Neutral Citation Number: [2012] EWHC 1189 (QB)

Case No: TLQ/11/0716
TLQ/11/0717

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/05/2012

Before:

THE HONOURABLE MR JUSTICE OWEN

Between:

ATTRILL & Others **ANAR & Others**	**Claimants**
- and -	
(1) DRESDNER KLEINWORT LIMITED **(2) COMMERZBANK AG**	**Defendants**

- -

Andrew Hochhauser QC and **David Craig** (instructed by **Mishcon de Reya**) for the **Anar Claimants**
Nigel Tozzi QC and **Kate Livesey** (instructed by **Stewarts Law LLP**) for the **Attrill Claimants**
Thomas Linden QC, Martin Chamberlain and **Oliver Jones** (instructed by **Linklaters LLP**) for the **Defendants**

Hearing dates: 25, 26, 27, 30 and 31 January, 1, 2, 3, 6, 7, 8, 9, 10, 13, 20 and 21 February

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE OWEN

MrJustice Owen:

1. Introduction

In 2008 Dresdner Bank AG (DBAG) was a wholly owned subsidiary of Allianz SE (Allianz) until its sale to the second defendant, Commerzbank AG (Commerzbank) announced on 31 August 2008 and completed on 12 January 2009. A division of DBAG, Dresdner Kleinwort Investment Banking (DKIB) carried on business as a global investment bank. Those who worked in DKIB were employed by or seconded to Dresdner Kleinwort Ltd (DKL), a service company wholly owned by DBAG.

2. Each of the claimants is or was employed by DKL and worked in London in the 'front' and 'middle' office of DKIB.

3. The claimants, 104 in number, form two groups. Those bringing claim No. HQ09X04007, 83 in number, will be referred to as the Attrill claimants. Those bringing claim No. HQ09X05230, 21 in number, will be referred to as the Anar claimants.

4. It was the established practice of DKIB to allocate a bonus pool and individual bonuses in November each year, to communicate the allocation to those employed to work within DKIB, and to pay the cash element of any such bonus in January of the following year provided that the employee was still then employed by DKL and not under notice to leave.

5. At a Board meeting of DBAG held on 12 August 2008 the chief executive officer (CEO) of DKIB, Dr Jentzsch, explained the need to define a minimum bonus pool for 2008 for DKIB so as to ensure employee stability. The Board approved the creation and communication of a bonus pool of EUR 400 million as presented by Dr Jentzsch.

6. On 18 August Dr Jentzsch made an announcement at what was known in DKIB as a 'Town Hall' meeting, a meeting at which business updates were given, and which were open to all DKIB staff wherever employed, either by attendance in person or by watching a live video link on screens on trading floors or on personal computers. The precise terms of the announcement are in issue; but it is common ground that he announced a guaranteed minimum bonus pool of EUR 400m for 2008 to be allocated to individuals on a discretionary basis according to individual performance.

7. The decision to create a guaranteed minimum bonus pool of EUR 400m for those employed in DKIB was subsequently confirmed on a number of occasions.

8. On 19 December 2008 a 'bonus letter' was sent to each of those employed in DKIB by DKL stating that a discretionary bonus for 2008 had been provisionally awarded at a specified sum, but subject to a material adverse change clause (MAC clause).

9. On the same day there was a Town Hall meeting at which Dr Jentzsch reassured those employed in DKIB that it was very unlikely that DBAG would seek to rely on the MAC clause.

10. On 12 January 2009, on completion of the sale of DBAG by Allianz to Commerzbank, Dr Jentzsch was replaced as Chief Executive of DKIB by Michael

Reuther. The MAC clause was invoked, and on 18 February 2009 Mr Reuther sent an e-mail to all employees in DKIB informing them that:

> "*Bonus awards for all front and middle office employees who received a letter in December stating their provisional award, which was subject to Dresdner Kleinwort's financial performance targets, will be cut by 90% pro rata to the stated provisional amount.*"

11. In the event the guaranteed minimum bonus pool of EUR 400m was applied in payment of EUR 152.2m to those to whom individual bonus guarantees had been made. Approximately 10% of the remaining EUR 247.8m was distributed as bonus payments.

12. Each of the claimants claims against DKL the unpaid balance of the sum stated in their bonus letter of 19 December 2008, in the aggregate a sum of EUR 51,855,474; and from Commerzbank the like sum as damages for inducing breaches of contract.

13. The principal issues are whether the announcement of 18 August, and/or any subsequent statements made on behalf of DKL, gave rise to a binding contractual obligation, and secondly whether the MAC clause was introduced in breach of contract, and if not, whether DKL was entitled to rely upon it.

14. <u>The Procedural History</u>

On 28 January 2010 DKL and Commerzbank issued applications under CPR rule 24.2 seeking summary dismissal of the actions. The applications were heard by Simon J on 4 and 5 May 2010. By a judgment given on 28 May 2010 he summarily dismissed any part of the claims that relied upon the announcement made on 18 August 2008 on the ground that it did not create any enforceable contractual rights on which the claimants could rely, but held that the claims based on the bonus letters raised issues of fact which should go to trial.

15. Both claimants and defendants appealed. By a judgment handed down on 8 March 2011 the Court of Appeal allowed the claimants' and dismissed the defendants' appeal, with the consequence that the judgment of Simon J was set aside, and the defendants' applications for summary judgment were dismissed.

16. On 25 June 2011 Master Eyre directed that the claims of the Attrill and Anar claimants be heard together, that the issues to which the claims gave rise should be split and determined in two trials, and identified the issues to be determined in trials 1 and 2. He further directed the parties to attempt to define and narrow the issues; and in response the parties agreed a list of issues to be determined at trial 1 (see Appendix 1).

17. In further directions made by consent on 2 December 2011, Master Eyre directed the parties to agree a representative sample of claimants to give oral evidence and to be cross-examined, made provision for the selection of such claimants in the absence of agreement, ordered that the written evidence of claimants not selected as sample claimants would stand as their evidence in chief at trial 1 notwithstanding that they were not required to attend trial to be cross-examined, and ordered that the claims of

all of the Anar and Attrill claimants were to be determined at trial 1 on the basis of (i) the oral evidence of the sample claimants and (ii) the written evidence of all claimants.

18. In accordance with the directions of Master Eyre, I heard evidence from a representative sample of claimants agreed between the parties.

19. The Factual Background

In 2008 DKIB, the Global Investment Banking division of DBAG, comprised approximately 3,100 front and middle office staff globally, working in a number of locations including London, Frankfurt, New York, Singapore and Tokyo. Approximately 1,300 were employed at its London headquarters, 30 Gresham Street.

20. DKIB's activities were divided into Global Banking, which focused on debt, capital raising, mergers, acquisitions, disposals and corporate broking for a wide range of corporate clients, and secondly Capital Markets which offered research services, and sales and trading of secondary equity and debt securities for a wide range of institutional clients, and which also performed proprietary trading (i.e. trading utilising the bank's funds rather than client funds).

21. Investment banks commonly have a tri-partite structure; the front office consisting of 'client-facing' bankers involved in revenue generating activities, middle office providing support functions primarily for the benefit of the front office, including risk, compliance, legal and IT functions, and back office. DKIB consisted of those discharging front and middle office functions, who ultimately reported to its CEO, Dr Jentzsch, but not of those discharging back office functions who ultimately reported to the board of DBAG.

22. The Contracts of Employment

Each of the claimants had an employment agreement with DKL which incorporated the DKL Employment Handbook. The employment agreements differed in immaterial respects.

23. The Employment Handbook, which was available to employees of DKL on the company intranet and was updated from time to time, was in two parts. Sections 1-20 were expressly incorporated into the claimants' contracts of employment; but Sections 21-44 were expressly stated not to be contractual terms.

24. Section 1.4 provided that:

> "*The Company reserves the right to vary the terms and conditions described in this handbook and the terms and conditions of your employment generally. Such changes can only be made by a member of the Human Resources Department and must be communicated to you in writing. When the change affects a group of employees, notification may be by display on notice boards or Company Intranet.*"

25. Most of the employment agreements also contained an entire agreement clause in the following (or substantially similar) terms:

> *"Entire Agreement*
>
> *The terms of this Agreement and Sections 1 to 20 of the Company's Employment Handbook supersede all previous conditions, understandings, commitments, agreements or representation (other than fraudulent misrepresentations) whatsoever, whether oral or written, relating to the subject matter hereof and constitute the entire agreement between the parties. No waiver or modification of this agreement shall be valid unless in writing, signed by the parties and only to the extent stated."*

26. The vast majority of the employment agreements made express provision for the award of discretionary bonuses in one of the following forms, conveniently set out in the witness statement made by Mark Hindle, Head of Human Resources for DKIB:

> *"1. From time to time the Company makes discretionary awards to its employees. You will be eligible for consideration by the Company for such an award in March [year] [and annually thereafter]. The payment of any such award to you shall be at the Company's absolute discretion.*
>
> *From time to time the Company makes discretionary bonus awards to its employees. Any award made to you shall be in accordance with the Company's policies and practices from time to time, as set out in the Employment Handbook as updated and amended, and at the Company's absolute discretion. If the Company elects to exercise its discretion to make you an award, it is generally paid on or before 31 March.*
>
> As you are aware, Kleinwort Benson makes discretionary bonus awards and you will be eligible for consideration in March [year]".

27. It is common ground that all the claimants, including the three whose employment agreements did not contain any provision with regard to payment of a discretionary bonus, Messrs Sacre, Honeywood and Daley, had a contractual entitlement to be considered for the award of a discretionary bonus. Section 33 of the Employment Handbook contained a statement by DKL as to the basis upon which it would make discretionary bonus awards.

> "*33. Discretionary Bonus Awards*
>
> *33.1. You may be eligible to be considered for the payment of an annual discretionary award if, but only if, on the day bonus awards are actually paid (which is usually in the first quarter of the calendar year), you are both*

employed by the Company and also not within a period of notice of termination of your employment.

33.2. Whether an award is made and an amount of such award, if any, is at the absolute discretion of the Company.

33.3. Many factors influence the Company's decision to make a discretionary award and, if awarded, the amount paid to an individual employee. There is no formula for calculating the level of awards which may be paid in any given year. The Company makes awards to support its commercial objectives at the given time and is likely to take into account many different and competing factors. These are likely to include but are not limited to:

- *The financial performance of the Company and its associated companies.*
- *The financial performance of particular business streams.*
- *The aggregate sum made available for discretionary awards by management.*
- *The need perceived by management to incentivise employees to achieve superior and preferably market-leading performance and to recognise such performance when it occurs.*
- *The monetary and non-monetary contribution of the employee to his or her business stream and the Company.*
- *The particular need to obtain key individuals regardless of their relative achievements during a period.*
- *Market trends and conditions.*
- *The strategic needs and relative priorities of the business and its various constituent activities.*
- *The employee's performance or conduct, including the outcome of any form of disciplinary proceedings.*

Many of these criteria have elements of subjectivity within them. Achievement of a particular level of performance by itself does not entitle you to an award of particular award.

> *33.4 Not all of these criteria may be applicable to the consideration of any or every employee's discretionary award and different criteria may be applied and/or emphasised for a specific individual depending on the particular circumstances. The criteria and reasons for making a discretionary award vary between individuals and business and may change from year to year.*
>
> *… "*

28. The Bonus Allocation Process

The usual practice at DBAG was for the process by which discretionary bonuses were allocated to take place in November/December. The bonus pools for the businesses within DBAG would be negotiated and agreed at senior management level, and with DBAG's parent company Allianz. The pools would then be divided between individual employees, and awards would be communicated on *"letter day"* on or about 19 December.

29. In the course of the year a bonus pool would accrue in DBAG's accounts; and it was common practice for the CEO of DKIB to refer to the accrual at Town Hall meetings. Staff would therefore be aware throughout the year that funds were being set aside for the payment of bonuses.

30. It is common ground that, in relation to the discretionary bonus process, there would be no entitlement to any specific award or sum until written notification of that sum to the individual employee on *"letter day"*. The letter sent on letter day would include a *"statement of total variable compensation",* which would set out the amount of the award, and the amount to be paid in cash as opposed to stock in DBAG.

31. In addition to an entitlement to consideration for payment of a discretionary bonus, some individuals were guaranteed a minimum bonus paid irrespective of financial performance. Typically such guarantees were given on recruitment as an incentive to join, and to compensate for awards of bonuses forfeited by the recruit on leaving his former employment; and in such cases the terms upon which the guarantee was given, were set out in detail in the recruit's contract of employment. Each year DKIB also awarded guaranteed retention bonuses to some key individuals. When it did so, it notified them in writing of the amount that they would receive by way of bonus, the form in which it would be paid and the terms on which it would be payable.

32. The different types of bonus payments made to those employed in DKIB are illustrated by those awarded to Mr Crapanzano, one of the claimants. On joining DKL in July 2007 as Head of Rates Flow Products in the Fixed Income, Currencies and Commodities (FICC) group with the status of Managing Director, he was guaranteed a minimum bonus worth more than £2 million in total for 2007, the terms of the award being set out in his contract of employment. It included a cash award and an award of stock or stock options which vested in tranches. It was subsequently topped up with an additional discretionary award of €500,000 at the end of 2007. On 18 August 2008, he received a letter, signed by two DKL HR Directors, confirming:

(a) the minimum value of his award (€2 million);

(b) the form in which it would be paid (cash payable on or before 31 March 2009 and a deferred award payable in accordance with the terms of a plan notified at the time of the award);

(c) the circumstances in which the award would not be payable (namely if he had given notice of termination of his employment with the First Defendant or the First Defendant had given him notice of termination for gross misconduct or any other serious breach of regulatory or legal requirement or the First Defendant's procedures);

(d) the currency in which the award would be paid (sterling) and the way in which the exchange rate would be calculated (calendar year average foreign exchange rate set by Finance);

(e) that the award was paid gross and was subject to such deductions as the First Defendant may be required to make by law; and

(f) that the details of his remuneration were confidential and should not be disclosed.

33. Similar letters were received by a number of the claimants, including Messrs de Toffol, McNamara, Napoli, Pinto and Santoro. When it was subsequently decided that their guaranteed award for 2008 would be paid wholly in cash, each was notified individually in writing of that fact.

34. The Relevant Sequence of Events in 2008

In the middle of March 2008 Michael Diekmann, chairman of the DBAG supervisory board and CEO of its parent company, Allianz, announced to the board that Allianz had decided to separate the investment banking from the commercial banking business as a prelude to exiting the investment banking business, either by selling DKIB, dramatically reducing the size of its operations, or by winding it down. The decision was made public following the board meeting.

35. The announcement was widely seen as a precursor to the sale of DKIB, and in consequence gave rise to widespread uncertainty as to their future amongst those employed in DKIB. As Dr Jentzsch said in evidence, it gave rise to a serious risk of a mass exodus of key personnel.

36. The evidence demonstrates that that risk began to materialise. On 13 May 2008 Eddie Listorti, the Head of FICC within DKIB reported to Baudouin Croonenberghs, the DKIB Chief Operating Officer, that *"FICC is starting to lose key individuals from both the trading and sales".* On 16 May Mr Listorti emailed Dr Jentzsch in similar terms; and on the same day Dr Jentzsch emailed Mr Diekmann, Herbert Walter, CEO of DBAG, Helmut Perlet, DBAG's Head of Accounting and Taxes, Wulf Meier, DBAG's Head of Human Resources and Klaus Rosenfeld, DBAG's CFO in the following terms:

> "*As I have already informed you in the past two weeks, there has been a growing wave of notices of termination, in particular in the Fixed Income,*

> *Currencies & Commodities Division, in all three areas (Trading, Sales and Quantitative Analysis/Modelling). Employees are moving either individually or in teams, above all to Goldman Sachs, Citigroup and Unicredit/HVB, lastly involving four out of five employees of the Analysis Team. Furthermore, we know that a majority of the employees are going for interviews with competitors and a substantial number of employees have requested a meeting under the key word "Resignation".*
>
> *In the event of further notices of termination, we will shortly no longer be in the position to manage the risks in the various accounts, let alone achieve trading revenues….*
>
> *I am very aware that you have issued the "No Retention" motto. Strict adherence to this guideline, however, will lead to the collapse of this business in just a few weeks and it will be extremely difficult for us to reconstruct this. I don't need to point out the consequences on the current sales efforts, at least as far as evaluation issues are concerned.*
>
> *…*
>
> *In order to at least have a chance to prevent the threatening [employee] migrations, I would like to promise FICC on the whole, that for example, if they achieve revenues of €780 million…the bonus fund for FICC will amount to at least €110 million…..This will give Employees at FICC the certainty of receiving an acceptable bonus at the end of the year if objectives are reached and will give us the flexibility of allocating individual bonuses based on performance and also of allocating less on the whole, if the target of €740 is not reached.*
>
> *…"*

37. On 23 May 2008 the Financial Services Authority (FSA) wrote to Dr Jentzsch notifying him that DKIB's UK regulated entities had been placed on the FSA's Firm Watchlist as a result of the FSA's assessment of the "… *specific risk posed by the planned restructuring of the Group and the resulting uncertainty about the implications for the future of the investment bank*." The letter also contained the following passages:

> " *…it is not clear to us that a robust or comprehensive strategy for the future of DK (DKIB) has been developed…In particular (i), the continuing uncertainty among management and staff could lead to a significant number of key individuals leaving or*

> *becoming disaffected, which may pose a heightened risk to DK where management acknowledge that resources are already stretched within support functions and (ii) there is a risk of impairment of DK's credit rating post separation, with possible severe impact on DK's business model.*
>
> ***Actions Required***
>
> *We recognise that the senior management of DK share these concerns and are actively taking steps to reassure staff and determine a strategy for the non-retail operations. However significant work needs to be undertaken in the short term to address the concerns outlined above. …*
>
> *The FSA will consider removing DK from the Watchlist when the following actions have been completed:*
>
> > *"…*
> >
> > *An assessment of the key risks to the UK operations has been completed, including the risk of the loss of key staff and the mitigation plans DK has in place. We would expect to receive this by end June for our review."*
> >
> > *…*"

38. In the course of June and July there were discussions within DBAG and DKIB and with Allianz as to a programme for retention of staff. On 11 June there was a meeting of the DBAG Management Committee Operating Committee at which the uncertainty as to the potential sale of DBAG and/or DKIB and declining staff morale was discussed. Steps to be taken included:

> "*… consideration be given to creating some kind of staff retention scheme to help retain front, middle office and back office staff whose continued presence is judged important to Dresdner Kleinwort at this time."*

39. The minutes of a meeting of DKIB's Executive Committee on 16 June record that:

> "*Stability of the workforce is key. Regulators have picked up on the risks brought about by the uncertainty. Allianz have embraced the concept of giving front and back office financial certainty, but this is likely to take time."*

40. On 30 June Dr Jentzsch wrote to the FSA confirming that loss of key staff was a key risk and that:

> *"…the risk of defections has risen considerably. A retention programme is therefore being discussed internally as well as with Allianz, and we expect its terms to be finalised shortly."*

41. On 16 July Dr Jentzsch sent a paper "*Incentivisation & Compensation Proposal for 2008*" to members of the DBAG Board. The proposal noted risks to both Allianz, the owner of DBAG, and to a prospective purchaser of the company, namely:

> *"In the run up to the transaction, the Seller runs the risk that there is severe diminution in the [DK] asset it is trying to sell because many of the employees, given the uncertain environment, decide to leave the firm, or they stop performing.*
>
> *Beyond the consummation of the transaction, the Acquirer runs the risk that [DK] becomes a withering asset because key personnel leave as there isn't a long term retention scheme to retain people's commitment to build a long term viable franchise.*
>
> *It is recognized that both the Buyer and Acquirer are willing to pay to mitigate these risks and to ensure management and employees continue to build the business, and get paid on this performance.*
>
> *... at this stage we can only deal with the first of these risks, and we feel that it is imperative that employees and management of [DK] have comfort that bonuses will be available for 2008 as we are preparing for the transaction."*

The proposal was for a "*floor bonus pool"* of €426m and a "*stretch*" pool of €532m.

