21 of the Programme Agreement was deemed to have been deleted and replaced. The replacement was a jurisdiction clause ("the Kiel Notes IPA jurisdiction clause") which read:

Subject as provided in this sub-clause (2), the parties hereby irrevocably agree that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement and the parties accordingly submit to the exclusive jurisdiction of the English courts for any suit, action or proceedings arising out of or in connection with this Agreement (together referred to as "Proceedings").

Each of [LB Kiel and LB Finance] hereby irrevocably waives any objection which it may have to the laying of the venue of any proceedings in the courts of England and any claim that any such Proceedings have been brought in an inconvenient forum and herby further irrevocably agrees that a judgment in any Proceedings brought in the English courts shall be conclusive and binding upon it and may be enforced in the courts of any other jurisdiction. Nothing contained herein shall limit any right of the Dealers to take Proceedings against the [LB Kiel and/or LB Finance] in any other court of competent jurisdiction, nor shall the taking of Proceedings in one or more jurisdictions preclude the taking of Proceedings in any other jurisdiction, whether concurrently or not. ...

26. I shall refer to the Kiel Notes jurisdiction clause and the Kiel Notes IPA jurisdiction clause as "*the English jurisdiction clauses*".

The New York complaint

27. The New York complaint was summarised by Mr Henshaw as being all about the initial mis-selling and subsequent mismanagement of the Reference Pool underlying the Class A to D NS4 Notes. He gave an outline of the complaint as being that:

(a) UBS in selling the Class A to D NS4 Notes to LB Kiel made various misrepresentations to LB Kiel, some fraudulently.

(b) UBS breached the contract for the sale of the Class A to D NS4 Notes to LB Kiel, by failing to deliver notes with the characteristics promised.

(c) UBS breached the RPSA.

28. I describe below UBS's criticisms of this summary and outline. For present purposes I record that Mr Henshaw identified an error in the factual account given in the New York complaint. In paragraph 29 the complaint referred to LB Kiel as making a $500 million cash investment in return for the Class A to D NS4 Notes, and in paragraph 30 the complaint said that NS4 used what it received from LB Kiel in order to invest in the Kiel Notes. Mr Henshaw acknowledged that this was inaccurate. The true position was that LB Kiel bought the Class A to D NS4 Notes by issuing the Kiel Notes to UBS, and UBS transferred them to NS4 which retained them as collateral.

29. After setting out extensive factual allegations the complaint set out 8 causes of action. I summarise here what Mr Henshaw said about them. In doing so I shall, like Mr Henshaw, adopt the complaint's usage of *"HSH"* to include LB Kiel.

30. The first cause of action was for breach by UBS of contractual obligations found in the agreement for the purchase of the NS4 Notes by HSH from UBS and in the RPSA. Paragraph 60 of the complaint said that in consequence HSH should be awarded rescission of its contracts with UBS, or, in the alternative, damages.

31. The second and third causes of action were for fraud and negligent misrepresentation respectively. Each gave an account of allegedly untrue representations, along with failures to disclose, which were said to have induced HSH to have purchased the Class A to D NS4 Notes. In relation to both these causes of action it was said that HSH should be awarded rescission of its contracts with UBS, or, in the alternative, damages.

32. The fourth cause of action was for breach of fiduciary duties. It asserted that UBS had utilised LB Kiel's investment as an opportunity to take default risk off its own balance sheet and profit by taking short positions against the Reference Obligations it selected for inclusion in the Reference Pool. As a result HSH said that it had been damaged in an amount to be determined at trial, and was also entitled to punitive damages.

33. The fifth cause of action was for breach of an implied covenant of good faith and fair dealing. It asserted that UBS knowingly, intentionally, in bad faith, and in secret, selected Reference Entities that fundamentally compromised the Class A to D NS4 Notes, charged an excessively high price for those Notes, and set an excessively low yield to be paid on them. It also asserted that UBS had made multiple adverse substitutions of collateral in the Reference Pool for its own benefit. Paragraph 93 of the complaint said that as a result HSH should be awarded rescission of the NS4 transaction, or, in the alternative, damages in an amount to be determined at trial.

34. The sixth cause of action was for unjust enrichment and breach of constructive trust. Paragraph 95 of the complaint asserted that UBS had received a monetary benefit to which it was not entitled, and which it had unjustly retained. Paragraph 97 of the complaint said that in consequence the parties should be returned to their original position prior to UBS's misconduct, and UBS's ill-gotten gains should be held in a constructive trust for HSH.

35. The seventh cause of action sought an injunction requiring UBS to establish a Commitments Committee conforming with the requirements of the RPSA or in some other way to manage its conflicts of interest.

36. The eighth cause of action was for conversion. Paragraph 103 of the complaint said that HSH had entrusted funds, through its investment in the Class A to D NS4 Notes, to UBS for specific and limited purposes. Paragraph 104 said

that the alleged actions of UBS had wrongfully converted funds that had been entrusted by HSH to UBS for specific and limited purposes. Paragraph 105 said that as a result of the conversion HSH had been damaged in an amount to be proved at trial. Mr Henshaw accepted that the funds alleged to have been converted were the Kiel Notes. However he said that the manner of conversion did not involve anything done in relation to the Kiel Notes. It had involved what was done in relation to the Class A to D NS4 Notes under the purchase agreement and the RPSA.

Proposed revisions to the New York complaint

37. During the course of Mr Henshaw's opening submissions on 20 May 2008 I observed that the ground might be different if in the New York claim HSH were not seeking rescission or alleging conversion of the Kiel Notes. Mr Henshaw's opening submissions were completed during the afternoon of 20 May. Argument was adjourned late that day, to be resumed on 23 May 2008. In the meantime HSH produced a third witness statement of Mr McNicholas dated 22 May 2008. This statement exhibited a letter of the same date from Quinn Emanuel, the American lawyers acting for HSH in the New York claim, to Paul, Hastings, Janofsky & Walker LLP, the American lawyers acting for UBS in the New York claim. The substance of the letter was as follows [with numbering added for convenience]:

    [1] This letter affirms that HSH is withdrawing its request that the North Street 4 transaction be unwound, and that, after Justice Lowe issues his decision on the pending motion to dismiss, HSH will amend the complaint to omit the request for such rescission. Though the request for rescission never concerned the Medium Term Notes ("MTNs") issued by HSH - which MTNs are no longer even held by UBS – this amendment will make clear that the MTNs are not at issue in the dispute before the Supreme Court, contrary to the statement of UBS's counsel in the UK proceedings.

    [2] For the same reason, we will also amend our complaint to clarify that the conversion claim set forth therein seeks damages in relation to UBS's misuse of assets in the Reference Pool, and does not assert a claim for conversion of the MTNs. While we believe this is clear in the complaint as drafted, we affirm that the complaint will be amended to clarify that the property which was converted was HSH's interest in the Reference Pool through its holding of the Notes issued by NS-4. As alleged, UBS converted HSH's interest by abusing its position as the manager of the Reference Pool and misusing HSH's interest for its own advantage by using the structure to offload its own risks and losses instead of selecting assets for the Reference Pool in conformity with its representations of stable value management. The harm suffered by HSH as a result of the conversion was the alleged reduction in the value of the NS-4 Notes.

    [3] In making these amendments, HSH reserves its right to assert all other claims for relief that are permitted by New York law, including the requests for damages and injunctive relief set forth in the complaint. We also reserve the right to make any further amendments that may be necessary

    [4] HSH is not amending the complaint right now because the parties already have fully briefed and argued a motion to dismiss the complaint. The amendment is not relevant to the issues before the Court on that motion. I am advising you of this amendment, however, because of UBS's misleading assertion in the UK proceedings that the New York dispute involves the MTNs. It does not, and this amendment will make that clearer.

38. I shall refer to this letter as "the 22 May letter". Mr McNicholas's third witness statement, which I shall refer to "the 22 May statement" summarised the letter as advising that UBS would amend the New York complaint to omit the request for rescission and to clarify the claim for conversion in the way described in the letter. Mr McNicholas added:

    3. I confirm that HSH accordingly no longer seeks rescission of the North Street 4 transaction, and revises its claim for conversion in the manner indicated above. I further confirm HSH's unequivocal intention to amend its Complaint in New York, to reflect such withdrawal and revision, on the terms stated in paragraph 2 above.

    4. As indicated in the [22 May letter], HSH does not believe its Complaint as originally formulated involves any dispute connected to or arising in connection with the MTN Notes, but has decided to make these revisions in the interest of clarity.

The dispute as described in UBS's claim form

39. The claim form stated that particulars of claim would follow. In the meantime, a section of the claim form headed "*Brief details of claim*" began by saying that declarations were sought:

    in connection with a series of related written agreements between, inter alia, the Claimants and the Defendant which together govern a Credit Linked Note transaction (the "Transaction") between the Claimants and the Defendant in March 2002 including inter alia …

40. This section of the claim form then went on to identify four agreements which were included in the series. These were:

    (a) the Credit Swap;
    (b) "a subscription by the Defendant for" the Class A to D NS4 Notes;
    (c) "a subscription by [NS4] for" the Kiel Notes; and
    (d) the RPSA.

The draft particulars of claim

41. Prior to the hearing on 20.5.08 UBS provided draft particulars of claim dated 16.5.08. These, like the New York complaint, used "HSH" to include LB Kiel, and I shall do the same in this section.

42. Section A of the draft particulars of claim described the parties to the litigation. Section B was headed "*Events leading to the Transaction.*" After setting out the background in paragraph 6.1 quoted above, the draft continued in paragraph 6.2:

HSH decided to participate in the Transaction by issuing to UBS on a principal to principal basis US$500 million of puttable medium term notes ("the MTNs") under HSH's existing MTN programme, and pursuant to a series of Agreements ("the MTN Agreements") in return for HSH providing credit protection to UBS against certain credit risks in relation to the Reference Pool. HSH's objective was to enhance its interest yield on the MTNs, in return for assuming a degree of risk on the Reference Pool.

43. Paragraph 7 referred to due diligence conducted prior to the Letter Agreement, and summarised parts of that agreement. Paragraph 8 continued:

HSH also expressly confirmed that it understood, acknowledged and agreed that UBS was only acting as initial purchaser for the Transaction and was not acting as adviser to HSH (clause 2 of the Letter Agreement), and that the Letter Agreement constituted the entire agreement and understanding of the parties with respect to the Transaction and superseded all oral or written communications in relation thereto (clause 6(b) of the Letter Agreement).

44. These, along with numerous passages in the Offering Circular, were relied upon in support of an assertion in paragraph 13 that:

at the time at which HSH entered into the Transaction it did so of its own volition based on its own judgment (following advice from its independent advisors and not on the basis of any advice or representation made by UBS), at its own risk and solely on the terms of the written agreements comprising the Transaction.

45. Section C was headed, "*The Transaction*". Paragraphs 15 to 17 recorded that the Kiel Notes were the mechanism by which Kiel made its $500m investment in the Transaction, and went on to describe the Kiel Notes IPA, the Pricing Supplement, the role of the notes as collateral for Credit Protection Payments, and the NS4 Kiel margin.

46. Paragraphs 18 to 22 described the NS4 Notes, and recited various acknowledgements and obligations which noteholders were deemed to agree to under the Indenture.

47. The sub-heading for paragraphs 23 to 27 was *"The Credit Default Swap and related side agreement."* These paragraphs described the Credit Swap and asserted that the RPSA was a related side agreement to the Credit Swap.