42. A presentation entitled "*2008 DKIB Bonus Pool – Version 1*" dated 25 July 2008 referred to the need:

> *"... to ensure that the firm is not destabilised with key and mass exits in 2008 prior to any transaction, thereby impacting or hampering a deal ..."*

and proposed that:

> *"... for 2008 a de minimis pool of €400m ... be set aside for DKIB ..."*

43. On 5 August Dr Jentzsch met representatives of the FSA. A note of the meeting records that:

> *"SJ would shortly announce a minimum bonus pool for DKIB to be guaranteed by Allianz. He had requested that this also extend to the functions. Certain key individuals would be guaranteed bonuses."*

44. On 11 August Dr Jentzsch sent an email to Messrs Diekmann, Perlet, Walter, Rosenfeld and others stating:

> *"... I will now promptly communicate the agreement regarding the minimum bonus pool"*

and suggesting that they "*formally decide and record"* the granting of a minimum pool and incentive pool at the meeting of the DBAG board on the following day, and that he announce the decision in his next business update on 18 August 2008, notifying Exco [Executive Committee] members shortly beforehand so that they could put a "*positive spin"* on the decision through an information cascade. Dr Jentzsch proposed saying that:

> *"The Firm's and Allianz senior leadership team have recognised the importance of providing certain financial reassurances to the employees [of] Dresdner Kleinwort in these times of continued speculation over Dresdner Kleinwort's future. As a result it was decided that the minimum bonus pool payable to Dresdner Kleinwort employees will be 400 million …*
>
> *Please note that this is not an individual guarantee and that the allocation of the pool to individuals is still discretionary and will be done according to individual performance.*
>
> *In addition we have agreed that there will be an incentive pool available to Dresdner Kleinwort employees. A baseline revenue number of €2.327.5 million has been established …The fact that we pegged the Incentive Pool to revenues instead of residual income is solely in order to keep the formula simple and transparent."*

45. The retention bonus pool was formally approved by the board of DBAG at a meeting on 12 August 2008. The minute recording the decision is in the following terms:

> "***DKIB Bonus Pool 2008***
>
> *Stefan Jentzsch explains the need to define a 2008 bonus pool for 2008. A minimum bonus pool, which should be announced in the coming week, is needed to ensure employee stability. All risk policies must be strictly observed in order to prevent the pool being 'generated' by taking excessive risk. The minimum pool should be guaranteed and allocated on a discretionary basis. Revenues of EUR 2,327.5 million formed the basis for a cash pool of EUR 400 million, with corresponding increases.*
>
> *Independently of the minimum pool, but related to it at a content level, approximately 60 front office staff should receive individual bonus guarantees. The EUR 87.2 million estimated for this is to be paid for out of the bonus pool of EUR 400 million. The Board also resolves that a defined number of names from the Functions should also receive additional bonus guarantees.*
>
> *The question of how to incorporate existing goals agreements, especially at L2 level, and communication to employees who do not receive an individual guarantee are discussed.*

> *The Board approves the preparation and communication of the 2009 bonus pools for DKIB as presented by Stefan Jentzsch. In view of the individual bonus guarantees, the Compensation Committee should take a basic decision on how to proceed on the basis of a list of names and should report on the results in the next Board meeting. Wulf Meier is requested to discuss the issue with Klaus Rosenfeld."*

46. The presentation approved by the Board, "*2008 DKIB Bonus Pool 12 August 2008",* was in very similar terms to the first draft of 25 July. The relevant parts are in the following terms:

> "*Introduction*
>
> *For staff at DKIB, these are very difficult and uncertain times. This uncertainty threatens to destabilise the business and potentially has serious ramifications for the transactions/strategy Allianz plans for DKIB:*
>
> *Allianz, the Board of Managing Directors of Dresdner bank and the management of DKIB have to ensure that the firm is not destabilised with key and mass exits in 2008 prior to any transaction, thereby impacting or hampering a deal.*
>
> *…*
>
> *In order to cover these points this paper is focused on:*
>
> > *The formulation and communication of the overall DKIB pool in 2008, so that we can all agree on the 'formula' and quantum of the pool as well as the communication of the pool to the staff base of DKIB in order to maximise the efficacy of our stabilisation objective:*
> >
> > *Whilst the pool would represent a base level of de minimis pool, we would also want to provide some incentivisation for better performance, and we also wanted to share our thoughts and agree this.*
>
> *Formulating/Agreeing the Pool*
>
> *We propose that for 2008 a de minimis pool of €400m (75% of 2007) be set aside for DKIB.*
>
> *This base case cash pool is set off the base revenues of €2.327bn*
>
> *...*
>
> *In order to provide some incentivisation to DKIB over and above base revenues a simple pay out ratio of 40 cents for €1 of*

> *revenue is proposed to be added to the bonus pool over and above the base case*
>
> *…*
>
> *Communicating the Pool*
>
> *In order to stabilise the DKIB business it is essential and necessary to formally communicate the pool that has been secured for the staff base.*
>
> *If agreed it would be our intention to formally communicate to the entire staff base of DKIB via a Business Update that Allianz have recognised the uncertainty and impact the strategic discussions are having on the staff base and have agreed to set aside a de minimis overall DKIB bonus pool for 2008 at €400m.*
>
> *…"*

47. The creation of the pool was announced by Dr Jentzsch at the Town Hall on 18 August. Dr Jentzsch was in Frankfurt; but the announcement was simultaneously broadcast on the company intranet, and could have been seen/heard by those employed in DKIB in other locations, in particular London, on desk top computers or on the large screens mounted in the trading floors.

48. No recording of the announcement was retained. But contemporaneous notes were made by Louise Beeson, DBAG's Head of Corporate Communications, and Emma Bryant, an Executive Employee Communications employee. Ms Beeson's note, in so far as is relevant, reads as follows:

> *"3. Compensation – long debate already. We management committee of DK, Dresdner Bank, also Allianz appr*
>
> *minimum bonus pool guaranteed for DK – 400m down 25% on last year – quite generous vs competitors – it is minimum, upside to deliver more*
>
> *two caveats:*
>
> *(i) its not an individual guarantee – it will be allocated according to performance – not an invitation to put your feet up – it's a call to go out there and perform*
>
> *(ii) subject to us sticking to risk guidelines – undue risk taking will not be rewarded.*
>
> *Generous gesture*
>
> *We are able to perform not as consistently and heterogeneously as might like, lets go out and make it happen."*

49. Ms Bryant's note reads:

> "*Minimum bonus pool 400mE, roughly equal to 25% reduction on 2007"*
>
> *Another 20 cents goes into the incentive bonus pool for passing aggregate revenue targets.*
>
> *This is not an individual guarantee of a 25% reduction on last year.*
>
> *Will allocate on a discretionary basis according to performance.*
>
> *Subject to sticking to risk guidelines.*"

50. In addition to the announcement of the minimum bonus pool, a number of 'key' individuals (including a number of the claimants) were notified by letter that they were to receive individual bonus guarantees (see paragraphs 31 and 32 above).

51. On 31 August the acquisition of DBAG by Commerzbank was announced. The workforces of the two banks were told that there would be approximately 9,000 redundancies from the combined total of 67,000 as a consequence of the merger of operations. 1,500 of the redundancies were to come from DKIB employees in London.

52. The acquisition of DBAG by Commerzbank was originally intended to take place in two phases: the first was to take place in January 2009 and was to involve the transfer of 60% of the shares in DBAG to Commerzbank; the second was to take place towards the end of 2009 and was to involve the transfer of the remaining shares. But in November 2008 an accelerated timetable was agreed by which Commerzbank would acquire all the shares in DBAG in January 2009.

53. Following the announcement of the guaranteed retention bonus pool on 18 August, its creation was further communicated to those employed in DKIB by means of the '*information cascade'* initiated by Dr Jentzsch, and to which he had made reference in his email of 11 August (see paragraph 44 above). Further reassurance was given by statements made at Town Halls, by the answers to Frequently Asked Questions (FAQs) posted on the intranet, and by assurances given by management.

54. On 19 September Dr Jentzsch produced a paper "*Stabilizing DKIB"* which contained the following passages:

> *"A Guaranteed Minimum bonus pool irrespective of performance has been agreed and communicated to staff in early August.*
>
> *…*
>
> *So far, the incentive scheme is working with YTD revenue €115mn above pro rate base target."*

55. On 15 September Lehman Brothers collapsed, precipitating a crisis in the banking sector. In the immediate aftermath a number of leading global financial institutions required large capital injections from public funds. On 3 November Commerzbank announced that it would receive an initial €8.2bn in guaranteed funding commitments from Sonderfonds Finanzmarktstabilisierung (SoFFin), the German government stabilisation fund. Further such commitments were subsequently made bringing the total funding made available to Commerzbank to €18.2bn by January 2009.

56. At a meeting on 2 October the board of Managing Directors of DBAG resolved that the letter day for communicating 2008 bonuses would be 19 December, and that bonuses would be paid out in January 2009.

57. On 20 October Mr Hindle, Global Head of Human Resources for DKIB, sent an email to DKIB Global Personnel in the following terms:

> ***"Dresdner Kleinwort and Aligned Functions Bonus Awards***
>
> *The communication date for bonus awards for both Dresdner Kleinwort (Front office employees) and Aligned Functions (support employees) will be* ***Friday 19 December 2008.***
>
> *The bonus pool for the Front Office has already been communicated by Stefan Jentzsch in his updates. The bonus pool for Functions will be comparable with last year's, adjusted for head count movements, individual bonus awards continue to be discretionary and determined by the relevant management, and last year's awards should not be taken as any indication of a level of any bonus award for 2008.*
>
> *Bonus communicated on 19 December will be paid in full with January salaries through the January payroll. The 2008 bonus awards will be awarded in cash and subject to statutory deductions (for example tax and social security). There will be no Stock Plan awards for 2008 and no portion of the 2008 bonus awards will be subject to deferral. "*

58. At a Town Hall meeting on 12 November Martin Blessing, the CEO of Commerzbank, was asked:

> *"…do we have your assurance that Commerzbank would not interfere in the awarding of the bonus pool which has been set aside by Allianz for the employees of Dresdner Kleinwort for this current year?"*

and replied:

> *"… I think the bonus as it's set aside by the Allianz management or by Dresdner, I think in the end is a decision by Dresdner's management. … You have a process, you probably have a formula, you have a judgment process and the question*

> *who makes this judgment can only be somebody who knows you, period. …"*

59. On 17 November, following a meeting of a DBAG Steering Committee, Dr Jentzsch sent a Memorandum to Messrs Diekmann, Perlet and others "*clarifying points about the bonus pool that allows us to justify a bonus pool as high as €400 million".* He further noted:

> "*As already discussed in detail, the minimum bonus pool was approved this summer in order to ensure employment and earnings stability in the face of the said dramatic changes yielded from the intended sale of the bank. This was and is being done for the bank, its shareholders, and finally even for its buyer. That this measure has fulfilled its purpose can already been seen on the basis of the significantly reduced personnel fluctuations. …*
>
> *…*
>
> *In my opinion, this goes to prove that the decision and communication of a minimum bonus pool of €400 million in the summer of 2008 stands justified and was made in the interests of the bank and the merger since the expected goal was fulfilled. If now the bonus pool must be reduced after the objective has been met, I would consider that a dishonourable idea. …"*

60. In late November/early December senior line managers and compensation committees (where required) reviewed each employee's performance for the year and decided on the level of bonus to be awarded to individuals from the guaranteed retention bonus pool. But during the same period there was discussion at board level in DBAG and Allianz as to the nature of the commitment made by Dr Jentzsch with the approval of the DBAG board on 18 August, and specifically as to whether modifications to the bonus pool would amount to breach of contract.

61. The minutes of the meeting of the Board of DBAG on 26 November noted that "*…stabilization has been achieved to date merely through the announcement of the bonus pool*", and recorded discussion as to whether bonus letters could be subject to a proviso.

> *"…..the question of whether modifications can be made to the bonus pool without involving a breach of contract needs to be clarified…Post hoc changes to the bonus pool raise not only the question of how these can be explained to employees but also questions of credibility, fairness and reputation. In other words, a failure to honour the commitments it has made can also represent a considerable risk for the Bank in the period up to the end of the year and thereafter…There is also the aspect of 'frustration of the contract' in the case of an unforeseen and clear deterioration in earnings…The issue of how the annual*

> *results can be taken into account in a suitable manner must therefore be considered."*

62. The minutes of a meeting of the DBAG board on 4 December record the decision to insert a 'Material Adverse Change' (MAC) clause into the bonus letters due to be sent out on 19 December.

> *"The board resolves to leave the volume of the DKIB bonus pool resolved on August 12, 2008 unchanged at present. However, this resolution is subject to the proviso that a clause is included in the bonus letter stating that the bonus payment will be adjusted if material negative deviations in DKIB's revenue and earnings as against the existing forecast for the months of November and December 2008 are established during preparation of the annual financial statements for 2008. The review of this issue will be performed in January 2009 under the leadership of Stefan Jentzsch. The board delegates the decision on any adjustment of the bonus pool that may be necessary following this review to Stefan Jentzsch, Wulf Meier, and Klaus Rosenfeld. This review process must be agreed with Commerzbank."*

63. The FAQs posted on the company intranet on the following day, 5 December, contained the following at Q8:

> *"The minimum bonus pool for employees of the business division Dresdner Kleinwort (ie excluding the functions) remains in place and will be awarded on a performance basis as previously announced by Stefan Jentzsch…"*

64. The bonus letters sent to all employed within DKIB on 19 December were in the following form:

> *"Dear ,*
>
> *A discretionary bonus for 2008 under the arrangements given below has been provisionally awarded at EUR*
>
> *The provisional bonus award stated above is subject to review in the event that additional material deviations in Dresdner Kleinwort's revenue and earnings, as against the forecast for the months of November and December 2008, are identified during preparation of the annual financial statements for 2008 i.e. that Dresdner Kleinwort's earnings position does not deteriorate materially in this period. This will be reviewed in January 2009 by Stefan Jentzsch. In the event that such additional material deviations are identified, the Company reserves the right to review the provisional award and, if necessary, to reduce the provisional award……*

> *You will receive a detailed statement confirming your final bonus award in local currency in February 2009. This will be paid together with your salary in the February 2009 payroll."*

65. At a Town Hall meeting on the same day, Dr Jentzsch sought to reassure employees that the bonus pool remained in place. The transcript of the meeting records him as saying:

> *"So I think it is fair to say that, as one can take from those numbers (*the review of performance year to date*) depending on how the remaining few days will go, then we're going to end the year having achieved, if not slightly exceeded, our base line target numbers: i.e. the underlying business that we're in, which is not affected by the mark-down, is performing in line with expectations which I think, given the very difficult market environment, is quite an achievement and I think can and should be applauded. Therefore, from my perspective, it was certainly right to confirm the bonus pool of €400m for Dresdner Kleinwort, which we did set out in the summer in order to stabilize the investment banking activities. As we can see from this and many other indicators, this pool that we've given out in August/September this year served its purpose as a retention measure because people have, by and large, stayed with the firm and kept the firm together but I think it's also fair to say that we earned the monies paid.*
>
> …
>
> *So when determining the allocation of the bonus pool, we of course had and did take into consideration the financial performance of the particular business areas, and hence we have seen units that will have or have a slight increase in their bonus pool versus last year in line with their performance, and other units have seen their respective bonus pool reduced, and in parts quite significantly. The same is to be said about the individual award. As in previous years, we had and of course we did take into account many factors, not limited to, but including the monetary and non-monetary contribution of the employee, the behavior of the employee, the difficulty of the role the employee has or had been undertaking, and therefore also individual bonuses vary quite dramatically. Of course, this is the same approach that we have adopted in any previous year and there was absolutely no change to the process. In line with these parameters, some employees have or will see their individual numbers being reduced dramatically and some will see significant increases. …*
>
> *… there's one deviation from the commitments that we've made before, and while the total bonus pool for Dresdner Kleinwort has been kept at 400 million, the letters distributed today are not telling you what your bonus number will*

> *definitely be but what you can expect it to be, subject to the review of the financial performance for the full year … I did not seek and do not like this proviso ...*
>
> *... before everyone starts to hyperventilate and develop paranoia, ... let me clarify a few things. First ... the final review will be done by me or under my leadership in January 2009 ...*
>
> *Second; while the determination of the individual bonus number is a fully discretionary process, as you know, the calculation of any adjustment would have to be based upon a demonstrably material deviation in Dresdner Kleinwort's financial performance in 2008 from that as currently forecasted. In addition any change in the individual award would have to take into account not only the deterioration but all the other factors determining individual compensation. …*
>
> *... both Martin Blessing and Michael Reuther are men of honour who will stick to the bonus commitments already publicly made. Also I could not understand how and why, for what no doubt will be just a small economic amount even if it happened, they and their senior Commerzbank management collectively would wish to destroy their reputation as trustworthy leaders ...*
>
> *… If the awards will have to be changed because we have a material deterioration in the business, then we have to go back and look at each and every individual award, taking into account the new performance figures for the firm but also taking into account all of the other factors that are there. So you can't just go out and do it by a mathematical formula."*

66. On 12 January 2009 the acquisition of DBAG by Commerzbank was completed, and in May 2009 Commerzbank and DBAG were formally merged under German law. On the completion of the acquisition Dr Jentzsch stood down as CEO of DKIB and was replaced by Michael Reuther. Mr Blessing became Chairman of the board of DBAG on 20 January 2009. It will be necessary to consider the events of January and February 2009 in greater detail; but it appears that at a meeting of the DBAG board on 27 January there was a decision to undertake "*a far more reaching review of the bonus pool and a reduction in the direction of a target of EUR 300m.*"

67. On 17 February 2009 the minutes of a meeting of the DBAG board record that it had resolved to reduce the bonuses to the DKIB front office by 90%.

68. On 18 February 2009 all those employed in DKIB were emailed a letter from Mr Blessing and Eric Strutz, Chief Financial Officer of Commerzbank, stating:

> *"…The months of November and December saw a dramatic deterioration in the earnings situation for both banks…we on the Board of Managing Directors of the new Commerzbank*

> *conducted a review of bonus payments for 2008. After an intense round of discussions, the boards of Commerzbank and Dresdner Bank decided in favour of a policy as uniform as possible for the two banks and their subsidiaries. No bonuses will be paid for 2008….For 2008, we will pay employees at both banks the contractually guaranteed benefits…Through these measures, we aim to ensure fair and equitable treatment for employees of both banks."*

69. Later that day an email was circulated by Mr Reuther stating:

> *"bonus awards for all Front and Middle Office employees who received a letter in December stating their provisional award, which was subject to Dresdner Kleinwort's financial performance targets, will be cut by 90% pro rata of the stated provisional amount."*

70. In accordance with Mr Reuther's email, those employed in DKIB were paid bonuses for 2008 at 10% of the provisional awards notified on 19 December 2008; save for those who, in addition to their entitlement to be considered for a discretionary bonus, had been awarded an individual guaranteed bonus, and who were not paid any part of their provisional awards.

71. <u>The Issues</u>

The issues to be determined in trial 1 as agreed by the parties (see Appendix 1) are expressed in generic terms that reflect the pleaded cases. But in the course of the trial an issue arose as to whether, on their pleaded case, it was open to the defendants to argue that distinctions were to be drawn between claimants on the issues of acceptance and/or consideration. I ruled that if the defendants wished to argue that the claims of individual claimants should fail on their individual facts, they should plead such a case. In consequence the defendants applied for, and were granted leave to re-amend the defence. The re-amendment gave rise to specific issues in relation to ten of the claimants, six Attrill claimants and four Anar claimants. Such issues will be addressed in Appendix 2. It also gave rise to further issues in relation to all claimants, namely whether they relied on the statements made in relation to the guaranteed minimum bonus pool by not seeking or taking up employment elsewhere, and in particular whether they remained in the employment of DKL because they had no wish to leave and/or because discretionary bonuses for 2008 were to be paid at the start of the following calendar year and/or because of difficulties in the employment market given the circumstances in the banking sector at the relevant time.

72. The issues common to all claimants fall into two categories, namely those arising from the announcement made by Dr Jentzsch at the Town Hall on 18 August 2008 and subsequent statements as to the bonus pool, listed under the heading '*A. The Effect of the Statements*', and secondly those to which the insertion of the MAC clause into the bonus letters distributed on 19 December 2008 give rise, '*B. The MAC Clause'*.

73. As to the former the claimants' case can be simply put, namely that by the announcement and/or subsequent statements made by the management of DKL and/or

DKIB, DKL made promises to the DKIB employees in the front and middle offices in relation to the creation of a guaranteed minimum bonus pool of €400m for 2008 in order both to retain and incentivise them, promises that were contractually binding. In breach of contract DKL failed to make bonus payments in accordance with their contractual obligations; and Commerzbank induced such breaches of contract.

74. The defendants case can be equally simply put, namely that the announcement of 18 August, which was never reduced to writing, was neither intended to have contractual effect, nor had such effect; and the subsequent references to the announcement and/or the bonus pool likewise had no contractual effect.

75. A. THE EFFECT OF THE STATEMENTS

The 18 August announcement

Before addressing the effect of the announcement made at the Town Hall on 18 August 2008, it is necessary to resolve issues as to what was said by Dr Jentzsch.

76. It is common ground that the announcement contained statements to the following effect:

a) that a minimum bonus pool of €400m had been created for 2008,

b) that it represented a reduction of approximately 25% from the bonus pool for 2007,

c) that there was potential for the size of the pool to be increased by 40 cents in the Euro if revenue exceeded targets,

d) that it did not give rise to individual guarantees and that the pool would be allocated on a discretionary basis by reference to performance.

77. But there are three areas of dispute.

a) It is the claimants' case that Dr Jentzsch announced a guaranteed minimum bonus pool. That is accepted on behalf of the defendants; but it is submitted that the communication made to the DKIB workforce by Dr Jentzsch was that he had secured an agreement with Allianz to the effect that Allianz would guarantee to make available to DKIB management a pool of €400 million, from which bonuses would be paid, ie it was guaranteed in the sense that it was funded.

b) Secondly the claimants contend that (per the Anar claimants' pleaded case) Dr Jentzsch announced that the pool had been created '*for front and middle staff of DKIB'*, and (per the Attrill claimants' pleaded case) "*would be paid to Front Office Staff."* The defendants contend that the minimum bonus pool was announced as being for DKIB staff.

c) Thirdly the Anar claimants contend that Dr Jentzsch announced that individual bonus allocations would be made from the pool "*in the usual way".* The defendants dispute that such a statement was made.

78. The context in which the term 'guaranteed' was used

There are two preliminary points to be made. First the contention as to the nature of the announcement made by Dr Jentzsch now advanced by the defendants represents a departure from their pleaded case, and was advanced for the first time in their written opening. Secondly it is a departure from the manner in which the defendants' case was advanced by Jonathan Sumption QC, as he then was, in argument before the Court of Appeal. When asked by the court for his case as to the meaning of the term '*guaranteed*', Mr Sumption replied that the use of the word was "*simply an emphatic statement*."

79. The sources of evidence as to what was said are the contemporaneous notes made by Louise Beeson and Emma Bryant, as to which see paragraphs 48 and 49 above, the evidence of Dr Jentzsch himself, and of the claimants and of one of the witnesses called on behalf of the defendants, Neil Aiken, Head of Structured Finance at DKIB at the material time, and now Head of Structured Finance for Commerzbank. In addition to the direct evidence there is documentary evidence, both pre and post-dating the announcement, against which the direct evidence can be tested, and from which inferences may be drawn as to what was said by Dr Jentzsch.