48. Section D was entitled "*HSH's allegations.*" Paragraphs 29 and 30 referred to the New York complaint and said that almost six years after it entered into the Transaction, and having received substantial benefits from it, HSH now sought to unwind its investment in the Transaction, which, due to market conditions, it no longer perceived to be a lucrative investment. Paragraph 31 summarised the New York complaint. Paragraph 32 referred to the Motion to Dismiss and the Reply Memorandum as setting out reasons for rejecting HSH's contentions. Paragraphs 33 to 45 summarised those reasons as being lack of inducement, no breach of contract, no fiduciary duty owed and no covenant to be implied, no breach of any such duty or wrongful act, no entitlement to rescission, and no recoverable loss.

49. Section E was headed Relief. This comprised paragraph 46, which set out various declarations of non-liability that were sought.

50. A revised draft dated 23.5.08 made a number of revisions to the proposed particulars of claim.

Issue 1: the arguments

51. Mr Henshaw acknowledged that ordinarily one would expect the parties to have intended any dispute arising out of a commercial relationship into which they have entered or purported to enter to be decided by the same tribunal. Indeed in the context of arbitration clauses the House of Lords has held that there is an assumption to that effect: see ***Fiona Trust v Privalov*** [2007] UKHL 40. In the present case, however, any such assumption must be displaced: the series of contracts between the parties made it clear that different aspects of the relationship were governed by different contracts containing different provisions as to law and jurisdiction.

52. A previous case where different aspects of the relationship were governed by different contracts was the decision of Rix J in ***Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd*** [1999] 1 Lloyd's Rep. 767 ("***the CS Europe case***"). MLC, a hedge fund, bought Russian notes from CS Europe, an English company, under two Purchase Agreements containing exclusive English jurisdiction clauses. MLC financed this by repurchase transactions with CS Europe pursuant to a Global Master Repurchase Agreement ("GMRA") containing a non-exclusive English jurisdiction clause. In addition, MLC and Credit Suisse First Boston Corporation ("CS US") had prior to the Purchase Agreements entered into a Customer Agreement which contained a New York law clause but no jurisdiction clause.

53. CS Europe required MLC to repurchase the notes under the GMRA but MLC failed to pay the repurchase price. CS Europe sued MLC in England under the GMRA. MLC sued CS Europe and CS US, along with another group company, in New York. CS Europe sought an anti-suit injunction relying on the exclusive English jurisdiction clauses in the Purchase Agreements. One issue which arose was whether such of MLC's claims in the New York action as referred to the GMRA were claims which arose out of or in connection with the Purchase Agreements.

54. MLC accepted that certain claims arose in connection with the Purchase Agreements, but submitted that others did not and that the exclusive English jurisdiction in the Purchase Agreements "should not be accorded a "halo effect" beyond its true scope". CS Europe submitted that every part of the complaint could properly be described as arising out of or in connection with the allegations relating to the original purchases and that all such parts were in any event inextricably interwoven with one another.

55. Rix J stated:

I find the evaluation of these competing submissions rather elusive. In one sense all that happened, beginning with the negotiations for the purchase of the notes and ending in MLC's alleged defaults and the liquidation of its accounts, is part of a single narrative, which it is artificial to divide up into different compartments. On the other hand, where different agreements are entered into for different aspects of an overall relationship, and those different agreements contain different terms as to jurisdiction, it would seem to be applying too broad and indiscriminate a brush simply to ignore the parties' careful selection of palette.

Sometimes it is possible confidently to divide the claims between wholly different agreements, as in ***Ocarina Marine Ltd. v. Marcard Stein & Co****., [1994] 2 Lloyd's Rep. 524 at p. 531. In such cases the mutually exclusive allocation of claim to relevant jurisdiction clause becomes much easier. In the present case, however, I do not regard such a hard and fast division to be possible. However, this difficulty must redound in CS Europe's rather than in MLC's favour. It is of course possible that [the jurisdiction clause in the Purchase Agreements] exerts an influence beyond the time of the Purchase Agreements themselves: but it is conceded that the GMRA does not exert an influence the other way. … Moreover, I am inclined to think that the centre of gravity of MLC's complaints, however they are or could be pleaded, is focused on the alleged vice of the initial deals, in the sense that if once that vice was proved or failed of proof, MLC's claim would either flourish or have the heart torn out of it accordingly.*

I am nevertheless reluctant to hold that those of MLC's claims in its New York complaint which refer to the GMRA are claims which arise out of or in connection with the Purchase Agreements and do not arise out of or in connection with the GMRA. If they arise out of or in connection with both the Purchase Agreements and the GMRA, then, where the jurisdiction clauses are in conflict, I do not see why the GMRA clause should not prevail: either on the basis that, in a case of conflict on standard forms plainly drafted by CS Europe, MLC should be entitled to exercise the broader rights; or on the basis that the clause in the contract which is closer to the claim and which is more specifically invoked in the claim should prevail over the clause which is only more distantly or collaterally involved.

56. This is the only example that Mr Henshaw was able to find of a single transaction where different jurisdiction clauses pointed in different ways. The passages cited from the judgment were relied upon by Mr Henshaw in support of a primary point that the court cannot ignore what the parties decided: *"it would seem to be applying too broad and indiscriminate a brush simply to ignore the parties' careful selection of palette"*. This palette included a choice not to include an English jurisdiction clause. In the present case the dispute related to parts of the relationship not containing an English jurisdiction clause, and in order to respect the parties' choice the court should conclude that the dispute did not fall within the English jurisdiction clauses.

57. Mr Henshaw added that the passages cited from the judgment of Rix J supported a second point. Rix J held that if it is not possible to divide claims between wholly different agreements then one has to decide which should prevail. This was an exercise in interpretation, not an exercise of judicial discretion. It was necessary to seek to identify a centre of gravity. The observation of Rix J to the effect that the clause in the contract which is closer to the claim and is more specifically invoked in the claim should prevail was directly in point in the present case, where the answer was obvious. Thus even if contrary to HSH's primary case the breadth of the Kiel MTN Notes jurisdiction clause was such that this dispute could fall within it, the court must give primacy to the contracts more specifically invoked.

58. Anticipating contentions by UBS that Rix J was dealing with an anti-suit injunction and a case outside the Regulation, Mr Henshaw submitted that neither of these points made any difference. They did not affect the process of construction by which one decided whether a dispute was within a particular clause or not.

59. Mr Henshaw also anticipated reliance upon the reasoning of Cooke J in ***Caterpillar Financial Services v SNC Passion*** [2004] EWHC 569 (Comm); [2004] 2 Lloyd's Rep 99 where, faced with the defendant's contention that the loan agreement sued upon was illegal, unenforceable or void, the claimants pleaded an alternative case that they were entitled in restitution to repayment of monies paid under the agreement. Cooke J concluded that the claim in restitution fell within the relevant jurisdiction clause because it *"[arose] out of or in connection with the Loan Agreement, since without that agreement no sum would have been advanced at all"*. Flaux J followed this reasoning in ***Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc*** [2008] EWHC 918 (Comm), [2008] All ER (D) 416. As to that, Mr Henshaw said that there would be a true analogy with the present case if HSH were to contend that the Kiel Notes had been induced by misrepresentation and sought restitution on that ground. All that was said in the present case, however, was that LB Kiel's purchase of the Class A to D NS4 Notes from UBS was induced by misrepresentation. The dispute related to that purchase because that was the impugned transaction, in relation to which there had been both misrepresentation and breach. An incidental effect on the Kiel Notes did not make it a dispute about those notes.

60. Mr Henshaw submitted that where there were contracts with more than one jurisdiction clause it was not unlikely that different parts of the dispute might be decided in different jurisdictions. In the present case, however, any dispute as to the effect on the Kiel Notes of HSH's complaints was only a by-product of a dispute as to the Class A to D NS4 Notes. No one was alleging that the Kiel Notes were void, or had been breached. Mr Henshaw submitted that a rational businessman would consider the jurisdiction clause relevant to the present dispute would be the clause conferring jurisdiction on the New York court. To say that the present dispute fell within the Kiel MTN Notes jurisdiction clause would strain that clause to breaking point.

61. In support of this characterisation of the dispute Mr Henshaw commented that UBS's claim form in the English claim identified no dispute between UBS and HSH concerning the Kiel MTN Notes. The "*Brief details of claim*" at (a) to (d) specified four contracts. HSH's skeleton argument commented on them as follows:
    (a) the [Credit Swap]: which is an agreement between [NS4] and UBS, to which HSH is not a party and under which it has made no claim;
    (b) HSH's subscription for the [Class A to D NS4] Notes: the terms of which contain a non-exclusive New York jurisdiction clause;
    (c) "a *subscription by North Street 4*" for the [Kiel] MTN Notes issued by HSH: thus apparently referring to the relationship between [NS4] (which is the holder of the [Kiel] MTN Notes, but is not a party to the claim) and HSH, in relation to which no dispute exists; and
    (d) The [RPSA]: an agreement under which HSH does make claims in the New York court, as it is contractually entitled to pursuant to the non-exclusive New York jurisdiction clause in that agreement.

62. Mr Henshaw then turned to the Motion to Dismiss. Much of the motion involved an attack on the substantive of merits of HSH's complaint. Part II of the Motion to Dismiss, however, was an alternative assertion that the New York claim should be dismissed or stayed in favour of the English claim. So far as choice of law and forum was concerned, the Motion to Dismiss acknowledged that the RPSA, the Class A to D NS4 Notes, and the Indenture were governed by New York choice of law and non-exclusive New York choice of forum clauses, and that the RPSA and the Indenture contained a waiver of forum non conveniens arguments. However, the Credit Swap, which contained the Reference Pool guidelines, and the Information Memorandum were governed by English law and specified English jurisdiction. It was asserted in the Motion to Dismiss that the allegations in HSH's complaint were largely based on the Credit Swap and alleged discussions between the parties outside the agreements. Mr Henshaw commented that it was now accepted that HSH's complaint was not based on the Credit Swap. He stressed that there was no suggestion in the Motion to Dismiss that the New York claim arose out of or in connection with the Kiel MTN Notes, and thus there could be no suggestion that HSH was bound for that reason not to proceed with the New York claim.

63. Mr Henshaw added that the Reply Memorandum acknowledged that the only agreements alleged by HSH to have been breached were the RPSA and the Letter Agreement. It noted that the New York jurisdiction clauses were non- exclusive, and that permissive clauses did not prevent a court from staying the action. The Reply Memorandum then acknowledged that there were "*other NS4 Agreements, including several to which HSH is a party, that contain English choice of law provisions and UK choice of forum clauses. …. In some of those cases, those choice of forum provisions are… exclusive… accordingly the English court is the only court where all relevant disputes under all the various agreements could be resolved without contravening or ignoring the respective choices of jurisdiction clauses.*"

64. Mr Henshaw observed that here, too, UBS conspicuously failed to assert that under any relevant agreement relating to the Kiel MTN Notes HSH was bound not to proceed with the New York claim. While they asserted that a dispute as to the Kiel MTN Notes had to be resolved in England, they did not identify any such dispute, and they could not credibly take a different position now in the context of HSH's application to this court.