80. In considering the contemporaneous notes, it must be borne in mind that in each case they are clearly not a verbatim record. That said, the note by Ms Beeson is consistent with the claimants' case that what was announced was a guaranteed minimum bonus pool for DKIB (referred to in the note as DK), which had been approved by DKIB, DBAG and Allianz. It is inconsistent with an announcement to the effect that Allianz had guaranteed the minimum bonus pool.

81. In the course of the broadcast on 18 August, Thomas Ris, Head of Equity Sales at DKIB's Frankfurt office, took advantage of the facility available to those seeing the announcement to put questions to Dr Jentzsch by email. His question was in the following terms:

> "*Stefan*
>
> *You just mentioned management has agreed with Allianz on a guaranteed bonus pool of €400m. Is it right to assume this only being the case if DKIB not being sold until year end or will this also be one negotiation point in the current negotiations with an investor?"*

The answer given by Dr Jentzsch as recorded by Ms Beeson is in the following terms:

> *"Bonus pool of – reason is to take away uncertainty – change of ownership should happen by year end – up to us to up the number accounts to perform but that number will remain no matter what – not a subject for negotiation."*

It can be argued that the first sentence of the question is consistent both with the claimants' case, and with that now advanced on behalf of the defendants. But the answer is revealing. By it Dr Jentzsch was saying that the figure for the bonus pool would remain whether or not there had been a change of ownership by the year-end,

in other words whether or not Allianz still owned DBAG/DKIB. That answer is inconsistent with an announcement to the effect that it was Allianz that had guaranteed the minimum bonus pool, and not DBAG/DKIB.

82. Ms Bryant's note is of limited assistance in this context. But bearing in mind that the announcement was being made by the CEO of DKIB, it is consistent with the claimants' case, and does not provide any support for the defendants' case, as it does not contain any reference to Allianz.

83. As to the evidence given by Dr Jentzsch, in his witness statement dated 7 November 2011, he said that he:

> "*... explained that a minimum retention pool of €400m was guaranteed for front office staff.*"

But he accepted in cross-examination that he did not have a precise recollection of what he had said. He was questioned at some length by reference in particular to his presentation to the DBAG Board dated 25 July 2008 (see paragraph 42 above), and the note of the meeting that he had with representatives of the FSA on 5 August 2008 (see paragraph 43 above).

84. As to his presentation to the DBAG Board, it was put to him in cross-examination that he was proposing "*…to go to the Town Hall and would then announce to the workforce that an agreement with Allianz had been reached".* His response was:

> *"The answer is yes because given that formally binding agreements of that nature required the approval not only of the management board but also of the global compensation committee of Dresdner Bank and the global compensation committee of Allianz before we made any formal communication. Yes, it was right to say that it was done in agreement with Allianz."*(day 10 page 26 line 21 to page 27 line 3)

When it was put to him that the commitment to the bonus pool *"... was one made by Allianz"* he said:

> *"No, again it is --- these matters were --- if you want to call it that way, it had to be a collaborative effort because the rules of the game, for lack of better words, were both in general terms, i.e., making these kind of commitments, but in particular in the situation where the decision has been made to first separate the investment bank and then later superseded by the agreement with Commerzbank that these kind of --- any of these kind of guarantees, commitments, statements or whatever you want to call them could only be made in conjunction with the shareholders because it would directly affect the shareholder. I think that is all that there is to it. I simply did not have the authority to make any of those statements on my own without having first one to --- I can't say in that order but without having gone to the management board of Dresdner Bank AG or*

> *indeed the compensation committee of Dresdner Bank AG or the compensation committee of Allianz. I simply didn't have the authority and therefore it had to be done in conjunction with the parties and those parties included Allianz."* (Day 10 page 28 line 18 – page 29 line 14):

85. It was then put to him that what he had said at the Town Hall had reflected both the content of his witness statement and the note of the meeting with the FSA on 5 August, namely *"… a minimum bonus pool to be guaranteed by Allianz"*. In reply he said:

> *"I agree with you that the statement made here to the FSA, the way I said it in my witness statement, was that it was guaranteed by Allianz but it is formally speaking not a correct statement because Allianz did not formally guarantee that bonus pool."*

86. Mr Linden QC further pressed Dr Jentzsch on the point, putting it to him that the message that he was giving in relation to the guarantee was that staff could have the assurance that Allianz had agreed to fund the pool. He answered in the following terms:

> *"It was not a question of who would fund the pool because again the funding would have --- the money would have come from Dresdner Bank and, as I just said, of course through the consolidation mechanisms it would ultimately be an Allianz group expense because we were part of the Allianz group but it was not meant to say that the physical funds were coming directly from Allianz as the shareholder."* (Day 10 page 32 12-19)

87. Although pressed hard on the point, Dr Jentzsch firmly resisted the suggestion that he had said in the course of the announcement that it was Allianz that had agreed to guarantee the minimum bonus pool, making it clear that what he had said was to the effect that the guaranteed bonus pool had been put in place with the agreement of Allianz.

88. There were statements from a number of the claimants that could be interpreted as consistent with the argument now advanced on behalf of the defendants, both in evidence and in grievances advanced following the reduction of individual bonuses to 10% of the sums stated in the bonus letters of 19 December 2008. But such statements have to be considered in context and as having been made by laymen. In my judgment they simply reflected the reality of the situation, namely that as explained by Dr Jentzsch in the passages from his evidence set out above, a guaranteed bonus pool could not have been created without the agreement of Allianz.

89. Mr Hindle, as Global Head of HR for DKIB, was responsible for overseeing the DKIB discretionary bonus process. He was on holiday in August 2008, and did not therefore hear the announcement of 18 August. But in his witness statement he said at paragraph 9.4 that:

> *"I became aware that Dr Jentzsch had obtained approval for a bonus pool of EUR 400 million for the front and middle offices of DKIB from the Board after this was announced at the Town Hall meeting on 18 August 2008."*

He was not asserting that his understanding of the announcement was of a guarantee by Allianz to make a pool of €400 million available to DKIB management. Furthermore his email to all DKIB staff of 20 October (see paragraph 57 above) does not suggest that the commitment to the bonus pool was of such a guarantee by Allianz. On the contrary, as head of HR for DKIB, he was informing DKIB staff of when and how their bonuses were to be paid.

90. Mr Aiken, the only witness called by the defendants who was able to give direct evidence as to what was said on 18 August, made no reference to the announcement in his witness statement. The fact that he had seen the announcement via the company intranet only emerged in cross-examination. He agreed that the gist of Dr Jentzsch's message was that it was to be a guaranteed minimum bonus. When Ms Beeson's note was put to him he said that he could not recall whether it was accurate or not, but he agreed that it was certainly the gist of what was said. He nevertheless maintained that he understood the announcement to mean that the minimum pool would be guaranteed by Allianz. But he also went on to say that he had told people in his team that *"… they would have to perform in the usual way and there was (sic) no guarantees"* (Day 13 page 154 line 16-18). When pressed on the point he asserted that that was what he had told two of his direct reports, the claimants Jeremy Thomas and Matthew Thorne, both of whom gave evidence. Mr Aiken was not an impressive witness. As has already been observed, there was no reference to having heard the announcement in his witness statement, a surprising omission given the centrality of the issue of what was said by Dr Jentzsch. Secondly it was not put either to Mr Thomas or to Mr Thorne in cross-examination that they had been told by Mr Aiken that there was no guarantee in relation to the bonuses, when both had given evidence to the effect that a guaranteed bonus pool had been announced, an announcement that both found very reassuring.

91. <u>The documentary evidence</u>

The documentary evidence reveals discussion with Allianz as to the creation of a retention pool. Of particular significance in this context are the email sent by Dr Jentzsch to the CEOs and CFOs of both Allianz and DBAG on 11 August (see paragraph 44 above) and the minute of the meeting of the DBAG Board of 12 August (see paragraph 45 above), from which it is clear that the decision to create the guaranteed bonus pool was made by DBAG, albeit with the agreement of Allianz.

92. Dr Helmut Merkel, who at the material time was General Counsel for DBAG, attended the meeting of 12 August, and took the minute. In the course of his cross examination he was asked about the use of the word 'guaranteed' in its first paragraph. There was then the following exchange:

> *"Q. And moreover you recorded, and you may want to look at this…that the minimum pool should be guaranteed and allocated on a discretionary basis…*

A. yes.

Q. And by 'guaranteed' you did not mean guaranteed by Allianz did you?

A. No, certainly not."

93. As to the post-announcement documentation, there are two documents of particular relevance. First the FAQs posted on the company intranet on 22 August 2008 contained the following:

> *"Allianz has said nothing to indicate a change of commitment to the bank and continues to show strong support for Dresdner Kleinwort. Recently Allianz has agreed and supported Dresdner Bank's Management Board decision to set a minimum bonus pool of €400m for Dresdner Kleinwort. This applies to the investment banking division in its existing form and therefore does not include corporate functions".*

That is inconsistent with the contention that four days earlier, Dr Jentzsch had announced that it was Allianz that had guaranteed the minimum bonus pool.

94. Secondly Dr Jentzsch prepared a presentation for Allianz entitled '*Stabilising DKIB*' dated 19 September 2008. It contains the following:

> "*Allianz has offered protection by agreeing to a €400mn minimum bonus pool. It is our duty to repay Allianz by getting as much business in as possible, however difficult it may have become. A poor performance may affect the foreign exchange ratio for Allianz, so we have to protect them as Allianz has protected us.*
>
> *A Guaranteed Minimum Bonus Pool of €400mn irrespective of performance has been agreed and communicated to staff in early August.* "

It is highly improbable that Dr Jentzsch would have been making a presentation to Allianz in such terms if, on 18 August, he had announced a minimum bonus pool guaranteed by Allianz.

95. Conclusion

In my judgment and in the light of the evidence summarised above, I am satisfied that the overwhelming probability is that the announcement made by Dr Jentzsch was simply of a guaranteed minimum bonus pool. It was not an announcement to the workforce that Allianz had guaranteed to make available to DKIB management a pool from which bonuses would be paid, ie that the pool was guaranteed in the sense that it would be funded by Allianz, as the defendants now contend.

96. Front and Middle Office Staff of DKIB or the Staff of DKIB

The second issue as to the content of the announcement of 18 August relates to those to whom the announcement was expressly directed. Did Dr Jentzsch announce that the pool had been created for front and middle office staff or, as the defendants now contend, for DKIB staff?

97. The first point to be made is that the evidence clearly shows that it is a distinction without a difference. If, as is submitted on behalf of the defendants, he announced a guaranteed minimum bonus pool for DKIB staff, that would have been understood by those employed in DKIB as referring to those discharging front and middle office functions.

98. Dr Jentzsch was cross-examined at some length as to whether he had used the term 'front and middle office', or had simply referred to DKIB staff in his announcement. But as he explained repeatedly, they meant the same thing. By way of example, when asked what the phrase "*Communicate to the entire staff base of DKIB*" used in his presentation to the DBAG Board on 12 August meant, he said:

> *"The entire staff base of DKIB would mean all the people at Dresdner Kleinwort investment banking division, i.e., the 3000 and small number that reported in the end to me; i.e., front and middle office as we discussed yesterday".*

In the course of re-examination there was the following exchange:

> *"Q. Moving from that, to whom was this promise made? Which of the employees did you understand this promise to be made to?*
>
> *A. To the employees in the front and middle office, ie, of what we call DKIB.*
>
> *Q. Yes. Was there any question of the back office being in this pool as far as you were concerned?*
>
> *A. No.*
>
> *Q. In the usual way, were the back office paid bonuses out of the same pool as the front and middle office?*
>
> *A. No, they had their separate bonus pools".*

99. Similarly although some claimants could not recall the precise words that Dr Jentzsch had used, and others thought that he had referred to DKIB employees, they understood the promise to relate to front and middle office employees. By way of example Mr Crapanzano, when questioned on the point said :

> *"A. Dresdner Kleinwort is only front and middle office. I mean, the back office do not belong to Dresdner Kleinwort, they were part of Dresdner Bank, and as a matter of fact it's another 3,000 people, I believe, but Dresdner Kleinwort's head count, which is 3,500 people, and my understanding has always been that it is only front and middle office, so the pool could*

> *only refer to the people he was addressing…which was Dresdner Kleinwort employees." (Day 8, page 52 lines 3 – 12)*

There was a similar exchange in the cross-examination of Mr Thorne:

> *"Q. Are you confident that Dr Jentzsch said at the announcement stage that the pool was for front and middle office employees or did he say that it was for Dresdner Kleinwort employees and staff?*
>
> *A. To be honest I can't recall what he said. I think the two are exactly the same. Dresdner Kleinwort is the front and middle office because the back – the way Dresdner Bank worked is that your sort of back office line of functions, you might hear them called, reported up to another reporting line right up to the way of the board so it is almost like you have two silos. One is DKIB, which is the front and middle office employees and one is the back office, which reports up to Mr Rosenfeld and, you know, they were completely different"*. [Day 7, page 64 line 16 to page 65 line 5]:

100. Secondly the evidence from the claimants as to their understanding of the announcement is borne out by the evidence of Mr Hindle, who said at paragraph 9.10 of his witness statement:

> *"The minimum bonus pool was only for front- and middle-office and did not include the back-office that supported the front- and middle-office. I recall that we did receive some queries within HR as to whether the back-office would benefit from the minimum pool or not, and HR confirmed that the back-office would not benefit from the minimum pool (as it was always clear to me that it would not, because Dr Jentzsch was not responsible for the back-office)."*

101. It is also consistent with the answers to the FAQs posted on the intranet on 22 August 2008 which contained the following:

> *"Allianz has said nothing to indicate a change of commitment to the bank and continues to show strong support for Dresdner Kleinwort. Recently Allianz has agreed and supported Dresdner Bank's Management Board decision to set a minimum bonus pool of €400m for Dresdner Kleinwort. (This applies to the investment banking division in its existing form and therefore does not include corporate functions)"*

and see also the FAQs posted on 12 September 2007.

102. Thus whether Dr Jentzsch referred to DKIB staff or to front and middle office staff in his announcement is of no significance. There can be no doubt as to those to whom the announcement of the guaranteed minimum bonus pool was directed. It was not

directed to back office staff whose reporting line was to the DBAG Board, and not to Dr Jentzsch as CEO of DKIB.

103. Did Dr Jentzsch announce that the individual bonus allocations would be made "*in the usual way*."

104. The third issue as to the 18 August announcement is whether Dr Jentzsch said in terms that the allocation of individual bonuses would be made "*in the usual way*", as pleaded by the Anar claimants. Both Ms Beeson and Ms Bryant recorded that the bonus pool would be allocated according to performance and subject to adhering to risk guidelines. It is implicit in such statements that individual bonuses would be allocated in the usual way.

105. Secondly none of the claimants who gave evidence were challenged on their evidence that Dr Jentzsch had stated that the distribution of the bonus pool would be made in the usual way, see for example the witness statements of Simon Dunn, Domenico Crapanzano, Igino Napoli and Matthew Jordan.

106. In his witness statement Dr Jentzsch referred to the exercise being carried out in the usual way. In cross examination he stated that he may have made a reference to the usual practice in the course of the announcement. He was challenged as to that by Mr Linden on the basis that that was contrary to the evidence that he had previously given. But careful analysis of his evidence shows that whilst he had earlier accepted that he had not said to the work force that "*we will follow exactly the same procedures*," he went on to explain that the respect in which the normal procedure had not been followed was the consequence of the announcement of 18 August, namely that the minimum bonus pool for distribution had been fixed, whereas the normal procedure would have involved a later determination of the bonus pool.

107. I consider that it is probable that Dr Jentzsch indicated that individual bonuses would be allocated in the usual manner, i.e. following an assessment of individual performance. But in any event that was implicit in the announcement.

108. Conclusions as to the content of the announcement of 18 August

I am satisfied that the announcement was to the effect that a guaranteed bonus pool of €400m had been established for those employed in DKIB, i.e. front and middle office staff, for 2008, to be allocated to individuals on a discretionary basis by reference to performance '*in the usual way'*, a pool that would remain '*no matter what*', and in particular whether or not there had been a change of ownership by the year end.

109. The effect of the announcement of 18 August

The central issue is whether the announcement amounted to a promise that gave rise to a contractual obligation owed by DKL to those employed in DKIB, or whether, as the defendants contend, it was a statement of future intent and, insofar as it amounted to a promise, was binding in honour only.

110. Resolution of this issue requires consideration of the following questions:

i) Was the announcement sufficiently certain to create legally binding obligations?

ii) Was the announcement such that an intention to create legally binding obligations is to be inferred?

iii) Did the announcement amount to an offer capable of acceptance, and if so were the employees required to communicate their acceptance, and if so did they?

iv) Was consideration given and/or received?

111. Before addressing those questions it is necessary to consider the nature of the contractual obligation for which the claimants contend. It is settled law that an entitlement to be considered for payment of a discretionary bonus has contractual force, and can be enforced notwithstanding that the amount to be received by an individual has not been stipulated, see *Clark v Nomura* [2000] IRLR 766 and *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2005] ICR 402. An employee entitled to be considered for payment of a discretionary bonus is further entitled to a bona fide and rational exercise by the employer of its discretion to decide whether, and if so, how much to pay him.

112. Thus I start from the premise that the promises made by Dr Jentzsch were capable of having contractual effect.

113. It is the claimants' case that the announcement amounted to a unilateral variation of their contracts of employment; and the first question to address is whether the announcement of 18 August and/or any subsequent statement varied the claimants' contracts of employment pursuant to paragraph 1.4 of the DKL Employment Handbook (see paragraph 24 above), by which DKL reserved to itself the right unilaterally to vary the terms of the contracts of employment. If paragraph 1.4 compliant, communication of a variation would take effect without the need for its acceptance by employees and without the necessity to demonstrate consideration.

114. <u>Was there compliance with paragraph 1.4 of the Employment Handbook</u>

As paragraph 1.4 could be used by DKL to effect changes to terms and conditions adverse to employees, a unilateral variation could not have contractual effect unless there was strict compliance with the requirements as to communication of the change in question.

115. By paragraph 1.4 "*When the intended change affects a group of employees, notification may be by display on notice boards or Company Intranet*". The claimants contend that there was compliance, given that the announcement of the guaranteed minimum bonus pool affected a group of employees, namely those employed in DKIB, and that the change was notified by company intranet. I agree. I am satisfied that on its proper construction, section 1.4 did not require 'display' of the change on the company intranet, rather that notification could be by company intranet.

116. But there is a further requirement that was not met by the announcement by Dr Jentzsch, namely that unilateral changes could only be made by a member of the

Human Resources Department. Dr Jentzsch was a member of the management board of DBAG and CEO of DKIB, but was not a member of HR, and HR did not report to him. I am therefore bound to conclude that the announcement could not of itself amount to a unilateral variation of the contracts of employment under paragraph 1.4.

117. The question then arises as to whether there was further communication which, either viewed in isolation or in conjunction with the announcement of 18 August, was paragraph 1.4 compliant. According to Mr Hindle FAQs were issued by DKIB Corporate Communications, and although normally reviewed by HR, were not "…*a tool used by HR to amend or introduce new terms of employment.*" Thus although there were references to the guaranteed minimum bonus pool in FAQs posted after 18 August (see in particular those of 22 August and 12 September), I do not consider that they amounted to compliance with paragraph 1.4, in that, whether taken in isolation or in conjunction with the announcement of 18 August, they were not the communication of changes made by a member of the Human Resources Department.

118. On 20 October Mr Hindle sent an email to DKIB Global Personnel (see paragraph 57 above). It referred to the bonus pool for the Front Office that had "…*already been communicated by Stefan Jenztsch in his updates*", and gave further information as to the dates upon which bonus letters would be issued, when bonuses would be paid, and in what form they would be paid. It amounted to confirmation by the Global Head of HR of the variation of the basis upon which discretionary bonuses were to be awarded for 2008 that had been announced by Dr Jentzsch in 18 August, and was communicated to all those employed in DKIB by the company intranet. In my judgment the endorsement of the announcement by Mr Hindle satisfied the requirements of paragraph 1.4, in that it confirmed the change announced by Dr Jentzsch, giving further details as to the manner in which it would be implemented.

119. But it is further submitted on behalf of the defendants that the announcement by Dr Jentzsch was insufficiently certain to be regarded as contractually binding, and secondly that, viewed objectively, it was not intended to give rise to legally binding obligations.

120. <u>Was the announcement of 18 August sufficiently certain to be regarded as contractually binding.</u>

121. The claimants contend that the announcement was made in clear and unequivocal terms. They submit that it amounted to a commitment to set a minimum figure for the bonus pool, a figure that was 'guaranteed' and that the term 'guaranteed' can only mean that that was the pool that would be distributed, and, per Dr Jentzsch, would not be reduced "*no matter what"*, in other words without reference to the performance of DKIB, although distribution to individuals would be dependant on individual performance.

122. A number of arguments were advanced on behalf of the defendants in support of the contention that the announcement was insufficiently certain to be regarded as contractually binding. First it was submitted that the announcement would not give rise to an expectation on the part of any individual of receiving a particular share of the pool. That is correct, but does not deprive the promise made in the announcement of having contractual effect. The announcement of the guaranteed minimum bonus pool, if legally binding, operated as a constraint on DKL and/or DBAG when they

exercised their discretion to award bonuses, in that the pool out of which bonuses were to be distributed would be not less than €400m. As the Chancellor observed at paragraph 29 of his judgment on the appeal from the judgment of Simon J (see paragraphs 14 -15 above).