65. While accepting that rescission, or the unwinding of contracts in some other way, featured among the remedies sought in the New York claim, Mr Henshaw submitted that it was common ground that the unwinding of the Kiel MTN Notes was an unlikely remedy. Indeed in their particulars of claim in the English proceedings UBS said that unwinding of the whole transaction was impossible. HSH accepted that it was unlikely. The Kiel MTN Notes were held by NS4, which was not a party to the New York claim. The whole dispute was about the Class A to D NS4 Notes. Even if a potential remedy had a collateral effect on another transaction, this did not mean that the dispute arose out of or in connection with that transaction – especially where the collateral effect was unlikely.

66. Mr Henshaw then addressed the position in the event that the dispute might be regarded as falling within the Kiel Notes jurisdiction clause. There was a series of contracts with different provisions as to jurisdiction. In order to reconcile them one had to work out in relation to which contract or contracts the dispute related. Once that was done, the question would arise as to what the relevant contracts said in any jurisdiction clauses, or by reason of the absence of jurisdiction clauses, as to jurisdiction. The assertion by UBS that the Kiel Notes jurisdiction clause governed was, he submitted, bizarre. It would mean that a jurisdiction agreement in a contract not relevant to the dispute would override the jurisdiction clauses in the relevant contracts. The fact that the Kiel Notes expressly conferred exclusive jurisdiction on the English court was, submitted Mr Henshaw, a difficulty for UBS. If the scope of the Kiel Notes jurisdiction clause were as broad as UBS suggested, then it would plainly be inconsistent with those contracts which conferred jurisdiction on the New York court. It could not be right to say that the parties must have intended that the Kiel Note jurisdiction clause should trump the other jurisdiction clauses that they had agreed upon. Where there were overlapping provisions, the only proper solution for the court was to do what a rational businessman would expect, to reconcile the differing clauses by working out in relation to which contract or contracts the dispute substantially related. In the present case those were contracts none of which provided for English jurisdiction.

67. As to the draft particulars of claim, Mr Henshaw commented that UBS in rebuttal of HSH's claims relied on the Letter Agreement. That agreement had no jurisdiction clause, and was thus not a contract which founded jurisdiction in England. If the dispute reflected in the draft were indeed proceeding here, the court would be looking at contracts which the parties had not agreed could be litigated here or had positively agreed could be litigated in New York. Thus in paragraphs 21 and 22 of the draft reliance was placed on the provisions of the

Indenture. In Paragraphs 34 and 35 UBS asserted that HSH's claims of inducement were unsustainable because, among other things, of what was said in the Letter Agreement, Offering Circular, RPSA and Indenture, none of which contained an English jurisdiction clause. The position was similar in relation to paragraphs 36 to 38 of the draft on breach of contract and paragraph 39 on fiduciary duty and an implied covenant. One looked in vain for any reference to the Kiel Notes or any connection with England. In its skeleton argument for the present application UBS said that it reserved its right to apply here for an anti-suit injunction to restrain HSH from proceeding in New York in respect of disputes which this court holds to be within the subject of the exclusive English jurisdiction clause. That, submitted Mr Henshaw, led one to wonder why UBS was afraid to strike in New York in the way that it had put its case here. He suggested that UBS were reluctant to say to the New York judge that HSH was bound to bring its entire claim in England, for this would demonstrate the unreal nature of UBS's position which ignored the jurisdiction clauses in the most relevant contractual documents.

68. On behalf of UBS Mr Railton QC and Ms Tolaney submitted that it was not necessary to go into minutiae. At the core were the Kiel Notes, the Class A to D NS4 Notes, and the Credit Swap. The RPSA was a small adjunct to the Credit Swap. It was probably a product of negotiations between the parties which led to different contracts having different jurisdictions. In relation to anything fundamental, however, it was clear that the parties had specifically agreed on exclusive jurisdiction in relation to the Kiel Notes, and that exclusive jurisdiction was England. This, it was submitted, must outweigh the agreement merely on non-exclusive jurisdiction for New York. Where something impacted all of the contracts it was possible that the parties intended that there be proceedings in parallel. The alternative was that the parties thought that if that were to happen then primacy should be given to the forum which was expressly stated to be exclusive. Another possibility was that the parties simply did not think through how it would work out. The case for UBS was that it was highly material that the English jurisdiction clauses were exclusive, whereas the New York jurisdiction clause in the RPSA was non-exclusive.

69. Mr Railton observed that HSH made its investments through two contracts. The first was the contract under which it sold the Kiel Notes. The second was the contract under which it purchased from UBS the Class A to D NS4 Notes. The sale of the Kiel Notes was, submitted Mr Railton, the key to the Transaction. This sale enabled LB Kiel to buy the Class A to D NS4 Notes without putting up any cash. On maturity the Kiel Notes and the Class A to D NS4 Notes would cancel each other out if there were no defaults. In the meantime, LB Kiel would have the benefit of interest payments which would, all being well, be enhanced as a result of the Credit Swap. Should there be a need for a Credit Protection Payment to be made to UBS – something which had not yet occurred so far as the Class A to D NS4 Notes were concerned – UBS was entitled to avail itself of the fact that the Kiel Notes were puttable at any time. Thus the Kiel Notes and the Class A to D NS4 Notes were interwoven both at the start and throughout their lives. The transaction turned on, was supported by, and was driven by, the Kiel Notes. In relation to those notes, there was an exclusive jurisdiction clause in favour of England – and in that regard there had been a specific change designed to make it clear beyond doubt that there was an exclusive jurisdiction clause in favour of England with an express submission to the English courts. The Pricing Supplement contained further provision for LB Kiel to provide a security interest if the rating of the Kiel Notes were to fall. As to the Letter Agreement, it was a commitment letter enabling UBS to put the deal together. Clause 1 set out the structure as expected, but the final structure was yet to be determined. Both parties were signing up in principle to the Kiel Notes providing a consideration which was cash free, and with the Class A to D NS4 Notes emerging with a particular structure that was to be superseded by more specific agreements, and to that extent the Kiel Notes moved away from the Letter Agreement. There was, however, no specific agreement for the sale of the Class A to D NS4 Notes by UBS to HSH, so the Letter Agreement survived in relation to that. The parties to it must be UBS AG and UBS LLC, if necessary the latter was acting as agent for UBS AG. Those two parties had bought the Class A to D NS4 Notes from NS4, and they must be the parties selling on.