> "*I see no reason why a promise of a guaranteed minimum bonus pool cannot be contractually binding even though individual employees cannot at that time point to an entitlement to a specific bonus payable out of it.*"

123. Secondly it is submitted that the announcement did not contain details as to when the bonuses would be paid, nor whether they would be paid in cash or stock. Again that is correct, but does not deprive the promise to create the guaranteed minimum bonus pool of having contractual effect. Such details related to the manner in which the obligation was to be discharged, not to its existence. But in any event Mr Hindle addressed such matters in his e-mail of 20 October.

124. Thirdly the defendants sought to argue that there was uncertainty as to whom the announcement was directed. That is an argument that I have rejected for the reasons set out at paragraph 96 – 102 above. It was directed to DKIB, ie to those discharging front and middle office functions.

125. The fourth argument relied upon by the defendants in this context is that Dr Jentzsch neither indicated that the whole of the pool would be paid out, nor gave any indication as to whether the pool was to be confined to bonuses or could be used for other purposes. That is not in dispute, but if, as was implicit in the description of the pool as 'guaranteed' and 'minimum', the payment of bonuses was the sole purpose for which the pool had been created, and it would be paid out in its entirety, there was no reason for him to do so.

126. Mr Linden sought to buttress his argument by pointing to the evidence as to other uses to which the pool would or could be put, namely the evidence that severance payments totalling approximately €7.5 million were subsequently paid out of the pool, and secondly the evidence from Dr Jentzsch and Mr Hindle as to the practice of retaining some part of the pool against contingencies. As to the former, if the announcement gave rise to a contractually binding obligation, the use of the pool for other purposes, such as severance payments, arguably amounted to a breach of contract, but such use does not serve to reinforce the argument that the announcement was insufficiently certain to give rise to a binding obligation. As to the latter, both Dr Jentzsch and Mr Hindle gave evidence to the effect that the usual practice was to leave a part of the bonus pool unallocated for contingencies. There was the following exchange in the course of the re-examination of Dr Jentzsch:

> *"Q. You were also asked, Dr Jentzsch, whether you said that the whole sum was going to be paid out, and you said that was not said because it was implicit. Can you just explain why it is implicit?*
>
> *A. I think from very small deviations, if a bonus pool was sized at a number X, whatever X was, and by whatever methodology, then we would typically spend, if not all of the money, then*

> *almost all of the money. It may well be that a few percentages may not be allocated, because it so happened…that in the various allocation rounds, I typically kept a little bit at the side, so to speak, so I gave the managers only part of what we had to work with in case there were any unseen events. Sometimes there were not, so we left it at that, yes. But I think with a 95 to 97 per cent probability, if that is the right word, those numbers (the agreed pool) were being paid out, to the extent of 95/97 per cent were being paid out." Day 10 page 191 lines 1-9.*

The retention of a very small percentage of the pool against contingencies was plainly part of the normal process for allocation of the pool. As such it fell within the announcement that the pool would be allocated 'in the usual way'. It does not in my judgment serve to support the argument that it was insufficiently certain to give rise to a binding obligation.

127. I therefore reject the argument that the announcement was insufficiently certain to be capable of giving rise to a binding obligation.

128. <u>Was the announcement of 18 August such that an intention to create a legally binding obligation is to be inferred?</u>

The issue of whether the announcement of 18 August was intended to create legally binding obligations must be considered objectively. As Lord Clarke said in *RTS Flexible Systems Ltd v Molkerei Alois Mueller GmbH & Co KG (UK) Productions* [2010] UKSC 14, [2010] 1 WLR 753 at paragraph 45:

> "*Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations."*

129. Similarly in *Edmonds v Lawson & Anor* [2000] All ER 31 at paragraph 31 Lord Bingham CJ (as he then was) said at paragraph 21:

> "*Whether the parties intended to enter into legally binding relations is an issue to be determined objectively and not by enquiring into their respective states of mind. The context is all-important.*"

130. But it is important to understand the reasoning behind the necessity to apply an objective test to the question of whether the parties to an agreement intended it to be legally binding. The objective test prevents a party from relying on his subjective (and uncommunicated) belief that he is not binding himself. It protects the party who has relied on the objective appearance of consent from the prejudice that he would suffer if the other party could escape liability by asserting that he had no intention that

he had been legally bound, and did not believe that he was. Thus as the author of Chitty on Contracts 30th Ed Vol 1 suggests, "*The objective test is subject to the limitation that it does not apply in favour of a party who knows the truth*" a proposition that I find persuasive. If valid it would suggest that evidence of the subjective view of a party that he intended to enter a legally binding contract is relevant and admissible where that party subsequently seeks to assert that there was no intention to create legal relations.

131. The point is of relevance in the light of the submission advanced by Mr Linden that it is impermissible to take account of evidence as to the subjective view of the effect of the 18 August announcement, a point to which I shall return.

132. The second and related point is that the onus of proving that there was no intention to create legal relations will ordinarily be on the party who asserts that no legal effect was intended, see Megaw J in *Edwards v Skyways* [1964] 1 WLR 349 at 355, and Aikens J, in *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2003] 1 Lloyd Rep 1.

133. Thirdly and as Lord Bingham CJ observed in *Edmonds v Lawson, "the context is all-important".*

134. There are a number of features of the announcement and of the context within which it was made that in my judgment point to the conclusion that it was intended to create legally binding obligations.

135. As to the announcement itself, and as I have already observed, it was in clear and unequivocal terms.

136. As to the context, and as is accepted on behalf of the defendants, the announcement was made in order to retain staff at a time of very considerable uncertainty as to the future of DBAG and in particular of DKIB. The guaranteed bonus pool was created to stabilise the workforce. If not intended to have legal effect, it is difficult to see how it could have had the intended effect. Furthermore when considered objectively by posing the question of whether a member of the staff of DKIB would reasonably have viewed the announcement as a legally binding commitment, the answer must be in the affirmative bearing in mind the insecurity of the workforce at the relevant time, and the unprecedented nature and terms of the announcement.

137. The related point is that it was created, at least in part, in response to the requirement of the FSA that a retention plan be put in place. On 30 June 2008 Dr Jentzsch had written to the FSA stating inter alia, and in the context of the '*risk of defections',* that "*a retention programme is therefore being discussed internally as well as with Allianz, and we expect its terms to be finalised shortly."*

138. In its response of 23 July, the FSA asked to be provided with a copy of the retention plan, on the assumption that it had been finalised, and sought monthly up-dates on staff turn over. The need to satisfy the concerns of the FSA points strongly to an intention to create legally binding obligations.

139. Thirdly the steps that preceded the announcement are strongly indicative of such an intention. The proposed guaranteed minimum bonus pool was approved by the

Compensation Committees of both DBAG and Allianz. The proposed announcement was specifically approved by the Board of DBAG at its meeting on 12 August, see paragraph 45 above. It is particularly to be noted that the minute of the meeting records the approval by the Board of DBAG of the proposal *"... to formally communicate the pool that has been secured for the staff base".* A resolution of the Board to make a formal communication of a guaranteed minimum bonus pool as a carefully considered measure to retain staff, is strongly indicative of an intention to enter into a legally binding commitment.

140. On 8 September 2008 a document headed '*Dresdner Kleinwort (Pre-Integration Actions – Retention*) was sent from a member of the Human Resources staff to Wulf Meier, Head of Human Resources for DBAG. It emerged in the course of cross-examination of Mr Hindle, Global Head of HR for DKIB, who reported to Wulf Meier, that he was its author. No reference to the document had been made in his witness statement, a striking omission in the light of its contents. The first section of the document headed 'Background' contains the following:

> "*Dresdner Kleinwort front office have a guaranteed minimum bonus pool with upside potential that will be announced in December and paid in January.*"

141. The reference to a 'guaranteed' minimum bonus pool is strongly indicative of the creation of a binding obligation. What else could the term 'guaranteed' mean? The document also provides the context within which Mr Hindle sent his email of 20 October to DKIB staff.

142. Fourthly subsequent statements as to the bonus pool in FAQs posted on the company intranet were consistent with there having been an intention to create legally binding obligations. The FAQs posted on 22 August contained the following answer:

> *"…Recently Allianz has agreed and supported Dresdner Bank's Management Board decision to set a minimum bonus pool of €400m for Dresdner Kleinwort."*

Those posted on 12 September included the answer that:

> *"The minimum bonus pool for employees of the business division Dresdner Kleinwort (ie those excluding the functions) remains in place and will be awarded on a performance basis as previously announced by Stefan Jentzsch…;"*

143. Some further support for an intention to create legal binding obligations is provided by the evidence of Jeorg Hessenmueller, Global Head of Financial Control for DKIB, who was called by the defendants, and who gave evidence that "*…starting August 2008 the bank was accruing for DKIB a bonus pool that until the reporting month, November, was based on the assumption that there would be a cash pool of 400 million"* (Day 13 page 85 line 8 – 12).

144. A number of arguments were advanced on behalf of the defendants as to why an inference that there was an intention to create legally binding obligations cannot be drawn.

145. The first point is that the logic of the case advanced by the claimants is that there was a contractual variation for each and every one of those employed to work in DKIB working in different locations around the world. The related point is that the announcement was collective in nature, being addressed to the entire workforce, rather than *"the stuff of contractual obligation"*. I do not find such arguments persuasive. There is no reason in principle why an announcement addressed to an entire workforce should not give rise to contractual obligations, provided it is couched in sufficiently certain terms, and that an intention to create legal relations can properly be inferred.

146. Secondly the defendants pointed to the fact that the announcement was not communicated in writing, arguing that if there was an intention to create a binding obligation, then it could have been communicated to the entire workforce via the company intranet as Mr Hindle did in his e-mail of 20 October. The defendants advanced the related argument that an announcement at a Town Hall was inconsistent with an intention to create binding obligations. They argued that Town Halls were an informal forum for the exchange of information, that attendance was voluntary, and likely to be poor, bearing in mind in particular that the announcement was made in the middle of the summer holiday period when a substantial proportion of staff was likely to be away, that no recording or written record of the announcement was to be made and that there would be no record of those who attended or watched. Those are points that carry force, but have to be weighed against the fact that the Board of DBAG had approved the use of the Town Hall meeting of 18 August as the means of formally communicating its resolution to establish the guaranteed minimum bonus pool. As Dr Jentzsch explained in his witness statement:

> *"We agreed to do so by way of one of my business updates (or town hall meetings). This was the quickest and most effective way in which to announce the minimum bonus pool to all staff.* (para 34)
>
> *"…it (town-hall format) became my primary means of communicating with staff at which everything that was important to the business was communicated to them."* (para 36)

147. As to the numbers who attended or saw the announcement, Emma Bryant sent an e-mail to Dr Jentzsch in the early evening of 18 August in response to his request for '*follow up on attendance in London'*. She estimated that "*a good 50% saw the up-dates*." She sent a further e-mail to Dr Jentzsch on the following day which was in the following terms:

> "*I now have all the stats for the live event: overall, attendance was second only to the special up date you did in March on the separation, and 27% up on June. I would see this as really good for August and an indication of employees' eagerness to hear more about the separation and future plans for the business. Information as to the announcement was also disseminated to staff by management by the 'cascade' directed by Dr Jentzsch. I have no doubt that the news of the creation of the guaranteed minimum bonus pool spread like wild fire."*

148. The point was put to Mr Aiken in the course of cross examination:

> *"Q. and it would be fair to say there was not a single employee in your team who did not know about the announcement of the guaranteed minimum bonus pool within a very short space of time of Dr Jentzsch announcing it?*
>
> *A. Correct.* (Day 13 page 179 line 17 – 23).

The same must have been the case for other divisions within DKIB given the nature of the announcement and the central importance to staff of their discretionary bonuses.

149. The defendants also place reliance upon the brevity and the uncertainties inherent in the announcement. I have addressed the issue of whether the announcement was sufficiently certain to give rise to binding obligations above. As to brevity, the decision by the DBAG Board to establish the guaranteed minimum bonus pool could be shortly stated. It did not require elaboration.

150. The defendants also sought to argue that the announcement had unreasonable consequences that tell against an intention to give it contractual effect. They identified three. First they argued that if the announcement had the effect for which the claimants contend, then, pursued to its logical conclusion, if only one individual remained within DKIB at the point at which bonuses fell to be distributed, he or she would be entitled to the entire pool. As a matter of logic that is unarguably the case. But in my judgment it does not lead to the conclusion that, viewed objectively, there cannot have been an intention to make a binding commitment. The purpose of the creation of the guaranteed minimum bonus pool was to retain staff so as to maintain the investment banking division as a going concern up to the point at which DBAG was to be sold. The creation of the pool was considered to be necessary to achieve that end, and incidentally to satisfy the concerns of the FSA. There was the risk that staff would nevertheless leave the bank, leaving very few as the beneficiaries of the guaranteed minimum bonus pool. But that was a calculated risk taken by the Board of DBAG.

151. The second consequence said on behalf of the defendants to be so unreasonable as to negate any intention to create binding obligations is the fact that if given legal effect, the promise would compel distribution of the bonus pool irrespective of losses made by DBAG. As to that there are two points to be made. First at the point at which the announcement was made DBAG was trading at a very substantial loss for 2008, a loss far in excess of the guaranteed bonus pool. Secondly the creation of the minimum bonus pool could only have the intended effect of retaining staff if guaranteed despite the losses being made by DBAG.

152. The third argument advanced in this context is that to give binding effect to the promise sits uneasily with paragraph 33 of the Employment Handbook, which sets out the basis upon which DKL makes discretionary bonus awards, in that it would place a restriction on the number of the factors to be taken into account in making a discretionary award, in particular *"the financial performance of the Company and its associated companies"*, and "*Market Trends and Conditions*". The first point to be

made is that paragraph 33 is to be found in that part of the Employment Handbook that does not contain contractual terms, see paragraph 23 above. Secondly and in any event, paragraph 33.4 (see paragraph 27 above) gives a very wide discretion as to the factors to be taken into account in consideration of an individual's discretionary award. I do not therefore consider that paragraph 33 of the Employment Handbook militates against an intention to create legal relations.

153. I am satisfied that the inference plainly to be drawn from both the terms in which the announcement was made, and from the context in which it was made is that, viewed objectively, it was made with the intention of creating a legally binding obligation to those employed in DKIB.

154. In arriving at that conclusion I have not relied upon subjective evidence as to the effect of the announcement either from Dr Jentzsch, or of the other witnesses called on behalf of the claimants. But if my analysis of the admissibility of such evidence is well founded (see paragraph 130 above), then it serves further to demonstrate that there was an intention to create a legally binding obligation.

155. Dr Jentzsch, although called by the claimants, regarded himself as independent of the parties, giving evidence to assist the court in what he thought would be an inquisitorial rather than an adversarial exercise. His perception of his position was borne out by the careful and objective manner in which he gave his evidence. He made it clear that he had always been of the view that his announcement had amounted to a contractual commitment made by him as CEO of DKIB. The relevant parts of his witness statement were couched in emphatic terms;

> *"46. It was absolutely the intention of the Bank's senior management that the retention pool would be a binding contractual commitment and would be paid out to the employees remaining until the end of the year, and it was clearly worded that way: there will be a bonus pool of at least €400 million paid to those who stay, or in other words: if you stay you will participate in the €400 million pool which has been set aside irrespective of the Bank's performance…"*
>
> *47. The Bank's HR department, and in particular the head of HR – Wulf Meier – had been involved in creating the retention pool, and in my understanding both the Board and the employees considered that the retention pool was binding. Even if it should transpire that certain employment law 'technicalities' had been skipped, the intention of the Bank to enter into a binding contractual commitment with its employees, was absolutely clear."*

156. As he said in the course of his evidence "*commitment for me always implies legally binding, otherwise it's not a commitment".* That evidence illuminates his letters dated 28 November and 8 December 2008 sent to the members of the DBAG board of directors. He concluded the letter of 28 November with the observation that "… *I consider it to be incomprehensible and irresponsible at this point to step back from the commitments made".* The concluding paragraph of that of 8 December is couched in similar terms

157. Secondly in an e-mail of 1 September 2008 to Wulf Meier, Mr Hindle referred to the "*commitment"* that had been made and repeated by Dr Jentzsch to the front office that they had a minimum bonus pool of €400m. His evidence was to the effect that that could not be a contractual commitment because no individual could point to the actual amount that they would receive from the pool. He was in error as to that (see paragraph 122 above). But it is implicit in his evidence that but for that misunderstanding as to the legal position, he, as Global Head of HR for DKIB, would have regarded the announcement as giving rise to a contractually binding obligation.

158. Dr Merkel, who at the material time was General Counsel for DBAG based in Frankfurt, asserted in his witness statement that the guaranteed retention pool was not a measure intended by the board on 12 August 2008 to have binding effect. He did not see or hear the announcement made by Dr Jentzsch, nor until he gave evidence had he seen Dr Jentzsch's e-mail of 11 August 2008. His role was limited to taking the minute of the meeting of 12 August. The only point of note in his evidence was that he agreed that the reference in the minutes to "*guaranteed*" did not mean guaranteed by Allianz, and that he understood it to mean that the pool would be "*set aside for the DKIB recipients*."

159. As to the evidence of Mr Aiken, Head of Structured Finance in DKIB, he, like Mr Hindle, found difficulty with the concept that a promise of a share in a pool could amount to a contractual commitment. But it is to be noted that he understood that a promise had been made, and secondly that *"there was a high probability that the bank would not break its promise."* There is some force in the argument advanced on behalf of the claimants, that Mr Aiken was in fact using the language of contractual entitlement, and of breach of such entitlement, albeit that he did not fully understand the position in law.

160. Such evidence provides considerable support for the conclusion that the announcement was made with the intention of creating a legally binding obligation to those employed in DKIB.

161. Conclusion as to variation of the contracts of employment under paragraph 1.4

I am therefore satisfied that the contracts of employment of each of those employed in DKIB was varied by DKL by virtue of the operation of paragraph 1.4 of the Employment Handbook to the effect that discretionary bonuses for 2008 would be determined by reference to a guaranteed minimum bonus pool of €400 million.

162. The Claimants' Alternative Case

The alternative case advanced on behalf of the claimants is that the announcement and/or subsequent statements gave rise to a contractual obligation whether or not there was compliance with paragraph 1.4 of the Employment Handbook. The conclusions at which I have arrived as to whether the announcement, taken together with Mr Hindle's e-mail of 20 October, was sufficiently certain to be contractually binding, and as to whether there was an intention to create legally binding obligations are as applicable to the alternative case as to the issue of compliance with paragraph 1.4. But the alternative case requires consideration of the third question identified at paragraph 110 above, namely whether the announcement amounted to an offer capable of acceptance, if so were the employees required to communicate their

acceptance, and if so, did they; and of the fourth question, namely whether consideration was given and/or received?

163. Did the announcement amount to an offer capable of acceptance?

It is implicit in my conclusion that the promises made by Dr Jentzsch in the announcement were capable of having contractual effect, that they amounted to an offer capable of acceptance.

164. Were the claimants required to communicate their acceptance?

In my judgment there was an implied waiver of a requirement to communicate an acceptance of the offer contained in the promise made by Dr Jentzsch, given the fact that no response was required of those to whom the announcement was directed and secondly the nature of the promise.

165. The first point speaks for itself. But it is also to be noted that those employees who received individually guaranteed bonuses were not required to communicate acceptance.

166. As to the second point, the promise made by Dr Jentzsch was beneficial to the staff of DKIB in that it gave security as to the fund from which bonuses would be paid. It was therefore analogous to the announcement of a pay rise; and as was submitted on behalf of the claimants, the contention that the announcement of a pay rise to a group of employees would not bind an employer unless and until there was communication of acceptance by each and every one is unsustainable.

167. The point is illustrated by the contractual documentation relating to one of the claimants, Mr Cernohorsky. It includes a letter from DKL dated 2 April 2001 which informed him that:

> "*Where there is an improvement over your existing benefits, such changes are effective immediately.*"

Mr Hindle confirmed in the course of his cross examination that that would be the position with regard to the announcement of a pay rise (see day 12 page 69 line 12 – page 71 line 1).

168. If required, was there acceptance of the offer contained in the announcement?

But if, on a proper analysis, acceptance of the offer contained in the promise made by Dr Jentzsch on 18 August was not waived, it is necessary to consider whether there was acceptance. It is common ground that there was no express acceptance of the promise by any of the claimants. The question is therefore whether in such circumstances, namely an announcement by an employer to employees of a change in their terms of conditions to their benefit, the change is accepted by the employees by continuing in the employment.

169. In this context there is a distinction to be drawn between the unilateral announcement of variations beneficial to an employee, and of variation to his or her disadvantage. Thus in *Sheet Metal Components Ltd v Plumridge* [1974] ICR 373 Sir John Donaldson said:

> "*It is without doubt the law that there is no dismissal where both parties to a contract of employment freely and voluntarily agreed to vary its terms. This happens whenever there is an increase in rates of pay or a promotion. However, the courts have rightly been slow to find that there has been a consensual variation where an employee has been faced with the alternative of dismissal and where the variation has been adverse to his interests.* "

170. In *Khatri v Cooperative Centrale Raiffeisen-Boerenleenbank BA* [2010] EWCA Civ 397 and at [2010] IRLR 715, the claimant was employed by the defendant bank as a derivatives trader. He was sent a letter by his employer containing what purported to be new terms and conditions. The proposed new terms were to his disadvantage. He did not use the method of acceptance of such terms specifically called for in the 'offer' letter, but continued to work for the bank. The judgment of the Court of Appeal was given by Jacob LJ, with whom Rix and Longmore LJJ agreed. At paragraph 46 Jacob LJ posed the question "*so why should his conduct in continuing just as if nothing had changed spell out acceptance of this offer?"* At paragraph 48 he continued:

> "*48. The law in such a case is reasonably clear. Perhaps the leading authority is Rigby v Ferodo [1987] IRLR 516. An employer unilaterally announced a reduction in pay. The employees rejected that but continued to work under protest. It was held that the unilaterally imposed variation of contract did not take effect. Lord Oliver said at pp518-519:*
>
> > *I can … see no other basis [i.e. estoppel waiver or acquiescence] upon which it can be argued that the continued working by Mr Rigby and his acceptance for the time being and under protest of the wage that the appellant, with full knowledge of his lack of agreement, chose to pay him is to be construed as an acceptance by him either of the repudiation by the appellant of the original continuing contract, or of the new terms which the appellant was seeking to impose.* "

171. After referring to the judgment of Elias J, as he then was, in *Solectron Scotland v Roper* [2004] IRLR 4, Jacob LJ concluded that:

> "*51. Applying Elias J's 'only referable' test to the present case, it seems clear to me that it would be quite wrong to infer from all the circumstances that the claimant had accepted changes to his contract, changes which were wholly to his disadvantage both by removing his right to performance-related bonus and imposing restricted covenants…* "

In *Solectron Scotland v Roper* Elias J had posed what he described as the fundamental question "*is the employees' conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer".*

172. Thus in this case, where the promise was to the advantage of the workforce, acceptance could be inferred from the continued discharge by the employees of their contractual obligations provided that the 'only referable' test is satisfied.

173. The defendants accept that the burden is upon them to establish that the employees did not act in reliance on or on the faith of the promise, but rely on evidence as to a number of other reasons why those employed in DKIB forbore to give notice and continued in the company's employment, namely that they had no wish to leave, or because discretionary bonuses were to be paid at the start of the following year and that they waited for the award of bonuses as they would have done in any year in accordance with the usual recruitment cycle, or because of the lack of opportunities of alternative employment in the banking sector at the material time.

174. There can be no doubt that the uncertainty created by the announcement by Allianz of its decision to separate the investment banking from the commercial banking business in mid-March caused those employed in DKIB to consider their futures. There can be equally little doubt that the decisions taken by individuals were influenced by a number of factors, both personal in particular their role, their seniority, the terms of their contracts of employment as to notice, in some cases their entitlement to a guaranteed individual bonus and to stock options, and secondly factors of general application namely the state of the employment market post Lehman, the timing of bonus allocation process and, related to it, the pattern of recruitment in the banking industry.

175. As to the latter the picture that emerged in evidence was that in general there is little hiring activity in the last quarter of the year. Movement in the job market usually follows the payment of bonuses early in the year. Secondly the autumn of 2008 was an exceptionally difficult period post-Lehman. As to the position of individual claimants, the defendants issued extensive requests for information from the claimants in relation to this issue which provided the basis for equally extensive cross-examination of those who gave evidence. I do not propose to set out such evidence in detail. In summary it is to the effect that many claimants did not seek alternative employment in the relevant period, and that those who did, either did not find employment or alternatively did not do so for some time.

176. In my judgment it is probable that the announcement was a factor that weighed to a greater or lesser extent in the equation drawn by each individual; and I bear in mind that there was a recognition within DBAG that the announcement had had the intended effect, that of stabilising the workforce. But the evidence summarised above compels the conclusion that I cannot be satisfied that the fact that the claimants continued in the employment of DKL was only referable to the announcement of 18 August.

177. Thus applying the proposition advanced by Elias J in *Solectron Scotland v Roper*, and approved by the Court of Appeal in *Khatri v Cooperative Centrale*, I am bound to conclude that if acceptance of the offer contained in the promise made by Dr Jentzsch was required, it is not to be inferred from the fact that the claimants continued in the employment of DKL.

178. Was consideration given and/or received?

There were two limbs to the argument advanced on behalf of the claimants, namely:

i) The modern approach to the law of consideration is to determine whether the promisor received a practical benefit from the promisee. If he did then consideration is made out, irrespective of whether the promisee suffered a corresponding detriment.

ii) The claimants can in any event establish a detriment simply because they did not resign and they continued to work and provide their labour. Even if they did not have the prospect of another job to go to, if they knew that there was little prospect of them receiving a bonus they could quite well have decided simply to leave, or alternatively (to adopt the phraseology of Dr Jentzsch) '*to have put their feet up'.* But they did not.

179. It is also to be borne in mind that as a general rule the court is not concerned with the adequacy of consideration.

180. As to the proposition at 178(i) above, the claimants relied upon the decision of the Court of Appeal in *Williams v Roffey Bros & Nicholls (Contractors Ltd)* [1991] 1 QB 1 in which the court considered the modern approach to consideration. Purchas LJ said at page 23D:

> *"I consider that the modern approach to the question of consideration would be that where there were benefits derived by each party to a contract of variation even though one party did not suffer a detriment, this would not be fatal to the establishing of sufficient consideration to support the agreement. If both parties benefit from an agreement it is not necessary that each also suffers a detriment."*

181. Russell LJ took a similar approach at page 18H:

> *"In the late 20th century I do not believe that the rigid approach to the concept of consideration found in Stilk v Myrick is either necessary, or desirable. Consideration there must still be but, in my judgment, the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflects the true intention of parties…A gratuitous promise, pure and simple, remains unenforceable unless given under seal. But where, as in this case, a party undertakes to make a payment because by doing so it will gain an advantage arising out of the continuing relationship with the promisee the new bargain will not fail for want of consideration."*

182. Glidewell LJ put it in the following way at page 15G:

> *"…(i) if A has entered into a contract with B to do work for, or supply goods or services to, B in return for payment by B; and (ii) at some stage before has completely performed his*

> *obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B's promise is not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B's promise, so that B's promise will be legally binding".*

183. Glidewell LJ also cited with approval the following passage from Chitty on Contracts:

> *"The requirement that consideration must move from the promisee is most generally satisfied where some detriment is suffered by him e.g. where he parts with money or goods, or renders services, in exchange for the promise. But the requirement may equally well be satisfied where the promisee confers a benefit on the promisor without in fact suffering any detriment."*

184. I am satisfied that there was a substantial benefit to the bank. The guaranteed minimum bonus pool had been created so as to stabilise the workforce, and to satisfy the concerns of the FSA, and secondly further to incentivise staff so as to maintain the performance of the investment banking division in the period leading up to the sale of DBAG.

185. DBAG made a promise from which it intended to derive a benefit in return. That benefit, the retention and further incentivisation of staff, was capable of being consideration for the promise.

186. The alternative proposition advanced on behalf of the claimants is that in any event there was consideration given by the claimants by remaining in employment, and either not seeking employment elsewhere or not taking up employment elsewhere, and in all cases not exercising their right to resign.

187. By their re-amended defence the defendants raised specific issues as to consideration in the case of 10 claimants, 6 Attrill claimants and 4 Anar claimants. Such issues will be addressed in Appendix 2. As to the remaining claimants, their position differed one from another, depending upon a number of factors including the level at which they were employed and their personal circumstances. But I am entirely satisfied that in every case the commitment to a guaranteed minimum bonus pool was a factor that weighed, to a greater or lesser extent, in their decisions to remain in the employment of the first defendant.

188. I am therefore also satisfied that in the case of those claimants against whom a specific case on consideration was not advanced, each gave consideration.

189. <u>The statements made subsequent to the announcement of 18 August</u>

Thus far my analysis has been directed to the effect of the announcement of 18 August, save that in considering whether there was compliance with paragraph 1.4 of

the Employment Handbook, I considered both FAQs posted on the company intranet and the e-mail sent by Mr Hindle to DKIB staff on 20 October. But the question arises as to whether, if I am wrong as to the effect of the announcement of 18 August, the subsequent statements, viewed individually or collectively, gave rise to a binding contractual obligation.

190. I do not consider that they did. The statements made in answer to the FAQs, and the statements made in the information cascade directed by Dr Jentzsch, were simply repetitions of the original announcement. If the announcement did not have contractual effect, then no more could such statements.

191. As to the e-mail circulated to DKIB staff by Mr Hindle on 20 October, although I have concluded that taken together with the announcement, there was compliance with paragraph 1.4, I do not consider that standing alone, the e-mail gave rise to a binding contractual obligation, not least because although it set out details of the manner in which Dr Jentzsch's promise would be implemented, it did not set out the terms of the promise.

192. Conclusion as to the 'Effect of the Statements'

For the reasons set out above, I am satisfied that the promise made by Dr Jentzsch on 18 August gave rise to a contractual obligation to pay discretionary bonuses from a guaranteed minimum pool of €400m, depending in the case of each individual upon their performance.

193. In the case of each of the claimants their entitlement was assessed by reference both to their individual performance at the figures identified in the bonus letters distributed on 19 December, and to the figure at which the pool had been fixed.

194. It has been conceded on behalf of the defendants that if the announcement on 18 August gave rise to a binding obligation, then the first defendant was not entitled to introduce the MAC clause into the bonus letters. It follows that the first defendant is in breach of contract in failing to pay bonuses in the sums identified in the bonus letters, and each of the claimants is entitled to damages for breach of contract, namely the difference between the sums stated in his or her bonus letter and the sum in fact paid by way of discretionary bonus.

195. B. The MAC clause

My conclusions as to the effect of the announcement of 18 August 2008 are determinative of the claims; but I propose nevertheless to address the issues to which the introduction of the MAC clause gives rise, issues that must be addressed on the premise that the announcement did not give rise to a contractually binding obligation.

196. Was DKL entitled to introduce the MAC clause?

The claimants contend that the introduction of the MAC clause in the bonus letters of 19 December amounted to breach of implied terms of their contracts of employment. They rely upon the following implied terms of the employment agreements, the first two of which are admitted by the defendants, namely that DKL would not;

a) without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee,

b) behave perversely, arbitrarily, capriciously or inequitably in matters concerning remuneration,

c) act in a manner that was designed to avoid paying the claimants a bonus, and/or would not introduce conditions in relation to the payment of any bonus award, that was designed to avoid paying the claimants a bonus.

197. The third is not admitted on behalf of the defendants; but it is submitted on behalf of the claimants that it is necessary to give business efficacy to the contractual entitlement to each claimant to be considered for a bonus. I do not agree as I do not consider that the possibility that there could be circumstances in which DKL could legitimately have acted to avoid paying bonuses can be excluded. But in any event it does not add anything of substance to the implied terms that are admitted.

198. Was the introduction of the MAC clause a breach of implied terms of the contracts of employment?

The nature of the implied term of trust and confidence was considered by the House of Lords in *Malik v Bank of Commerce and Credit International SA* [1998] AC 20. At page 34 B – C Lord Nicholls said:

> *"the trust and confidence required in the employment relationship can be undermined by an employer, or indeed an employee, in many different ways. I can see no justification for the law giving the employee a remedy if the unjustified trust-destroying conduct occurs in some ways but refusing a remedy that occurs in others. The conduct complained must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."*

Lord Steyn concluded his speech in the following terms:

> *"Earlier, I drew attention to the fact that the implied mutual obligation of trust and confidence applies only where there is 'no reasonable and proper cause' for the employer's conduct, and then only if the conduct is calculated to destroy or seriously damage the relationship of trust and confidence. That circumscribes the potential reach and scope of the implied obligation."*

199. Accordingly in considering whether the introduction of the MAC clause amounted to a breach of the implied term of trust and confidence, it is necessary to consider whether, on an objective view,

a) the introduction of the clause was calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between the claimants and DKL, and if so

b) whether it was introduced without a reasonable and proper cause.

200. The essential facts are not in issue. It is conceded on behalf of the defendants that the announcement made by Dr Jentzsch on 18 August amounted to a promise to DKIB staff, albeit on their case a promise that did not create a legally binding obligation. Secondly the promise was made with the intention of both retaining and further incentivising DKIB staff, and was therefore clearly made in the expectation that staff would rely upon it in making decisions as to their future at a time of considerable uncertainty as to the future of the investment banking division.

201. Thirdly the announcement gave rise to the expectation that discretionary bonuses would be paid from a guaranteed pool '*no matter what*', ie whatever the performance of DBAG during what remained of 2008.

202. It is then necessary to consider the evidence as to the reasons for introducing the MAC clause. The principal justification for its introduction was advanced by Mr Blessing; but it is to be borne in mind that at the material time he was CEO of Commerzbank, and did not become chairman of the board of managing directors of DBAG until 20 January 2009. It is also to be noted in this context that neither members of the Board of DBAG nor of Allianz, the former directly the latter indirectly, involved in the decision to introduce the clause, were called by the defendants. The only witness called to give evidence of DBAG management board meetings during the relevant period was Mr Merkel, General Counsel for DBAG, who attended such meetings as minute taker.

203. But the evidence of Mr Blessing is of importance, not least as it is submitted on behalf of the claimants that following the announcement of the acquisition of DBAG by Commerzbank, it was Mr Blessing and the Board of Commerzbank who brought pressure to bear on DBAG to introduce the MAC clause.

204. In the course of his cross examination, Mr Blessing was taken to the minutes of a meeting of the supervisory board of DBAG held on 4 March 2009. It contains a note of Mr Blessing's report on the issue of bonus payments for employees for the year 2008. The note includes the following:

> "*Mr Blessing points out the complexity of the bonus issue, which will be discussed very sceptically in public and in politics. Internally, the problem lies in the fact that the board did not fulfil commitment expectations and thus, the trust in the board as an institution was eroded. De facto, however, promises made by both organisations, Dresdner bank and Commerzbank have not been met.*"

When the minute was put to him, he agreed that "*we couldn't stand to our promise."* There were then the following exchanges:

> *"MR JUSTICE OWEN: ... I want to be clear about this, Mr Blessing. You tell me, "We couldn't stand by our promises."*
>
> *A. Yes.*
>
> *Q. Why not?*
>
> *A. Because the promises were given at a time in a totally different economic situation. They were given in August in a difficult situation not only for Dresdner but in a difficult situation regarding the stability of the organisation. This was prior to signing the sales agreement to Commerzbank. Then we had in the September the Lehman collapse. Then the economic situation deteriorated and then in ---*
>
> *Q. Just a little more slowly.*
>
> *A. Sorry.*
>
> *Q. Yes, then?*
>
> *A. The economic situation deteriorated. Commerzbank had to take government money at the beginning of November. Then basically there was the debate about including a material adverse change clause that the Dresdner board decided in early December and still in late November and December the financial situation of Dresdner eroded further significantly so that ---*
>
> *Q. A little more slowly. Yes, so that?*
>
> *A. And also in the markets so it wasn't only Dresdner, it was the market situation, so that Commerzbank group had to take a second government rescue package early January and, therefore, after a review process in Dresdner Bank about whether the material adverse change clause had been triggered or not, actually solely by ex-Dresdner people, we as the board came to the decision to basically reduce the bonus pool. Therefore I am saying we gave a promise, or the institution gave a promise and in different circumstances and there was such a radical change in the circumstances that we couldn't stick to it. We looked at it whether this was a promise or a contractually binding thing and we thought that this was a promise, therefore, we changed --- we changed that and, as Mr Hochhauser said, we basically didn't stick to our --- or he said we broke our promise because we thought given the circumstances this was necessary".*

205. But Mr Blessing's argument that the reason why DBAG could not adhere to the promise that had been made in August was a result of what he described as the radical change in circumstances is difficult to reconcile with the fact that reassurance as to the continued existence of the guaranteed minimum bonus pool was being given as late as 5 December. As at that date DKIB employees were still being told by the FAQs posted on the company intranet that "*the minimum bonus pool for employees of the business division Dresdner Kleinwort (i.e. excluding the functions) remains in place*

and will be awarded on a performance basis as previously announced by Stefan Jentzsch."

206. The real reason for the introduction of the MAC clause emerges clearly from the contemporary documents and from the evidence given at trial. Concern as to the effect that the acquisition of DBAG by Commerzbank might have on the distribution of the guaranteed minimum bonus pool surfaced soon after its announcement on 31 August, for example in the FAQs posted on the company intranet on 12 September:

> *"Q8. How does the proposed Commerzbank acquisition affect the Dresdner Kleinwort bonus pool for 2008?*
>
> *A. The minimum bonus pool for employees of the business division Dresdner Kleinwort (ie excluding functions) remains in place and will be awarded on a performance basis as previously announced by Stefan Jentzsch."*

207. On 24 September 2008 Dr Jentzsch asked Mr Hindle to make clear in his discussions with representatives from Commerzbank that *"2008 compensation will be decided by us, and not by them or with them"*

208. On 16 October 2008 Will Dennis, a member of the DKIB HR department, sent an email to Alan Yarrow, vice-chairman of DKIB and chairman of DKL, addressing concerns that had been raised by HR, and that "*Mark Hindle and I have discussed the idea that the wording of the December bonus letters needs to be very tight to ensure that CoBa* (Commerzbank) *cannot legally renege on the payments in January*".

209. On 3 November 2008, Commerzbank announced that it was to receive guaranteed funding commitments of up to €8.2 billion from the German Government. Two days later, on 5 November 2008, Mr Blessing wrote to Mr Diekmann, CEO of Allianz and Chairman of the Supervisory Board of DBAG until completion of the sale to Commerzbank, stating that Commerzbank wished to discuss the 2008 bonuses. The letter contained the following:

> *"…The bonus suggestions for the current fiscal year are to be stipulated as early as the middle of December. It is intended that employees should receive the legally-binding bonus letters before Christmas. Furthermore, the payout date is to be set for January 2009. We would like to ask you – not only on the basis of the current state of the capital markets – to rethink this procedure….Naturally we are of the opinion that the current management of Dresdner Kleinwort should stipulate the amount of the bonuses, however we would expect that we would be involved in the process of stipulation of the bonus pool and the distribution of the pool to the business units, and that we would be able to discuss this with our Dresdner Kleinwort colleagues. For this reason we suggest that in January next year a joint Compensation Committee should be convened, in which representatives of Commerzbank and Dresdner Kleinwort can meet together to decide on the distribution. We*

> *request that you take this matter up with the management of Dresdner Kleinwort…"*

210. It was put to Mr Blessing in cross-examination that his letter demonstrated that he was "*beginning to seek to undo the deal that had been done*". His answer was less than convincing:

> *"Q. You see, Mr Blessing, the reality when we look at this letter is that this shows that you are beginning to seek to undo the deal that had been done, weren't you?*
>
> *A. I think that that is your interpretation.*
>
> *Q. It is and I think it is a very fair interpretation of that letter, isn't it?*
>
> *A. That is your interpretation.*
>
> *Q. Yes, but it is a fair interpretation of that letter, isn't it?*
>
> *A. I am not here to judge whether you do fair interpretations or not."* Day 5, p26, line 18 to p27, line 4.

211. He was pressed further, and conceded that he was putting pressure on '*the Dresdner Kleinwort people'*, albeit in a more limited way than was put to him.

> *"Q. What you are doing at this stage is you are putting pressure on Allianz to depart from the deal that they had earlier made, aren't you?*
>
> *A. No. I am writing to make pressure on the Dresdner Kleinwort people to at least share information with us and get us involved in the process. That's what I am doing."* Day 5, page 29, lines 11 to 19

212. Mr Blessing followed up his letter with an email to Dr Walter, CEO of DBAG, on 8 November 2008 in which he said:

> *"1) Bonus pool 2008 for IB: here you know my opinion that I think that the amount in the pool is completely excessive in comparison with the previous year. But since this was decided upon by the Management Board of Dresdner in agreement with Allianz prior to entering into the agreement, I would only say that I am surprised by the amount in the pool in view of the high losses. We as Commerzbank are not responsible for this decision…*
>
> …
>
> *Points 1-3 could emotionally burden the integration since on our side hardly anyone can understand that in spite of billions*

> *in losses, higher bonuses are paid at Dresdner Bank than at Commerzbank. I find this also to be extremely critical in view of the public debate…".*

213. On 10 November 2008 Mr Blessing and Eric Strutz, CFO of Commerzbank, wrote to Mr Diekmann. The letter began:

> *"The variable compensation within our profession is being discussed intensely and controversially in public. Not least against this background we are irritated – and, to be honest, also a little upset – by the way the Executive Board of Dresdner Bank is conducting the figuration and allocation of compensation"*

The letter was specifically directed to the decision by DBAG as to bonuses for back office staff, but it referred to an unfavourable article in the Frankfurter Allgemeiner Zeitung in which reference had been made to the €400m pool, as "*a taste of things to come*".

214. In marked contrast to the pressure that Mr Blessing was bringing to bear on Allianz and DBAG as to the guaranteed minimum bonus pool, Mr Blessing addressed the staff of DKIB at a Town Hall meeting held on 12 November, two days after his letter to Mr Diekman, in the course of which there was the following exchange:

> *"Q…do we have your assurance that Commerzbank would not interfere in the awarding of the bonus pool which has been set aside by Allianz for the employees of Dresdner Kleinwort for this current year?*
>
> *MB...I think in the end is a decision by Dresdner's management. I think to be very blunt, whoever has done a good job should get a bonus …the question who makes this judgment can only be someone who knows you period."*

The answer sidestepped the question; and Mr Blessing gave no indication to DKIB staff that he was calling into question the size of the guaranteed bonus pool.