70. In support of UBS's claim that the RPSA was on the edge of the structure, Mr Railton commented that no specific consideration moved under it when one looked at the sale of the Kiel MTN Notes and the sale of the Class A to D NS4 Notes. It was so unimportant that it received only a brief summary in the Offering Circular and that the section of the Offering Circular dealing with governing law made no reference to it. That gave an indication as to where in the scheme of things the parties thought that the RPSA stood.

71. When resuming oral submissions on 23 May 2008, Mr Railton made three preliminary points. First, the test was whether UBS had a good arguable case that there were disputes within the meaning of the English jurisdiction clauses. Second, the *Fiona Trust* case had swept away the "baggage" of earlier decisions. A jurisdiction clause was to be construed liberally, with a presumption that disputes would be decided by the same tribunal. The approach should be to determine what disputes were within the English jurisdiction clauses in the first instance. UBS submitted that the court should hold that the present disputes fell within those clauses, and only at that stage go on to examine whether the same disputes were caught by another agreement and what mechanism would be appropriate to deal with this.

72. Mr Railton added that although the *Fiona Trust* case involved a fresh start, it was helpful to look at some of the earlier authorities. In ***L Brown & Sons v Crosby Homes (North West) Ltd*** [2005] EWHC 3503, Ramsey J concluded that the phrase *"under"* a contract is less broad than "*arising out of or in connection with*" a contract:

> [*53] The phrases "**out of or in connection with**" are wider than "**under**" the contract. They cover matters which arise out of the performance of the contract and in connection with that performance. The side agreements and the disputes under them arose out of the performance of the contract or in connection with them."*

73. The ***Brown*** case showed that the wording of the English jurisdiction clauses was not limited to contractual disputes but included misrepresentation, mistake, and claims under side agreements. **The *Caterpillar* case** showed that these words included restitutionary claims. It was clear from these authorities and ***Fiona Trust*** that *"in connection with"* was to be given a wide meaning.

74. The third preliminary point was that a "*dispute*" merely amounted to some disagreement between the parties, a failure to see eye to eye. This could crystallise in any way, and did not need to be in proceedings. UBS sought negative declaratory relief, and in that context the court should consider whether it was useful to grant that relief. A negative declaration will be useful if there is any disagreement or lingering uncertainty, and in that event there would be a dispute. Mr Railton submitted that it was helpful to keep this in mind when identifying the target, or object, of the English jurisdiction clauses.

75. Mr Railton then turned to the 22 May letter and the 22 May statement. He began by focussing on the assertions that the New York dispute did not involve the Kiel Notes, and that for that reason there was no need to make the amendment until after judgment had been delivered on the pending Motion to Dismiss. Without questioning the good faith of those acting for HSH, Mr Railton submitted that both these assertions were patently wrong. The alternative basis for the motion to dismiss had asserted at paragraph (i) that the English court was a competent alternative forum. Thus a factor in the motion to dismiss was whether the claim fell within the Kiel Notes jurisdiction clause. The Reply Memorandum had stressed that the English jurisdiction clauses were exclusive jurisdiction clauses.

76. Mr Railton noted that there was no undertaking by HSH that it would in fact do what it presently intended to do. In the English claim UBS sought a declaration that HSH was not entitled to rescind the Transaction. What HSH proposed fell short of agreement with that proposition. No draft had been prepared to give details of precisely what would be withdrawn and precisely what would be put in its place. The reason for not taking steps at once in the New York claim was simply wrong.

77. I asked Mr Railton what possible disadvantage to UBS could arise from the fact that HSH did not intend to make the revisions immediately. Mr Railton replied that HSH had accepted that it should not pursue certain relief in the New York claim because pursuit of such relief might adversely affect HSH's application in the English claim. That raised the question whether the underlying cause of action was not within the English jurisdiction clauses. Notification to the New York court now would unravel HSH's carefully constructed arguments. What had happened followed a judicial suggestion that the ground might be different if HSH were not seeking rescission or asserting conversion of the Kiel Notes in the New York claim. To the extent that the ground might now be different it did not take matters much further. The court should be cautious in concluding that this eleventh hour manoeuvre meant there was no dispute. The most serious part of HSH's complaint was that it was induced by fraud to participate in the transaction. This necessarily involved saying that it had been induced by fraud to enter into the Kiel Notes IPA. The fact that rescission of that was sought in New York made it plain that this dispute was in connection with the Kiel Notes IPA. The allegations of fraud remained, albeit that damages were sought rather than rescission. They necessarily gave rise to a dispute between the parties, and for the same reasons as in relation to rescission it was a dispute in connection with the Kiel Notes IPA.

78. Mr Railton submitted that it was plain from section A of the New York complaint that it related to the sale of the Kiel Notes to UBS as part of the Transaction. The representations relied upon related to this. Section B was concerned with the investment by LB Kiel of $500 million, and that investment was made by the Kiel Note IPA. Section C dealt with the Credit Default Swap, which was linked with the Kiel Notes IPA. In section D there was the reference to cash which Mr Henshaw had accepted to be erroneous. Mr Railton characterised the erroneous paragraphs as involving "*at its lowest a distortion*." The remainder of the complaint prior to the setting out of the causes of action continued the previous pattern of intertwined and inter woven allegations – which is what one would expect where there is a package deal. There were no severable parts of the package.