215. On 17 November there was a meeting of the Steering Committee, which, per Dr Jentzsch, dealt with acquisition issues, at which Mr Diekmann reported that Mr Blessing agreed with the approach taken by DBAG in establishing the bonus pool, and Dr Peter Hemeling, General Counsel of Allianz confirmed that the ".. *the committee's position related to promising the DKIB bonus pool is legally proper".* But the minute of the meeting further records that

> *"However based on PH's recommendation, the promised DKIB Bonus pool will be submitted to another inspection regarding its appropriateness and design. Based on this SJ will once again assess the stabilisation effect of the DKIB bonus pool promise."*

216. Dr Jentzsch duly reported to the DBAG board later on 17 November by a letter that he concluded in the following terms:

> *"…the decision and communication of a minimum bonus pool of €400 million in the summer of 2008 stands justified and was made in the interests of the bank and the merger since the expected goal was fulfilled. If now the bonus pool must be reduced after the objective has been met, I would consider that a dishonourable idea."*

217. But on 19 November Gerd Zinssius, DBAG HR (Policies and Guidelines) sent an email to various members of the DBAG and Allianz boards (excluding Dr Jentzsch) in which he questioned the *'appropriateness and structure of the DKIB bonus pool'*. On 21 November an email was sent on behalf of Mr Meier to Mr Hindle asking the amount by which the bonus pool could be reduced as a result of fluctuations of employees since August 2008. Mr Hindle responded that his understanding was *"that the bonus pool was agreed as an absolute number and was not agreed as being relative to any headcount figure."* By an email to Mr Hindle on 20 November, Mr Zinssius sought information as to the process by which the guaranteed minimum bonus pool had been decided and communicated, asking inter alia:

> *"It is important for us to know the facts about the deciding process of the bonus pool…We need to know all the details leading to this decision. Was it a board meeting or a compensation committee meeting or both".*

Mr Hindle's initial response was to the effect that he had not been involved in the bonus pool setting process, but in a second email on 21 November he gave some further detail, although without reference to his own communication to DKIB staff of 20 October, and concluded by saying:

> *"..the process was essentially discretionary and I would not want to make a legal argument that the bank cannot reduce the pool. I might want to make a moral argument given that the bank did agree with the pool and it has been communicated to the employees."*

218. By this stage, and as Mr Blessing accepted [Day 5, page 48, lines 3 to 7] "*enquiries are being made left, right and centre to find any excuse to try to avoid having to pay out the whole of the bonus pool*"

219. The decision to introduce the MAC clause was made at the meeting of the DBAG Management Board on 4 December (see paragraph 62 above). Earlier meetings had discussed two options, a reduction in the bonus pool by 30 – 50 million, or the introduction of a "*caveat clause to cover the case of a significant deterioration in the earnings situation at DKIB".* The minutes of the meeting record that the Allianz board recommended the latter. As Mr Merkel agreed in cross-examination:

> *"Q ….Effectively Allianz was --- of course it was a matter for the Dresdner Bank board but Allianz was giving a very, very clear indication of what outcome it*

> *indicated the Dresdner Bank board to come to. Is that fair?*
>
> *A. Yes, you can say that."* Day 14, page 108, lines 6-12

220. In the absence of any evidence or explanation from the Allianz Board members (or any disclosure of Allianz documents) it is a legitimate inference that what drove Allianz to push for the introduction of a MAC clause was pressure from Commerzbank.

221. It is also clear that the pressure that was successfully brought to bear by Mr Blessing, was borne of an understandable sensitivity to the public perception of the payment of bonuses on such a scale in the context of the massive support for Commerzbank by the German government. There was no financial motive in that the price that Commerzbank had agreed to pay for the Bank reflected the accrual for the guaranteed minimum bonus pool, so that the payment out of the whole of the guaranteed bonus pool would not have had an adverse financial effect for Commerzbank.

222. It follows that in my judgment the introduction of the MAC clause by DBAG was driven by Commerzbank for reasons unrelated to the performance of DKIB.

223. Secondly both the contemporary records and the evidence given at trial demonstrate clearly that the introduction of the MAC clause was regarded as likely seriously to damage the relationship of trust and confidence between DBAG and those employed in DKIB.

224. Reference has already been made to the memorandum sent by Dr Jentzsch on 17 November 2008 to Messrs Diekmann, Walter and others justifying the €400m bonus pool, and stating that it had achieved its effect to the benefit of the bank and the merger, and that he would consider the reduction of the bonus pool to be a "*dishonourable idea".*

225. Similarly in his email of 21 November 2008 Mr Hindle expressed the view that he might want to make a "*moral argument*" against reduction of the bonus pool. His evidence on the point was also telling:

> *"A. … I think we had made a statement to employees or Stefan had made a statement to employees, as you have pointed out, on a number of occasions. I think employees had an expectation from that statement but what I can't say honestly from this witness stand is that it required the 400 million to be distributed for the reasons I have already given.*
>
> *MR JUSTICE OWEN:* (To the witness): *But I think you go further, don't you, because you say, as I understand your evidence, that what had been said gave rise to a moral obligation to make these payments?*
>
> *A. Yes, I did and I have a lot of sympathy with the employees. I was personally very angry about what*

> *happened but I think the documentation shows me pointing out at one point going to the extent of finding out the number of times that this had been spoken about. I think that is in your document pack somewhere. So the idea here that I am perfectly content with what is going on would be very misleading".*

At page 149 line 16 to page 150, line 16:

> *"Q. You see, you at the time, Mr Hindle, were very concerned about the repeated promises that were made and can we look at C13 page 4472. Have you seen this before?*
>
> *A. Yes, I have just referred to it.*
>
> *Q. You ask, "Emma, can you let me know when Stefan made statements on the euro 400 million with upside bonus pool?"*
>
> *A. Yes.*
>
> *Q. Turn over the page and at 4473 on 22nd January you ask again, "Do you not know how many times Stefan mentioned the guarantee at his business briefings then, Emma? The question is important because I want to impress upon management the fact that this was a repeated statement to staff." That is exactly the same stance as Mr Lewis Davis is taking, is it not?*
>
> *A. No. I think this is the document or part of the document chain and I think it continues which I have referred to in saying that I personally was very upset about what was going on and I did want to impress upon senior management that the fact had been repeated to staff because I thought we had an employee relations disaster on our hands".* Day 12, 9 February 2012, page 146, line 21 to page 147, line 19]

And at page 176, lines 19-24**:**

> *"- I think it is likely that the bonus pool did play a part in retaining staff and therefore it achieved its objective and I will also agree with Stefan that I consider changing it a dishonourable idea, which was my comment about moral".*

226. On 28 November 2008 Dr Jentzsch wrote to the board of DBAG warning them that:

> *"… a retraction of the commitments will destroy the trust of the employees in the executive management fundamentally, finally*

> *and irrecoverably … I consider it neither comprehensible nor responsible at this point in time to step back from the commitments made ."*

227. He repeated the warning in almost identical terms in a further letter to the board on 12 December.

228. In a statement published on the company intranet on 26 February 2009, after the bonus awards had been reduced, Mr Blessing said:

> *"... The board promised something and the board has somehow failed to deliver this. This is an issue that also affects credibility, which was something that we were aware of as we were making the decision ... We, my colleagues and I, also have to fight to rebuild the trust that we have shattered with this decision ..."*

229. In their witness statements the claimants refer to their surprise and disappointment when they received the letters of 19 December 2008. It is clear that they felt that they had been deceived and let down by the Bank, although the statements made by Dr Jentzsch at the Town Hall on the same day to the effect that the MAC clause was unlikely to be invoked, that, for it to be invoked, the circumstances would have to be extreme and unforeseen and that the "*total bonus pool for Dresdner Kleinwort has been kept at 400 million"* (see paragraph 65 above), gave considerable reassurance. But for such assurances, the reaction to the introduction of the MAC clause could have been devastating, a point acknowledged by Mr Aiken in cross-examination:

> *"Q. Did people report back to you that the clear message from Stefan Jentzsch at that meeting was that it was unlikely, very unlikely .....*
>
> *A. Yes.*
>
> *Q. ... that the MAC clause was going to be invoked?*
>
> *A. Yes. That is, I believe, what he said.*
>
> *Q. Did they explain to you that he had been quite graphic in his account, he had said literally books or positions exploding. Do you recall anyone telling you about that particular colourful phraseology?*
>
> *A. I have read the transcript of what he said, so I do know he said those words.*
>
> *Q. Right, but do you remember at the time whether anyone said that to you?*
>
> *A. I don't recall at the time, no.*
>
> *Q. I suggest that the reason why you told Mr Thorne, amongst others, that you thought it was unlikely,*

> *extremely unlikely, that the MAC clause was going to be invoked was because that was the message that Dr Jentzsch had conveyed at the Town Hall meeting on 19th December.*
>
> *A.* *Yes, that is probably right.*
>
> *Q.* *Yes, and that it is only going to be invoked in extreme circumstances.*
>
> *A.* *Yes.*
>
> *Q.* *That effectively meant everyone stayed and carried on working for Dresdner Kleinwort where otherwise there might have been a mass protest.*
>
> *A.* *Absolutely.*
>
> *Q.* *Yes. The stability of the bank could have been threatened, could it not, if there had been a mass reaction, adverse reaction to the imposition of the MAC clause.*
>
> *A.* *Yes.*
>
> *Q.* *So effectively by giving the reassurances that he did on 19th December, Stefan Jentzsch preserved the stability of Dresdner Kleinwort at that stage, did he not?*
>
> *A.* *He did".* Day 13, page 201, line 14 to page 203, line 1

230. The defendants sought in this context to rely upon statements made by Dr Jentzsch at the Town Hall meeting on 19 December in which he described the introduction of the MAC clause as "*a prudent thing to do"*, and encouraged employees to *"look at it in exactly that spirit".* But is it important to consider such statements in context. They were made in response to a question as to whether there was "*any risk that Commerzbank could be involved with regard to what you call the material deterioration in terms of any possibility of remarking the books or write down?"* He replied in the following terms:

> *"…I would urge literally anyone and I've said it before and I say it again, I wish on the one hand that the sentence would not have been in and on the other hand, I think it is, given the circumstances, quite understandably (sic) that such a sentence had to go in. God forbid that anything would happen dramatically in the past few days, literally books, positions exploding and then management not having the ability to react, if only a theoretical ability to react. I think that would be hard to defend and, as you know, managements' actions in banks in particular, those that are exposed to this credit crisis, are under scrutiny not only by the press and the general public and*

> *by shareholders but also by state attorneys and others. So I think it was just a prudent thing to do and I think people should just look at it in that spirit."*

231. I am satisfied that the introduction of the MAC clause amounted to a breach of the first of the implied terms set out at paragraph 196 above. It is clear that the clause was introduced simply as a means of enabling DBAG to go back on the promise made by Dr Jentzsch, the purpose for which it was eventually used, rather than for the much more limited purpose for which on its proper construction it could be used, the issue addressed in detail below. It is not therefore necessary to consider whether the introduction of the clause also amounted to a breach of the second of the implied terms.

232. <u>The meaning and effect of the MAC clause</u>

The developing law on the construction of commercial contracts has recently been authoritatively clarified by the decision of the Supreme Court in *Rainy Sky SA* v *Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900. The overriding principle that emerges is the need to approach issues of construction with business common sense in mind, as opposed to the rigid application of language in a manner divorced from commercial realities. In giving the judgment of the court Lord Clarke said at paragraphs 14 and 21:

> *"14…The principles have been discussed in many cases, notably of course, as Lord Neuberger MR said in Pink Floyd Music Ltd v EMI Records Ltd [2010] EWCA Civ 1429, [2011] 1 WLR 770 at para 17, by Lord Hoffmann in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, passim in Investors Compensation Scheme Ltd v West Bromwich Building [Society 1998] 1 WLR 896, 912F-913G and in Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101, paras 21-6. I agree with Lord Neuberger (also at para 17) that those cases now show that the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarised in the Investors Compensation Scheme case at page 912H, the relevant reasonable person is one who has 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.*
>
> *21. The language used by the parties will often have more than one potential meaning…In doing so (determining what the parties meant by the language used), the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other".*

233. The context in which the MAC clause was introduced, in particular the announcement of the guaranteed minimum bonus pool on 18 August, the reasons for its announcement and the repeated assurances as to its continued existence, is background knowledge relevant to its construction.

234. Regard can also be had to the statements made as to the meaning and intended effect of the MAC clause given by Dr Jentzsch at the Town Hall meeting on 19 December 2008, the day on which the bonus letters containing the MAC clause were issued (see paragraph 65). They too are relevant background knowledge admissible in an objective consideration of the true meaning and effect of the clause.

235. As to the repeated assurances as to the continued existence of the guaranteed minimum bonus pool, it is to be noted in particular that as at 5 December, the answers to FAQs on the company intranet included the following:

> "*The minimum bonus pool for employees of the business division of Dresdner Kleinwort (i.e. excluding the functions) remains in place and will be awarded on a performance basis as previously announced by Stefan Jentzsch …*"

236. Which forecast was referred to by the MAC clause, in particular what is the relevant date of such forecast?

The defendants contend that the relevant forecast was the Multi Year Plan (MYP) for November as that was the document to which the board had reference when it made the decision to include the MAC clause in the letters of 19 December. The claimants submit that it was the forecast as at 18 December contained in the document entitled "*Dresdner Bank Projection Result and Capital Base".*

237. The claimants argue that a reasonable person reading the MAC clause would understand the relevant forecast to be the most up to date forecast of DKIB's revenue and earnings available at the date of the bonus letters, and advance a number of arguments in support of their argument.

238. First they submit that an objective recipient of the bonus letter would assume that the forecast to which reference was being made was that current at the date of the letter. Why, they ask rhetorically, would the objective reader think that it was a reference to an historic forecast when more up to date figures were available. Secondly they make the related point that in any event the MYP process was not known to the claimants, and was not part of the relevant background information reasonably available to them. In support of that argument they rely upon the evidence of Mr Hessenmueller, global head of financial control for DKIB, who agreed in cross examination that the MYP figures were not generally shared with front and middle office employees, adding *"… this was not supposed to be discussed widely within the bank*", and further agreed that he would not be too surprised to learn that some of the front and middle office employees had not heard of the MYP process (see day 13 page 72 line 15 to page 73 line 1).

239. More importantly Mr Hessenmueller confirmed that during November and December 2008 a team led by Urban Wirtz, Head of Group Controlling, who reported to Mr Rosenfeld, DBAG's CFO, were regularly monitoring DBAG's performance,

including that of DKIB, and up-dating their internal forecasts. In the course of cross examination his attention was invited to the document dated December 18 2008, entitled '*Dresdner Bank Projection Result and Capital Base*', which contained a series of forecasts dated 30 October, 27 November, 2 December, 12 December and 18 December. He accepted that as at 19 December that was the most up to date forecast for DKIB:

> "*Q. … if someone said to you on 19 December 2008; "what is the most up to date forecast for DKIB?" You would find that in this document, would you not?*
>
> *A. I personally, yes."*

It was also the most up to date forecast available to Mr Rosenfeld, as he sent it to various people on 18 December in preparation for a meeting that afternoon.

240. Mr Blessing had a copy on 18 December as he referred to it in a subsequent Town Hall meeting on 14 January 2009 when he said:

> *"… on 18 December we received further information about the results in November and probably December, the possible trends in December, in particular the need for capital would be much greater because the risk weighting of the assets had to be increased …"*

The document appears also to have been before the Board of Managing Directors of DBAG at an extraordinary meeting which took place by telephone conference on the evening of 19 December.

241. It is further submitted on behalf of the claimants that if the MAC clause did not refer to the most up to date forecast, then it was disingenuous. The November MYP figure for DKIB profit before taxes was minus E3.122 bn. As at 18 December 2008 the forecasted profit/loss before tax figure for DKIB in respect of sub-prime or credit crisis related items alone was minus E4.619 bn. Accordingly if the submission advanced on behalf of the defendants is correct, the bank was sending out a letter to its employees intending the MAC clause to bite if there was a deterioration from a figure of minus E3.122 bn at a time when Mr Rosenfeld, the CFO, and others on the management board of DBAG were already aware of a forecasted loss before tax for DKIB of over E4.6 bn. On that basis there was simply no possibility of employees ever receiving the '*provisional awards'*. Not only does that militate strongly against the construction for which the defendants contend, but if they are right, the introduction of the clause would appear to have amounted to a further breach of the implied term of trust and confidence.

242. In support of their construction, the defendants argue that a '*forecast for the months of November and December 2008*', could only mean a forecast prior to the commencement of that period. But, as is clear from the document dated 18 December, the term forecast was used by DBAG in relation to then current figures, i.e. figures for the current month. Furthermore such construction is inconsistent with the manner in which the bank sought to apply the MAC clause, namely by comparison between the MYP for November and the final year end figures. If the

construction that they now advance is correct, then they should have relied upon a forecast pre-dating the month of November.

243. Before reaching a conclusion as to the forecast to which the MAC clause should be construed as referring, it is necessary to consider what is meant by the phrase "*additional material deviations".*

244. What is meant by the phrase "additional material deviations"?

For the MAC clause to be triggered there had to be "***additional*** *material deviations*" in DKIB's revenue and earnings as against the forecast for the months of November and December. The word 'material' in this context must mean a deviation of substance, i.e. more than de minimis. What meaning is therefore to be given to 'additional'?

245. As a matter of ordinary language, the use of the word 'additional' indicates that a deviation in revenue and earnings as against forecast had already been identified, and that the MAC clause would be triggered if there was further material deviation from the forecast for the months of November and December. The defendants argue that that confirms that the relevant forecast was the November MYP, in that the figures forecast in the August MYP for the full year's losses were significantly better than the figures for the November MYP. They therefore argue that a material deviation had been identified in the November MYP, and that the additional material deviation must refer to any deviation from the November MYP.

246. I do not find that analysis persuasive. It amounts to a gloss on the MAC clause to the effect that the clause would be triggered if the November MYP revealed a material deviation from the August MYP, and that the year end figures demonstrated an additional deviation from the November MYP. Furthermore such a construction is not necessary to make business sense of the clause. The construction for which the claimants contend is more consistent with the commercial realities of the situation, namely an attempt on the part of DBAG, to reserve the right to review the provisional bonus awards in the event that the year end figures revealed a material deviation as against the November MYP, and an additional material deviation from the forecast contained in the 18 December figures.

247. Furthermore, and whilst the construction of the MAC clause presents obvious difficulties, I consider that it should be given the construction most favourable to the claimants, given that DBAG sought to impose it unilaterally.

248. I am therefore satisfied that on an objective view the MAC clause would have been understood as referring to the most up to date forecast available, namely that of 18 December. I am reinforced in that conclusion by the statement made by Dr Jentzsch in the Town Hall meeting on 19 December that *"… the calculation of any adjustment would have to be based upon a demonstrably material deterioration in Dresdner Kleinwort's financial performance in 2008 from that as currently forecasted."* The point is underlined by his answer to the question set out at paragraph 230 above.

249. What is meant by the phrase "if necessary"?

The MAC clause provided that "*In the event that such additional material deviations are identified, the Company reserves the right to review the provisional award and, if necessary, to reduce the provisional award".* But what is the nature of the necessity that would warrant a reduction? As is submitted on behalf of the claimants, it must set a higher threshold than one requiring the bank to decide that it was "preferable" or "desirable" to do so. The word 'necessary' must be given its ordinary and natural meaning. An adjustment to a provisional award could only be made if it was necessary, in other words that the bank had no other choice open to it. It would obviously be necessary to do so if the bank did not have the means with which to pay the provisional awards. It is to be noted that although not relevant to the construction of the clause, impecuniosity was expressly disavowed by Mr Sumption before the Court of Appeal. But I accept the proposition advanced on behalf of the claimants that evidence that it was reasonable to make such reductions, that it would be beneficial to the new Commerzbank to do so, that it would be expedient or appropriate because of public reaction to payment of bankers bonuses, would fail to meet the high threshold of necessity. I accept that the bank would have to show that the reductions had to be made, i.e. that there was no other option open to it.

250. Deviations in fact, or deviations identified in good faith?

Was the requirement under the MAC clause that there should be additional material deviations in DKIB's revenue and earnings against the forecast against the months of November and December 2008 in fact, or simply that such deviations would have been identified in good faith in the course of preparing the annual financial statements?

251. The construction for which the defendants contend is that the right to review the provisional bonus awards would be triggered in the event that additional material deviations were identified during the preparation of the annual financial statements for 2008, even if they were identified in error, and regardless of whether there were in fact such deviations.

252. The clear intention of the MAC clause was that any review of the provisional bonus awards would be conditional upon there being an additional material deviation. The clause refers to additional material deviations identified during the preparation of the annual financial statements for 2008, but that is qualified by the following "*i.e. that Dresdner Kleinwort's earnings position does not deteriorate materially in this period."* The words '*does not*' clearly indicate that there must have been an actual deterioration in the earnings position, not one appearing to have occurred prior to a final reconciliation.

253. Review of the Awards or review of the Pool?

Was DKIB entitled to review the €400m bonus pool as well as the provisional bonus awards made to individual employees? The answer to this question is clear from the language of the clause. It was only the provisional bonus award of each individual employee that was subject to review. The clause did not permit the bank to reduce the pool so as to make pro rata reductions across the board of the amounts awarded. The language of the clause does not permit the alternative construction, a point endorsed by Dr Jentzsch in the Town Hall meeting of 19 December in which he said in terms that *"... the total bonus pool for Dresdner Kleinwort has been kept at €400m ...".*

254. Reviewed in January 2009 by Dr Jentzsch

Was the review of whether there were additional material deviations (as against the forecast for the months of November and December 2008) in DKIB's revenue and earnings required to be conducted by Dr Jentzsch, and if so, was it required to be conducted by Dr Jentzsch alone? In either case, what are the consequences of a failure to comply with the relevant requirement?

255. The clause provides in its second sentence that *"this will be reviewed in January 2009 by Stefan Jentzsch".* The first question is what '*this*' refers to. Does it refer to the identification of additional material deviations or to the review of the provisional bonus award, or to both? On a purely literal construction, the sentence "*This will be reviewed in January 2009 by Stefan Jentzsch*" could be construed as referring to the identification of additional material deviations, given that the following sentence provides that "*In the event that such additional material deviations are identified, the Company reserves the right to review the provisional award …".* On such a construction it would be for Dr Jentzsch to identify additional material deviations, and then for the company to determine whether in consequence to review provisional awards.

256. The rival construction is that "*this*" refers to the provisional bonus award as it is that which is "*subject to review*"; and that accordingly the clause is to be construed as meaning that it was Dr Jentzsch who was to carry out the review of provisional bonus awards. Not only is the latter a valid construction of the language used, but considered in context, is more consistent with business common sense for a number of reasons.

257. Dr Jentzsch had been directly involved in the process of allocation of the provisional bonus awards. As CEO of DKIB he oversaw the process, and as he explained in evidence, had been involved in at least a couple of hundred individual awards, which constituted three quarters to four fifths of the total bonus pool. It was because he had overseen the original process that it was he who would carry out the review. Secondly at the Town Hall meeting on 19 December he had reassured employees that "*as the letters say, the final review will be done by me or under my leadership in January 2009".* Thirdly it is clear that the DBAG board was well aware that the involvement of Dr Jentzsch was of critical importance to the employees of DKIB, as he had their trust. As to that the following exchange in the course of the cross examination of the defendants' witness, Mr Aiken, was revealing:

> "*Q. They trusted him in a way that they did not trust either Mr Blessing or Commerzbank to ensure that the bonus pool allocations were dealt with fairly.*
>
> *A. That is a good way of putting it.*"

258. The counter argument advanced on behalf of the defendants is that the construction for which the claimants contend is not consistent with business common sense, posing the question of what would have happened had Dr Jentzsch simply not been available to undertake the review in January. I do not find the argument persuasive. The introduction of the clause into the bonus letters was recognised as being likely to provoke a considerable adverse reaction from DKIB staff. The stipulation that Dr

Jentzsch would be involved in such a process was plainly intended to mollify staff. If he was not available, then the review could not proceed, and the awards would fall to be distributed as allocated on 19 December. Had the bank wanted the provision to be effective notwithstanding the incapacity of Dr Jentzsch, or in the event of his unwillingness to carry out the review, then it could have made provision for an alternative mechanism.

259. I am therefore satisfied that on a proper construction of the MAC clause, the review of provisional bonus awards was to be undertaken by Dr Jentzsch.

260. Reviewed in January

The question also arises as to whether, on the proper construction of the MAC clause, the review was required to be conducted in January 2009, and if so what are the consequences of failure to comply with that requirement. The clause provides that *"This will be reviewed in January 2009 …".* I have concluded that '*this*' refers to the review of the provisional bonus award. On the premise that that construction is correct, then the review plainly had to be carried out in January.

261. Moreover that reflected the unequivocal statement made by Mr Hindle in his e-mail to DKIB staff on 20 October 2008 that bonuses communicated on the 19th December would be paid in full with January salaries through the January pay roll. The right *"… to review the provisional award and, if necessary, to reduce the provisional award*", depended upon compliance with the terms of the MAC clause.

262. Did DKIB comply with the requirements of the MAC clause, properly construed?

On 8 January 2009 the German Government announced further support for Commerzbank, bringing the total to €8.2 billion. The acquisition of DBAG was completed four days later on 12 January. At that point the FAQs posted on the company intranet regarding the "*Commerzbank Integration"* continued to confirm that:

> *"The minimum bonus pool for employees of the business division Dresdner Kleinwort (i.e. excluding the functions) remains in place and will be awarded on a performance basis as previously announced by Stefan Jentzsch…"*

263. But at a Town Hall meeting on 14 January Mr Blessing said:

> *"…on 18 December we received further information about the results in November and probably December, the possible trends in December, in particular the need for capital would be much greater because the risk weighting of the assets had to be increased…"*

and of the MAC clause:

> *"… the only reason that this proviso has been kept there is to say, we will just agree the rough size of the bonus pot in August before the closing. And that of course was a completely*

> *different economic situation. And of course it was clear in the last few weeks in December the economic performance and the profit and loss can still dramatically change. And so I think it's absolutely right to go back and say, let's reassess the bonus pool on the basis of the economic performance. Because if you've only done a certain amount of profitable work you can only pour out a certain amount of money. We can't really use the money from the State and use it to pay bonuses…"*

264. By January a document entitled "*Bonus Pool DKIB Business Performance*" had been prepared by the bank which compared "*Preliminary Actuals*" with the MYP forecasts that had been made in August 2008 and on 5 November 2008. On 27 January 2009 the DBAG board was presented with the comparison of year end 2008 figures with the forecasts as at 12 October 2008 and 5 November 2008 and decided that:

> "*In view of the failure to meet the earnings target on which the August 12 2008 board decision on the DKIB 2008 bonus pool was based, the Board considers a more far reaching view of the bonus pool, and a reduction in the direction of a target of EUR 300m, to be necessary.* "

265. Following the meeting there was an exchange of e-mails between Mr Hindle and Mr Reuther, who had become CEO of DKIB on 12 January 2009. Mr Hindle opened the exchange with an e-mail saying inter alia:

> *"Michael, I have been told that the board have decided to cut the bonus pool for Dresdner Kleinwort by 100m. To achieve this cut we would need to reduce the provisional discretionary awards communicated on 19 December by 36%*
>
> *I am sure you intend to communicate the cut to staff but in doing so I would recommend that we communicate the amount of the material adverse variance to the November and December forecasts and why the board thought a reduction of EUR 100m on the discretionary bonuses was appropriate. I also recommend communicating how this cut will be applied and the reason for the method of application. People will also ask about Stefan Jentzsch's involvement in the decision so I recommend covering that as well."*

Mr Reuther replied in the following terms:

> "*I can confirm that the Board has decided to bring down the pool by EUR 100mio. This is based on the significant losses in the on going business in November and December. EUR 300 mio. Pool would be less than 50% reduction of the 2007 pool of EUR 530 mio. This would still be at the lower end of cuts compared with industry, also considering the overall net DKIB performance of minus EUR 4bio.* "

266. That evening Mr Merkel wrote to Dr Jentzsch asking him to get in touch. Dr Jentzsch replied via his former secretary on the following day.

267. On the following day, 28 January, Mr Reuther was on the point of announcing the reduction, but was deflected from doing so as Mr Merkel, General Counsel for DBAG, was contesting "*an effective decision by the board for a reduction of EUR 100 million*".

268. On 29 January 2009 Eric Strutz, the CFO Commerzbank, gave a press interview in which he said of the Retention Pool that:

> *"One cannot guarantee a bonus pot…the bonus pot as a whole is now on the test bench. In addition we must wait for the numbers. If agreed goals were not achieved, adjustments are normal."*

His comments were met with approval by Mr Blessing (*"Well done, mb"*).

269. On 10 February 2009 Dr Jentzsch attended a meeting with Messrs Meier, Rosenfeld and Merkel which was followed by a Board Meeting at which Dr Jentzsch was a guest. Preparatory documents for the Board Meeting were circulated on 6 February 2009. Copies were not sent to Dr Jentzsch. The documents contained details of alternative ways of achieving a reduction in the bonus pool. The aim was identified as being to *"Reduce the IB Front Office bonus pool from €400 mill. to €300 mill."* The option of not making a reduction was not identified.

270. At the first meeting on 10 February 2009 Dr Jentzsch was given the document "*Bonuspool DKIB Business Performance*". According to the note of the meeting there was a discussion of, and comparison between, year end figures for 2008 prepared by KPMG, and forecasts as at 12 August 2008 and 5 November 2008. Dr Jentzsch said he was willing to take part in:

> *"an individual determination of bonuses subject to the proviso that the bonus pool in the amount of EUR 400m established at the time is considered as a retention pool, that only performance is assessed (i.e., that transaction effects attributable to the merger … are eliminated), and that, furthermore, the assessment is performed on the basis of the extent to which individual performance was substantially worse or better that expected in the last 2 months of 2008".*

Mr Rosenfeld is recorded as stating that:

> *"He does not see any grounds to doubt the assessment that DKIB's earnings situation has deteriorated significantly in the months of November / December 2009."*

Mr Meier (but not Dr Jentzsch) is recorded as concurring with that view. The participants in the meeting concluded that the Board could make:

> *"differentiated adjustments to the preliminary individual bonus figures communicated in the bonus letters".*

271. It is clear from Dr Jentzsch's account of the meeting that he was simply being asked to 'rubber stamp' a decision that had already been made. As he said in the course of his evidence:

> *"... The way I experienced that meeting on February 10th, and I am referring to the pre-meeting not the subsequent board meeting, is that a decision has been made to invoke the MAC clause and the meeting was simply there to sort of, if you want, get me to sign off on it and assume the responsibility for that decision. That was the way - and that's why I was so upset about the meeting, because it wasn't about a discussion whether or not, it was - I was basically presented a fait accompli ..."*

272. Immediately following that meeting there was a meeting of the DBAG Board. Dr Jentzsch was present as a guest for the discussion of item 10.1 "*Bonus 2008".* The minutes record that there was an in depth discussion regarding the issue of the 2008 bonuses. Dr Jentzsch recalls that he advanced the following view:

> *"On the one hand there is the basic principle of "pacta sunt servanda" and that for Commerzbank to walk away from the deal now that the other side had delivered its side of the bargain was not only wrong but could very well lead to serious reputational damage reducing Commerzbank's ability to operate in the market. The only possible exception in my view was if Commerzbank could argue that the agreement to pay bonuses to the value of €400 million had been frustrated (in German "Wegfall der Geschaftsgrundlage"), for example if Commerzbank simply did not have sufficient funds for paying the bonuses or a payment of the bonus would render Commerzbank insolvent or in violation of capitalisation rules. In this case, there should be no payment to any employee and not just a dramatic reduction of the payments to Dresdner Kleinwort front office employees. I concluded by saying that while I might not be in possession of all relevant information, I did not see the basis for claiming frustration of purpose".*

273. But it appears that his views were disregarded. The minutes record that:

> *"A uniform decision should be taken in the Board meeting on February 19, 2009 on the following bonus variants:*
>
> *1. Payment in accordance with the distribution mechanism submitted*
>
> *2. Payment on the basis of reduced bonus pools*

> *3. Payment on the basis of individually agreed legal obligations only."*

and that legal advice would be sought.

274. On 12 February 2009 Mr Blessing made a public speech in which he stated that:

> *"a company showing a loss has no room to distribute any bonuses … this should also apply to banks. And a decision regarding the matter will be made by the Board of … Commerzbank and the Board of …. Dresdner Bank next week"*

Mr Blessing confirmed in evidence that he did this before the Board had made its decision in order to reduce their room for manoeuvre:

> *"MR JUSTICE OWEN: Can I ask whether it would be unusual for you to be expressing yourself publicly in such forceful terms before the board has made a decision on an issue?*
>
> *A. It is unusual.*
>
> *...*
>
> *A. Can I also say why it was unusual and why I made that statement?*
>
> *MR JUSTICE OWEN: Yes, please do.*
>
> *A. I know that there was a lot also internal debate, especially also with my colleague, Michael Reuther, who was probably taking a more positive stand on paying than some other colleagues, including myself, and I wanted to give a clear indication in which direction this would go, and since we had a lot of public debate I made openly this statement, "Yes, and I know exactly" and that's why I answered this very honestly to Michael Reuther, to his mail, that I reduced the room for manoeuvre.*
>
> *MR JUSTICE OWEN: So, Reuther was right to express concern that you were reducing the room for ---*
>
> *A. Yes, and I said so, and I answered him, "Yes, you're right and I know exactly that I did this" and I did it intentionally".* [Day 5, page 125, line 14 to page 126, line 16]

275. On 17 February 2009 the Board resolved to reduce the bonuses to the DKIB front and middle office by 90%. The minutes of the meeting record that:

> *"Martin Blessing then explains the document on the Dresdner Bank 2008 bonus pool. They should be resolved today and the results communicated in tomorrow together with the Commerzbank bonus decision. Martin Blessing goes into the background to the bonus debate in the light of the… Financial Market Stabilisation Act and the discussions with the SoFFin and mentions the reduction of approximately 90% year-on-year in the bonus payments at RBS, which has just been announced and which brings their level down to the statutory minimum. In addition, he mentions the legal position in Dresdner Bank, which is different in some areas, and Dresdner Bank's capital ratio, which presumably amounts to between 4% and 5% at present.*
>
> *Under the starting situation, the total bonus pool at Dresdner Bank amounts to EUR 620 million, of which EUR 400 billion is attributable to the IB bonus pool (front office), EUR 187 million to the bonus for staff not covered by collective wage agreements and EUR 33 million to the bonus of staff covered by collective wage agreements. Martin Blessing also presents the starting situation for the individual bonus pools, including the subsidiaries, broken down by the guarantee bonuses, discretionary component, both after December 2008 and January 2009, taking into account the resolution by the Board on January 27, 2009. With respect to scenarios A to C (linear reduction of the discretionary bonus, discretionary bonus 0, differentiated reduction) presented in the documents submitted to the Board, he gives further details on proposal C since this is to serve as the basis of the subsequent discussion by the board."*

276. The minutes then record "*an in-depth discussion*" followed by the decision to reduce discretionary bonus awards by 90%. Mr Blessing offered the following explanation of the decision in the course of his cross-examination:

> *"... we had to take different stakeholders and different interests into account. We had to take into account the interests of the employees and their contracts, we had to take into account the interests of the shareholders, we had to take into account the interests of the public opinion because we are also a retail brand, so if the public opinion exposes --- is very much against what we do that could mean that less people come to our branches, less business. So we have to take different things into account in coming to this decision but also the legal position of the bank vis a vis the employees.*
>
> *MR HOCHHAUSER: (To the witness): Mr Blessing, let me be plain. I suggest to you that intense political pressure was placed upon you not to honour these commitments that had been made before you assumed and issued it (as heard). Do you agree?*

> *A. Mr Hochhauser, I would not deny that also political pressure is put on banks but, to be honest, it is the question to decide of the management board to which pressures you bow and to which you don't. ..."* Day 4, page 118, lines 11 to page 119, line 4

277. On the following day, 18 February 2009, all employees were emailed a letter from Mr Blessing and Mr Strutz stating:

> *"...The months of November and December saw a dramatic deterioration in the earnings situation for both banks...we on the Board of Managing Directors of the new Commerzbank conducted a review of bonus payments for 2008. After an intense round of discussions, the boards of Commerzbank and Dresdner Bank decided in favour of a policy as uniform as possible for the two banks and their subsidiaries. No bonuses will be paid for 2008....For 2008, we will pay employees at both banks the contractually guaranteed benefits...Through these measures, we aim to ensure fair and equitable treatment for employees of both banks."*

278. Later on the same day an email was sent by Mr Reuther stating:

> *"bonus awards for all Front and Middle Office employees who received a letter in December stating their provisional award, which was subject to Dresdner Kleinwort's financial performance targets, will be cut by 90% pro rata of the stated provisional amount."*

279. On 19 February there was a Town Hall meeting at which Mr Reuther addressed a number of issues arising from the reduction of the provisional bonus awards, saying inter alia:

> *"... there are various factors that the bank had to take into account in returning discretionary bonus payments. One of these is the overall financial performance of the bank. For 2008, the overall financial performance of the bank as a whole has been a determining factor...*
>
> *Secondly the decision is based on an understanding that bonuses are additional payments that dependent on the success of the company; therefore they should not be paid if the company as a whole does not make a profit."*

280. Conclusion

In my judgment it is clear from the evidence summarised above that the requirements of the MAC clause were not met in a number of respects.

281. First the correct forecast was not used in determining whether there had been '*additional material deviations*'. The forecast that was used was the MYP for

November, and not the most up-to-date forecast, that of 18 December, (see paragraphs 247, 264 and/or 270 above)

282. Secondly Dr Jentzsch did not carry out the review, and it was not carried out in January 2009, (see paragraphs 269 – 271 above).

283. Thirdly DBAG did not review the individual provisional awards, but in effect reduced the size of the pool by reducing the discretionary awards by 90%, and in relation to those who had received individual guarantees, reduced their provisional discretionary awards by 100%. (See paragraphs 275 above).

284. Fourthly and given that DBAG does not contend that it was unable to pay the provisional awards, they have not established that the reduction in the awards was necessary within the proper construction of the MAC clause.

285. In my judgment, and save for the failure to carry out the review in January 2009, the effect of the failure to comply with the requirements of the MAC clause had the consequence that the purported reductions in the provisional bonus awards were invalid. So far as the requirement that the review be carried out in January 2009, I do not consider that it was a condition precedent to the exercise of the right to undertake the review. But I reject the argument advanced on behalf of the defendants that the requirement that the review should be carried out by Dr Jentzsch was not a condition precedent. As I have already observed the involvement of Dr Jentzsch in the exercise was of critical importance to the employees of DKIB, see paragraphs 257 – 258 above.

286. <u>Conclusion on the MAC clause issues</u>

Thus not only was the MAC clause introduced in breach of the implied terms of the contracts of employment, but had DBAG been entitled to rely upon the clause, there was a failure to comply with its terms, properly construed, such as to invalidate the purported reductions in the provisional bonus awards. It follows that in my judgment had the claimants not succeeded on the issues to which the announcement of 18 August 2008 gave rise, they would have succeeded on the MAC clause issues.

APPENDIX 1

Agreed list of issues prepared by the parties pursuant to the order of Master Eyre.

A. THE EFFECT OF THE STATEMENTS

1. Did the:

1.1 statement by Dr Stefan Jentzsch on 18 August 2008; and/or,

1.2 subsequent statements relating to the bonus pool up to 19 December 2008, including:

(1) by Dr Jentzsch:

(a) in Town Hall meetings on or about 1 September 2008, 1 October 2008, 12 November 2008 and/or 18 November 2008; and/or,

(b) (so far as they are established to have taken place) in conversations with individual employees between August and December 2008, and/or

(2) by Mr Blessing in a Town Hall meeting on or around 12 November 2008; and/or,

(3) in 'the 'Frequently Asked Questions section of DKIB's intranet between August 2008 and December 2008, and/or,

(4) (so far as they are established to have taken place) by other senior employees of the First Defendant in staff meetings held between August and December 2008; and/or,

1.3 statement by Mr Mark Hindle in writing on 20 October 2008,

create contractual obligations on the part of the First Defendant (in relation to the payment of discretionary bonus awards to each of the Claimants for the 2008 bonus year) as follows:

(a) that there would be a guaranteed minimum bonus pool payable for the 2008 bonus year of €400m, from which individual bonus awards would be allocated;

(b) that the allocation of bonus awards to the Claimants from that pool would be made in December 2008 in 'the usual way' as described in para 8(5) of the Anar Reply including, or alternatively limited, by reference to individual performance;

(c) that the individual bonus awards would be paid entirely in cash in January 2009.

2. In respect of paragraph 1 above:

2.1 was any of the statements intended to create legal relations?

2.2 was any of the statements sufficiently certain to be regarded as contractually binding?

2.3 was any of the statements an offer which was capable of acceptance?

2.4 what was the effect of paragraph 33 of the First Defendant's Employment Handbook?

2.5 did any of the statements qualify or displace the provisions of paragraph 33 of the First Defendant's Employment Handbook?

2.6 did any of the statements vary the Claimants' contracts of employment pursuant to the operation of paragraph 1.4 of the First Defendant's Employment Handbook?

2.7 if any of the statements constituted an offer capable of acceptance, were the Claimants required to communicate their acceptance and, if so, did they do so?

2.8 was there any consideration moving from the Claimants for the promise(s) which they allege?

B. THE "MAC CLAUSE"

3. Was the First Defendant entitled to introduce the MAC clause? The Defendants accept that if the statements prior to 19 December 2008 gave rise to a contractual obligation to distribute the whole of the €400m bonus pool regardless of the performance of the investment banking division, they were in breach of that obligation in introducing and seeking to rely on the MAC clause. If, however, the statements did not constitute such an obligation was the First Defendant entitled to introduce, by its letters to the Claimants of 19 December 2008, the MAC clause or was its purported introduction a breach of the implied terms:

(a) of trust and confidence (i.e. that the First Defendant would not, without reasonable and proper cause, conduct itself in a manner that was calculated or likely to destroy or seriously to damage the relationship of trust and confidence to be expected between the Claimants as employees and the First Defendant as its employer)? and/or,

(b) that the First Defendant would not behave perversely, arbitrarily, capriciously or inequitably in matters concerning remuneration? and/or

(c) (asserted by the Claimants and denied by the Defendants) that the First Defendant would not act in a manner that was designed to avoid paying the Claimants a bonus, and/or would not introduce conditions in relation to the payment of any bonus award, that was designed to avoid paying the Claimants a bonus?

3. If the First Defendant was entitled to introduce the MAC clause, what was the true meaning and effect of the MAC clause? In particular:

4.1. which forecast was referred to by the MAC clause, in particular what is the relevant date of such forecast?

4.2. what is meant by each of the phrases "additional material deviations" and "if necessary"?

4.3 was the requirement under the MAC clause that there should be additional material deviations (as against the forecast for the months of November and December 2008) in DKIB's revenue and earnings in fact, or simply that such deviations should have been identified in good faith in the course of preparing the annual financial statements?

4.4 was the review of whether there were additional material deviations (as against the forecast for the months of November and December 2008) in DKIB's revenue and earnings required to be conducted by Dr Stefan Jentzsch, and, if so, was it required to be conducted by Stefan Jentzsch alone? In either case, what are the consequences of a failure to comply with the relevant requirement?

4.5 was that review required to be conducted in January 2009 and, if so, what are the consequences of a failure to comply with that requirement?