79. As to the causes of action in the New York complaint, each began with a repetition of the earlier allegations. In the first cause of action the account of the relevant contracts plainly involved references to the Kiel Notes IPA. The complaint that HSH would not have agreed to enter into the Transaction was a complaint that it would not have agreed to the Kiel Notes IPA. The complaint that HSH had been deprived of what was promised by UBS was a complaint as to the overall effect of the Transaction which must include the Kiel Notes IPA. Damages were sought on the reliance basis, which must therefore be clearly connected with the Kiel Notes IPA. If damages were sought in lieu of rescission that would be something in connection with the Kiel Notes IPA.

80. Turning to the second cause of action in fraud, the only basis on which the claim could be made was that the Kiel Notes IPA was induced by fraud. The same was true in relation to the third cause of action in misrepresentation. As to the fourth cause of action for breach of fiduciary duty, the concern must be about exercise of the put option under the Kiel Notes. The claim was that UBS had to work in the best interests of HSH to avoid things going wrong. However, things going wrong would lead to the exercise of the put option. That sufficed to show that the dispute was "*in connection with*" the Kiel Notes and the Kiel Notes IPA. What was said on the fifth cause of action concerning an implied duty of good faith and fair dealing brought into play similar points as those which arose on the first cause of action. As to the sixth cause of action in restitution, returning HSH to its original position continued to be the essence of this claim, and was not affected by the 22 May letter or the 22 May statement. It was a restitutionary claim, which had been held in ***Caterpillar*** to fall within the words used in the English jurisdiction clauses. The seventh cause of action for an injunction simply turned on other claims, but Mr Railton drew attention to the reference to "*irreparable harm*". Such harm could only arise through the put option being exercised under the Kiel Notes.

81. The eighth cause of action concerned the allegation of conversion. Here Mr Railton said that the 22 May letter and 22 May statement involved no more than "*rearranging the deckchairs*". They were rearranged because it was recognised that the claim for conversion of the Kiel Notes caused problems for HSH's present application. There was no detail as to what would replace this claim. It seemed to involve an allegation of misuse of HSH's investment, in other words its contribution to the Transaction. It was not possible for UBS properly to deal with this in the inchoate way it was put forward. In whatever way the wording was tweaked, however, the substance of the claim would remain the same.

82. Mr Railton commented that while in theory a claim might have been advanced under the RPSA only, here the net had quite deliberately been cast by HSH as widely as possible. It was still plainly in connection with the Kiel Notes IPA. UBS had sought to mirror that in their particulars of claim. As to the pleading point taken Mr Henshaw, if necessary UBS would prepare an amendment. If this court were to conclude that some of the disputes in the New York claim were within the English jurisdiction clauses and some were not, then the particulars of claim on behalf of UBS could be revised accordingly. As to the failure on the part of UBS to make an express claim for breach of the exclusive jurisdiction clause, Mr Railton explained that UBS had worked on the basis that if HSH were told by the English court that the New York claim was within the Kiel Notes IPA jurisdiction clause then that might lead HSH to rethink its stance as to continuing with the New York proceedings.

83. Mr Railton said that for present purposes UBS were content to assume that HSH was arguably right to say that part of the dispute fell within the non-exclusive jurisdiction clause in the RPSA. That covered proceedings "*arising out of or relating to*" that agreement. Those words had no different reach from the words "*in connection with*" found in the Kiel MTN Notes jurisdiction clause. Thus, submitted Mr Railton, the assertion in the New York claim that words of that kind in a side agreement brought the entire dispute within New York jurisdiction made it impossible for HSH to say in the English claim that the words of the English jurisdiction clauses were not at least of similar effect. The only question under Issue 1 was whether for the purposes of the Regulation the dispute was within those words. The fact that the dispute might fall within two different jurisdictions was irrelevant, and it was not appropriate to try to give precedence to one or the other. Article 29 of the Regulation acknowledged that more than one court might have exclusive jurisdiction, and in those circumstances jurisdiction was accorded to the court first seised. In the present case, the submission on behalf of UBS was that there was nothing in the regulation to require this court at the jurisdiction stage to do anything other than decide whether the dispute fell within the jurisdiction clause.

84. As to the *CS Europe* case, that case involved no question of construction and was merely concerned with how a judicial discretion should be exercised. The English court refused to injunct claims by MLC in New York, permitted declaration claims to proceed in this country, and recognised that there would be multiple proceedings as a result of there being different and overlapping clauses and the court's decision to decline an anti-suit injunction. Rix J had asked which of the two clauses should prevail, and in that regard was referring to which should be the decisive point when exercising discretion. If one went on to seek to identify which clause was "*closest to the claim and more specifically invoked*", that posed difficulties where two agreements were part of a single package. UBS submitted that the provision of the $500 million under the Kiel Notes IPA was at the heart of the deal. There was a specifically agreed exclusive jurisdiction clause which was much more apt and appropriate to prevail where there was in effect a root and branch attack on the package.

85. Mr Railton turned to what the Kiel Notes IPA jurisdiction clause meant. He observed that there was no agreement on jurisdiction in the Letter Agreement, a non-exclusive New York jurisdiction clause in a side agreement, and in the English jurisdiction clauses a deliberate change in wording from previous documents to make it clear that England was to be the exclusive jurisdiction. In these circumstances reasonable and commercial businessmen would think that in any case where there was a conflict between "*exclusive*" and "*non-exclusive*", a clause that was expressly said to be "*exclusive*" was intended to be just that.

86. The judgment in **the *CS Europe* case** did not help in construing the contracts in the present case, alternatively it pointed to a conclusion that the Kiel Notes IPA jurisdiction clause was overriding in the present circumstances. There was nothing in the judgment to suggest that a good construction of that clause should, because of an overlap with other contracts, be twisted to a different construction.