4.6 was DKIB entitled to review the €400m bonus pool as well as the provisional bonus awards made to individual employees?

5. Did DKIB comply with the requirements of the MAC clause, properly construed? In particular:

5.1 did DKIB use the correct forecast (as identified at paragraph 4.1 above)?

5.2 did DKIB comply with the relevant requirement in respect of the conduct of the review (set out at paragraph 4.4 above)?

APPENDIX 2

THE INDIVIDUAL CASES

1. Paragraph 29(c)–(e) of the Re-amended Defence in the Anar claim and paragraphs 28(d)-(f) of the Re-Amended Defence in the Attrill claim raised specific issues in relation to three groups of claimants, namely:

> "*29(c) The following Claimants received individual guarantees which were designed to stay and had that effect. Their decisions to stay were referable to these guarantees and/or to the general matters set out above, not to the contingent possibility of receiving some unknown additional sum by way of discretionary bonus;*
>
> *i) Desmond McNamara;*
>
> *ii) Sandro De Toffol;*
>
> *iii) Dominico Crapanzano;*
>
> *iv) Igino Napoli;*
>
> *v) Claudio Pinto;*
>
> *vi) Vito Santoro.*
>
> *(d) The following claimants sought or continued to seek alternative employment following the announcement and yet did not find suitable alternative employment. They made no decision to stay. The fact that they did in fact stay was referable to their failure to find other employment, not the announcement as to the bonus pool:*
>
> *(i) Marco Laicini;*
>
> *(ii) Gareth Lewis-Davies.*
>
> *(e) The following claimants considered that the acquisition of the first defendant by the second defendant was a positive development and that caused their decision to remain at the first defendant:*
>
> *(i) Jeremy Thomas;*
>
> *(ii) Matthew Thorne."*

2. <u>The Claimants who received individual guarantees</u>

In this context the defendants placed considerable reliance upon the evidence given by Dr Jentzsch to the effect that key individuals were given individual guarantees to ensure that they did not leave DKIB. That was unquestionably the purpose for which individual guarantees were given; but the issue to which the re-amended pleading gives rise is whether, in the case of the six named individuals, the prospect of receiving an additional performance-based allocation from the guaranteed minimum bonus pool was a factor that weighed in the decision made by them to remain with DKIB. As to that the evidence was in my judgment clear and compelling. Each gave evidence to the effect that the individual guarantees were not sufficient to keep them at DKIB, and that it was the expectation of a share in the guaranteed minimum retention pool that induced them to stay.

3. Desmond McNamara

In his discussions with his line manager, Mr Neumann, it was made clear to Mr McNamara that he would be considered for an additional payment based on his performance. He was happy to have been put on the list for an individual guarantee but as he said at at Day Two, page 193, lines 3 – 9:

> "*A. … I was actually happy that there was just a retention pool. My line manager decided to put me on the list. Did I feel pleased about that? Yes, I felt pleased about that. Would I have carried on working if I had not been on the list? I would have carried on working if I had not been on the list.*"

4. It was not put to Mr McNamara in cross-examination that his only reason for staying at DKIB in 2008 was his individual guarantee. What was put to him was that his individual guarantee in itself gave him a "*major incentive to stay*". He responded in terms that it was the "*the retention pool*" that gave him "*a huge incentive to stay*", and explained that he had taken the award of an individual guarantee by Mr Neumann as a "*vote of confidence*" that he was performing and would be fairly rewarded from the guaranteed pool at the year end, see Day 2, page 4 lines 10 – 16 and page 205 line 6 – 12.

5. Thus on a careful analysis of his evidence it is clear that the existence of the guaranteed minimum bonus pool was a factor in his decision to stay.

6. Sandro De Toffol

Mr De Toffol was not required to attend to give oral evidence. Paragraph 6 of his first witness statement is in the following terms:

> "*The creation of the guaranteed bonus pool was a huge relief as at that point we did not know who would finally take us over and this meant that we could stop worrying about compensation and focus on performing. It played a massive part in my decision to stay with the bank and especially after it was announced that Commerzbank was the purchaser. We all knew that Commerzbank was not interested in the investment banking division, but as a result of the guaranteed bonus pool it*

> *was worth staying at the bank at least until the end of the year in order to receive the 2008 bonus.*"

In his second witness statement served in response to the re-amended case against him, he made it clear in paragraph 10 that his individual guaranteed award alone would not have been enough to keep him at the bank.

7. Domenico Crapanzano

It was clear from Mr Crapanzano's evidence that he considered the amount awarded to him as an individual guarantee to be a floor, with the potential for a substantially greater sum to be awarded from the guaranteed minimum bonus pool at the end of the year. His response to the suggestion put to him in cross examination to the effect that the individual guarantee would have been sufficient to retain him was emphatic, see Day 8 page 64 line 6 – 16, and page 60 line 16 to page 61 line 11. Such evidence was consistent with paragraphs 36 – 38 of his witness statement, which contained the following passages:

> "*Although I had the benefit of an individual guaranteed bonus ... my main motivation to remain at DKIB was the prospect of receiving additional compensation for the work I was performing, much like in 2007 when my total compensation exceeded my minimum guaranteed bonus.*
>
> *Had I known that I was not going to receive any pay out from the Guaranteed Retention Pool, I would have looked for other job opportunities in 2008. I was conscious that my guaranteed bonus for 2008 was conditional on me not resigning before the date on which the bonus was due to be paid. However, any new employer would have 'bought out' this award so had it not been for the opportunity to participate in the Guaranteed Retention Pool, I would have left the bank.*"

I am entirely satisfied that the announcement of the guaranteed minimum pool was a decisive factor in his decision to remain with DKIB until payment of bonuses in early 2009.

8. Igino Napoli

Mr Napoli gave similar evidence. He illustrated his position by a memorable reference to a conversation with his line manager, Eddie Listorti, in which Mr Listorti described the individual guarantee in the following terms:

> "*This is an anti pasto. You stay with us and then you are going to get more.*"

At Day 11 page 182 line 6 there was the following exchange with counsel for the defendants:

> "*Q. … the €1.3m was the sum which management judged would be enough to ensure that you were not bought out by the competition?*
>
> *A. … No it was not like that. €1.3m was the sum that was enough to let me work within bigger promise. This bigger promise was the €400m.*"

9. He was emphatic that had the announcement of the guaranteed minimum bonus pool not been made, he would definitely have left the bank, see Day 11 page 186 line 8 to page 187 line 6 and page 194 line 17 to page 196 line 13. As in the case of Mr Crapanzano, Mr Napoli was a compelling, if colourful witness. I have no hesitation in accepting his evidence on this issue.

10. Claudio Pinto and Vito Santoro

Mr Pinto and Mr Santoro did not give oral evidence; but it is clear from their witness statements that the announcement of the guaranteed minimum bonus pool was a highly material consideration in their decision to stay at DKIB. As Mr Pinto put it at paragraph 31 of his witness statement:

> *"had I known that I was not going to receive any additional payout from the Guaranteed Retention Pool, I would certainly have looked for other job opportunities in 2008. In the light of my performance, I have no doubt that I would have found a new job."*

11. At paragraph 33 of his first witness statement Mr Santoro said that by the time of the announcement in August 2008, he had already had informal discussions with another investment bank, Deutsche Bank, and at paragraph 34:

> "*If there had been no announcement regarding a guaranteed minimum bonus pool, I would certainly have pursued discussions with other banks, including Deutsche Bank. I was one of the top performing employees not only at DKIB, but in the industry sector, and would have found employment elsewhere …*
>
> *35. Although I had been promised a personal guarantee as described above, this on its own would not have been enough of an incentive to remain at DKIB; after all, if I had moved, I would have only done so on the basis that this guarantee would be bought out … if I had known that I was not in fact going to receive any payout from the guaranteed bonus pool there would have been absolutely no point in staying at DKIB.*"

12. Messrs Laicini and Lewis-Davies

Paragraph 29(d) of the Re-amended Defence asserts that in the cases of Marco Laicini and Gareth Lewis-Davies, the fact that they stayed at DKIB following the

announcement of 18 August was referable to their failure to find other employment, not to the announcement.

13. Marco Laicini

At paragraphs 6 and 8 of his witness statement Mr Laicini explained that after the March 2008 announcement, and as a result of uncertainty about the future of DBAG, he had considered leaving and had begun to look around for a new job, but that as a result of the August announcement he had decided to stay at the Bank at least until his 2008 bonus was paid.

The documentary evidence substantiates moves on Mr Laicini's part to look for alternative employment prior to the August 2008 announcement and that he had looked for jobs in autumn 2008. He confirmed in response to a Request for Further Information by the defendants and in evidence at trial (see Day 8 at page 92 line 24 to page 93, line 2), that he followed up job opportunities in late 2008 with a view to finding a job starting in 2009, after payment of his 2008 bonus.

Giving evidence at trial he said (Day 8 at page 85, lines 3 to 14):

> *"... when I heard about the split, I was talking to friends and my line manager and they were saying, as I start, this was my second year, I am a junior, I was a junior, so it was my second full year in this industry, so I talked to my line manager and other friends and they say, look, if you are in a bank where there is a merger position, it is always good to look for another job. So this is why I was a little bit nervous about this split. Then the announcement and, based on the announcement, I decided to stay until the end of the ... until actually February 2009, or whenever the bonus will be paid."*

He also explained (page 99, line 16 to page 100, line 17) that, prior to the August announcement, he had been considering deferring his honeymoon so as to look actively for alternative jobs but that, having heard it, he had decided to take his honeymoon and to look for a 2009 job in the autumn:

> *"Q. Having told Mr Deeble in terms that you were not looking for other jobs and that it was your plan to look around in the autumn because you had been with Dresdner for two years and because you were getting married, that the true position is that it was always your plan to look for other jobs in the autumn, is it not?*
>
> *A. No. I disagree. The fact that we were getting married in September, we were thinking about honeymoon and actually my wife was quite anxious, I as well, and the fact that we were ready to postpone our honeymoon after, you know, looking for a job. So discussion with the firm was August or summer, the plan was, the wedding in September, I said, okay, the wedding is only three days, fine. Let's do it, but, on the other hand, I said about the honeymoon, probably we want to move, to shift*

> *or to postpone, because if the situation was the same, like if I didn't hear about the bonus pool, I will definitely look for a job more actively and the honey, I am sure we... we agreed that it could be postponed. So the fact that... so I disagree in the sense that once I got the news when I attended the Town Hall on the screen, and I was reassurance, and the email with my wife was clear, I said, "For now it's fine", clearly was suggesting, "Let's stay here. Let's go... let's get married. Let's have a honeymoon and let's look for a job in autumn." This was the plan."*

Mr Laicini was clear that if the bonus pool had not been announced he would have looked for a job earlier and more actively with a view to leaving DKIB before payment of any bonus. In March 2009, he received a job offer in a week, see his evidence at p101 line 21 to p101, line 6:

> *"Well, if the bonus pool was not announced, I would have been looking for a job early September, end of August, early September to look for a job.*
>
> *Q. And it would take you several months, as you have just said, and so there would be no prospect, realistically, of you actually leaving before the date when bonuses were paid, would there?*
>
> *A. I disagree, because obviously you have to look at the worst case, right. The worst case is it could take up to three months. The best case could take a week. Actually, in March I got an offer in a week."*
>
> And at p104, lines 14-20:
>
> *"Q. If the bonus pool announcement had not been made, there was nothing more than you could do or you did do to secure another job?*
>
> *A. No, there was because clearly I would have started looking for a job in September much, much more actively. The fact that I went for a honeymoon, because I was reassured by the announcement*."

I am therefore satisfied that the expectation of a bonus from the guaranteed minimum pool was a factor that weighed with Mr Laicini in his decision to remain with DKIB and to defer seeking a new position.

14. Gareth Lewis-Davies

In paragraph 6 of his witness statement Mr Lewis Davies explained that as a result of uncertainties associated with the re-structuring and possible sale of DKIB he had begun interviewing with recruitment consultants prior to the August announcement but thereafter halted his searches. In further information provided pre-trial he

explained that he had attended three interviews, in May 2008, on 28 August 2008 and on 12 September 2008, after which he did not interview again until April 2009.

In evidence at trial he explained that interviews he had attended up to mid September 2008 were the product of contact with recruitment consultants prior to the August announcement, and that he was not actively looking to leave DKIB after the announcement. Had he understood in August 2008 that the Bank would renege on the retention bonus he said he would have tried far harder to leave, and that the fact that he did not do so was directly due to the August announcement and subsequent repetitions. He pointed out that when he reactivated job searches in 2009 he obtained job offers relatively easily, suggesting that he could have left in 2008 had he decided to. See his evidence on Day 8, page 145, line 15 to page 146, line 23):

> *"MR LINDEN: Well, isn't the reason that you stopped looking for jobs that there weren't actually suitable jobs out there for you?*
>
> *A. That may be one -- yes, one element in it. It also may be the fact that I may not have been actively looking but I accept that in the second half of the year, clearly we had the financial crisis and opportunities were short -- were limited, but I have to say that as soon as Commerzbank reneged on the deal and I received my payment in February I was able to start applying, reactivating my search so from the end of February there were a few emails. My first interview started in April and by the time I resigned from Commerzbank in May I had two offers, which were conversation -- which were superior to Commerzbank and one of those had an element of a guaranteed bonus, and I use that just to illustrate that despite difficult circumstances that persisted before the turn of the year and after the turn of the year I was still in a position to find a job relatively easily and therefore -- again we are speculating here. If I had tried harder, would I have got a job in the remaining part of 2008? Well, I would suggest based on the fact that I was able to get a job in 2009 relatively easily, suggests that I -- I could have done that if I had chosen. One thing is for sure and this is not speculation. If I had known that Dresdner would renege on the retention bonus in August I would have tried far harder to have left the bank and the fact that I didn't was directly due to the fact -- well, yes, almost all totally due to the fact that all the commitments that had been made, not just on the 18th but subsequently, again and again and again, from other town halls, from Q & A's, from what fed down from management."*

15. Thus in his case I am satisfied that the announcement of 18 August was the decisive factor in his deferring serious search for a position until the point at which the bonuses from the guaranteed minimum bonus pool would have been paid.

16. <u>Messrs Thomas and Thorne</u>

At paragraph 29(e) of the Re-amended Defence the defendants contend that Jeremy Thomas and Matthew Thorne considered the acquisition of DBAG by Commerzbank to be a positive development, and it was that that caused them to remain at DKIB.

17. The basis for the pleaded case against them was the evidence of Mr Aiken, their line manager who was called on behalf of the defendants. His evidence was put to them in cross examination, but was not accepted by them, by way of example see the evidence of Mr Thorne on Day 7 at page 49, line 18 to page 50, line 10:

> *"Q. Mr Aiken will say to the court that there was a positive view about the prospect of sale because Allianz was really better known as an insurer rather than serious about investment banking. Is he right about that?*
>
> *A. No, I don't believe he is. I think, as I said, he will just put the best points across but I was always very sceptical as to whether, you know, our bureaucracy would ever reduce as a sale and I think that even the sale to Commerz -- maybe we are jumping ahead of ourselves, but even the sale to Commerzbank was fraught with uncertainty. For example, Commerzbank said, "We don't want to do proprietary trading. We want to focus on Germany" and probably three quarters of our business was taking proprietary risks in the UK, so, you know, it's a complete -- it wasn't adherence to their stated strategy. So, I think there was a lot of uncertainty."*
>
> And at p50, line 24 to p51, line 10:
>
> *"Q. ... Doesn't that suggest that you were in fact taking the view that if there was an acquisition that would not be a problem for those in structured finance?*
>
> *A. I think it was a balance, the way I described it. You had factors weighing in your favour so, you know, it is a profitable group, and then you had factors weighing against you.*
>
> *MR JUSTICE OWEN: That is the one you have just identified?*
>
> *A. Exactly, and I think where 18 August came in is it sort of tipped the balance, if that makes sense."*

18. Secondly Mr Aiken's evidence was undermined by his acceptance that he was himself considered to be a 'flight-risk' at the material time, and had discussed the possibility of leaving as part of a team with Mr Thomas and others (a fact not mentioned in his witness statement), and that Mr Thomas and Mr Thorne posed no lesser flight risk than he did. See Day 13, page 112, line 5 to page 113 line 17:

> *"Q. You see, he was actually right in thinking you were a flight risk wasn't he?*
>
> *A. I don't believe -- well, yes, I think possibly he was.*

Q. Well, isn't it the case, Mr Aiken, that once you had been paid your guaranteed award you spoke to Mr Thomas about making a team move with him, Mr Hewson and Mr Burrows?

A. I did do that, yes.

Q. And you told Mr Thomas, didn't you, that you had been discussing that possibility with someone called Iain Lorriman of Pure Recruitment?

A. Mm hmm.

Q. And you also told them that you were meeting Standard Chartered to discuss a team move?

A. Correct.

Q. And you did, in fact, have such a meeting, didn't you?

A. I did have a meeting, yes.

Q. When was that meeting?

A. At the end of January, I believe.

Q. Yes. You don't mention any of that in your witness statement, do you?

A. I had only just remembered it when I read the transcript of Mr Thomas's statement.

Q. Did you not think, Mr Aiken, if you were going to give evidence about lack of flight risk that it might have been relevant to tell this court about your own position and the fact that you yourself considered leaving?

A. No, I didn't. It didn't cross my mind.

MR JUSTICE OWEN: Help me. Were Mr Thomas and Mr Thorne any greater or any lesser flight risk than you?

A. I don't believe so, no."

19. Mr Thorne (to whom the defendants did not submit any Request for Information pre-trial) explained that he had chosen not to pursue contact with a headhunter in Q4 2008 because of the guaranteed bonus pool. See Day 7, page 74, lines 1 to 11; 22-24:

"Q. Your witness statement indicates, and correct me if I am wrong, but you did not so much as look for alternative employment in the fourth quarter of 2008. Is that right?

> *A. It is sort of right. Since just before the trial my solicitors asked me did you have any other contact. There was a contact with a headhunter on 2 September 2008, which I did not take forward because I knew about the pool and then I, you know, would say I fulfilled my half of the bargain that, you know, I stayed at the bank.*
>
> ...
>
> *A. I didn't pursue it because -- yes, as I said, I thought the guaranteed bonus pool sort of tipped the balance in terms of staying."*

Mr Thomas also chose not to pursue other opportunities. See 2/2/12, p108, line 22 to p109, line 4:

> *"Q. ... So we have understood that in the period prior to January 2009 you did not make enquiries or have discussions about alternative employment, is that right?*
>
> *A. Yes. I mean, one colleague in another bank did say to me that his boss said that if things went wrong at Dresdner there would always be a job for me at his bank, but I did not pursue that at the time."*

20. The further argument advanced on behalf of the defendants was that the job market in structured finance in the fourth quarter of 2008 was such that neither Mr Thomas nor Mr Thorne could have found alternative employment, even if they had attempted to do so. That was a proposition that both rejected, see Mr Thorne on Day 7, page 75, line 17 to page 76, line 4:

> *"Q. Is this right that in Q4, the position so far as the market for structured finance was concerned, it was going steadily downhill?*
>
> *A. I think Mr Aiken makes some speculation about there was not a market in 2008 for the structured finance. I think, to be honest with you, we didn't test it, is the point, and I don't think we could say categorically there was no jobs available. I think it's likely that some of the factors, Lehman Brothers being one, meant that people were more nervous about hiring, but I don't think we can say definitely that there were absolutely no opportunities there. It is a shame I didn't test it."*

Mr Thomas, Day 7, page 109, line 10 to page 111, line 13:

> *"Q. Therefore there was no realistic possibility, was there, of your finding a job and leaving before bonus time.*
>
> *A. If you take from 15th August to - what was it? - 21st February, that is a period of six months, so if I had wanted to*

move I think there would be a realistic chance of doing that before that time.

Q. Mr Attrill was saying that, certainly in his line of business, it generally takes three to four months to find a position. Is it different in structured finance?

A. I would think three to four months is probably an average. Obviously, if you go for your first position and you get offered it, you can do it within a couple of weeks, but it could take a couple of weeks, it could take a couple of months, it could take three months, it could take six months.

Q. With the market as it was, the (inaudible) dimension, with the market as it was in relation to structure finance in Q4, given your notice period, there was not a real possibility, was there, of your leaving before bonus time?

A. I don't know. I mean, one of the other senior members of the team, Mr Hewson, who was the Head of the European Group ... he actually handed in his resignation in November 2008 on the basis that he had found another job to go to. So he gave notice then. I don't know what the job was, but after some discussion internally he was made an offer which persuaded him to withdraw that resignation.

Q. Added to the consideration of notice, the question of the situation for structured finance in the market in terms of job market, you stood to lose £640,000 worth of share options. That was another reason, was it not, why there was no realistic possibility of your leaving before bonus time.

A. I think, as previous witnesses have said, the practice in the market, whether logical or not, is that a new bank will replace your options with their options. I mean, they value the shares at current market value and give you equivalent shares in their own organisation. And I think I perhaps need just to explain that: I gather that generally that sort of cost does not hit the business lines, sort of hits a central pool, where obviously they are getting credits for people leaving and debits for people joining who they are having to give - and they sort of see it as .....

MR JUSTICE OWEN: Yes.

A. It is certainly not seen as a cost in the business line, so it is not generally an obstacle to moving."

21. I have already indicated (see paragraph 90 of the judgment) that I did not find the evidence of Mr Aiken to be reliable. In this context I prefer the evidence of Mr Thomas and Mr Thorne, both of whom impressed as reliable witnesses, doing their

best to give a fair and accurate account of their situation in 2008. It follows that in their cases I am satisfied that the announcement of the guaranteed minimum bonus pool was a factor in their decision to continue at DKIB.