87. I shall refer in my analysis of Issue 1 below to points made by Mr Henshaw in reply.

Issue 1: Analysis

88. This court only has jurisdiction under the Regulation if the Article 23 precondition is met: namely that there is a dispute which falls within the contractual scope of a relevant jurisdiction clause. To my mind this means that the fundamental question is as to the contractual meaning of the English jurisdiction clauses.

89. In determining whether that precondition is met, I have to consider whether UBS surmounts the hurdle of showing a "*good arguable case.*" I use this expression in the sense explained by Waller LJ in ***Canada Trust Co v Stolzenberg*** [1998] 1 WLR 547, analysing the speech of Lord Goff in ***Seaconsar Far East Ltd v Bank Markazi*** [1994] 1 AC 438:

> *… what the court is endeavouring to do is to find a concept not capable of very precise definition which reflects that the plaintiff must properly satisfy the court that it is right for the court to take jurisdiction. … "Good arguable case" reflects in that context that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, ie of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction. …*

90. Mr Railton's arguments realistically focussed on the Kiel Notes IPA jurisdiction clause rather than the Kiel Notes jurisdiction clause, for UBS held the Kiel Notes for no more than an instant. As a matter of principle, however, I shall examine the position having regard to both the English jurisdiction clauses.

91. Had the contracts in which those clauses are found stood on their own, I would have had considerable sympathy with Mr Railton's submission that they should be given a wide construction. The authorities cited by Mr Railton uniformly supported such an approach in the absence of conflicting jurisdiction clauses in other relevant contracts. However the contracts in which the English jurisdiction clauses are found do not stand on their own. As Mr Henshaw pointed out in his reply, this is a case where the parties have entered into different agreements for different aspects of an overall relationship, with different terms as to jurisdiction. They have done this despite the fact that many different aspects of the various contracts are intertwined and interwoven. In these circumstances the parties have made agreements in circumstances which are markedly different from the normal expectation described in ***Fiona Trust***.

92. I accept for present purposes Mr Railton's submission that the words "*arising out of or relating to*" found in the RPSA have no different reach from the words "*in connection with*" found in the English jurisdiction clauses. Applying the well-known approach described by the House of Lords in ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 W.L.R. 896, 912-913, as a matter of general principle the court must seek to identify:
the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

93. The relevant background knowledge in the present case will include knowledge of other contracts forming part of the Transaction. When considering the jurisdiction clauses found in the RPSA, the Kiel Notes, and the Kiel Notes IPA, a person having that background knowledge would at once see that there was scope for the clauses to clash. In order to limit that scope, and to ensure that the clauses had meaning, it seems to me that such a person would be driven to the conclusion that each such clause focused upon matters directly relating to the contract in which it is found. UBS stressed that the English jurisdiction clauses were exclusive. To my mind this compels the conclusion. It is manifestly incompatible with a non-exclusive New York jurisdiction clause for a matter falling within it also to be the subject of an exclusive English jurisdiction clause. I agree that one would expect an exclusive jurisdiction clause to be just that – and because it is just that it seems to me necessarily to follow that it cannot be anything like as wide in scope as UBS suggest.

94. I have reached this conclusion as a matter of principle. I add that it is in my view entirely consistent with the approach taken by Rix in **the *CS Europe* case**. The language used and principles applied by Rix J in the passage cited earlier are familiar in the context of contractual construction. Moreover I consider that Mr Henshaw was right to observe in reply that as a matter of logic no distinction is to be drawn in this context between (i) contracts with jurisdiction clauses and (ii) contracts which are silent as to jurisdiction (such as the Customer Agreement in **the *CS Europe* case**) and under which each party is therefore contractually free to sue in any appropriate forum possessing jurisdiction. The question in each case is to which contract the dispute in question is properly to be allocated; and the court then applies whatever jurisdiction provisions, if any, that contract may contain.

95. This conclusion necessarily entails that the English jurisdiction clauses are insufficiently wide to cover the dispute set out in the New York complaint –even if one entirely leaves out of account the proposed revisions to that complaint. All matters relating to the Class A to D NS4 Notes, including the Indenture, the Letter Agreement and the RPSA are subject to the laws of New York. All those agreements contained submissions to the jurisdiction of the courts of New York, save for the Letter Agreement which was silent as to jurisdiction and hence effectively agreed that action could be brought in any court of competent jurisdiction. The Letter Agreement certainly would not entitle UBS to sue HSH, a German domiciled company, in England. I agree with Mr Henshaw that the focus must be on the cause of action rather than the remedy flowing from that cause of action. Thus a claim to rescission, or for damages based upon the risk of exercise of the put option, is not in my view to be regarded as so directly linked to the Kiel Notes or the Kiel Notes IPA as to fall within the English jurisdiction clauses. I was initially troubled by the cause of action for conversion in this regard, but on close examination it seems to me that Mr Henshaw was right to say that the events constituting the conversion as set out in the New York complaint are events which directly relate to the sale of the Class A to D NS4 Notes and do not directly relate to the Kiel Notes or the Kiel Notes IPA.

96. In these circumstances I do not need to examine the extent to which the ground may be different as a result of the promised revisions to the New York complaint. I should record, however, that in the course of his reply Mr Henshaw on instructions gave an undertaking that the complaint would be revised in accordance with the 22 May letter.

Issue 2

97. My conclusion on Issue 1 means that issue 2 does not arise. Issue 2 raised difficult questions which I consider are best left to a case where they necessarily arise for decision.

Conclusion

98. For the reasons I have given HSH succeeds in its application. I ask the parties to seek to agree consequential orders.

Mr David Railton QC and Ms Sonia Tolaney (instructed by Simmons & Simmons) for the claimants
Mr Andrew Henshaw (instructed by Mr Michael McNicholas) for the defendant