Neutral Citation Number: [2012] EWHC 1278 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2012

Before :

MR JUSTICE BURTON

- -

Between :

Case No: 2009 Folio 605

The Royal Bank of Scotland PLC

Claimant

- and -

(1) Highland Financial Partners LP
(2) HFP CDO Construction Corp
(3) Highland CDO Opportunity Master Fund LP
(4) Highland Capital Management Europe Ltd
(5) Scott Law LLC

Defendants

AND
B E T W E E N

Case No: 2011 Folio 481

The Royal Bank of Scotland PLC

Claimant

- and -

(1) Highland Financial Partners LP
(2) HFP CDO Construction Corp
(3) Highland CDO Opportunity Master Fund LP
(4) Highland Capital Management Europe Ltd
(5) Highlander Euro CDO V B.V.
(6) Scott Law LLC

Defendants

- -
- -

MR JOHN NICHOLLS QC and MISS LOUISE HUTTON
(instructed by **Linklaters LLP**) for the **Claimant**
MR STEPHEN AULD QC, MR BEN STRONG and MR LAURENCE EMMETT
(instructed by **Cooke, Young & Keidan LLP**) for the **First to Third Defendants**
MR GRAHAM DUNNING QC and MISS PHILIPPA HOPKINS
(instructed by **DaySparkes**) for the **Scott Law LLC**

Hearing dates: 23, 24, 25, 26, 27, 30, 31 January, 1, 2, 3, 6, 7 , 9 February, 6, 7, 8 & 23 March 2012

- - - - - - - - - - - - - - - - - - - -

Judgment Approved by the court for handing down (subject to editorial corrections)

If this Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.

CONTENTS

Mr Justice Burton:

I Introduction

1. This is the latest episode in the continuing battle between the Claimant ("RBS"), for whom on this occasion John Nicholls QC appears, together with Louise Hutton, and companies in the Highland Group, the First, Second and Third Defendants ("the Highland Defendants"). I gave judgment ("the Liability Judgment") on 10 February 2010 in favour of RBS against the Highland Defendants for a sum quantified by my further judgment on quantum on 7 December 2010 ("the Quantum Judgment") as approximately €21 million in 2009 Folio 605 ("the 2009 Proceedings"). As at the Quantum hearing, Stephen Auld QC and Ben Strong of Counsel appear for the Highland Defendants, now assisted additionally by Laurence Emmett of Counsel. At this hearing, which lasted 16 days, there has been an additional participant, Scott Law Group LLC ("Scott Law"). Scott Law is assignee of claims by the First and Third Defendants (and by the Fourth Defendant (the Highland "Interim Servicer" or "Servicer"), which, though joined in these proceedings as a defendant, has taken no active part), which are being brought in Texas (in the District Court of Dallas County) ("the Texas proceedings"), and is represented by Graham Dunning QC and Philippa Hopkins.

2. The issues arise out of a series of Agreements, involving the advancing by RBS of some €240 million in respect of a proposed CDO (Collateralised Debt Obligation) transaction, involving the Highland Group, called "Highlander V".

II The History

3. The history of the proposed CDO is summarised in the Liability Judgment, which I gave pursuant to a summary judgment application under Part 24 by RBS against the Highland Defendants [2010] EWHC 194 (Comm), relevant passages from which I shall now cite. My quotations from my earlier judgments, though in italics and inverted commas for ease of identification, should be read as if fully incorporated into this judgment.

> "*2. Highlander V involved the Highland companies borrowing from the Claimant via a Special Purpose Vehicle ("SPV"), in name a Highland company, but because of its SPV status effectively a trust company (Highland Euro CDO V BV), known as the Issuer. Such advances were to be used to acquire a portfolio or "Warehouse" of loans, and the Issuer was to issue securities to the market using the loans as collateral. There was to be a Closing Date, by which the loans would be acquired and the securities issued, and the Claimant's advances would thus be repaid, at the latest by the agreed Termination Date, with interest. There were provisions … for termination in the event – in those heady days no doubt considered unlikely – that the securities were not snapped up prior to the Termination Date. The original longstop for the Termination Date, upon which the Warehouse arrangements would expire if*

Highlander V had not closed (and had not been earlier terminated), was 30 September 2007. That date was ... twice extended, first to 28 February 2008, and then, subsequently, to 31 January 2009, but Highlander V was a casualty of the market collapse of 2008-2009, and ... there never was a Closing Date, no securities were ever issued, and the Claimant now seeks repayment. Such assets as the SPV Issuer retained, either in respect of the loans that were purchased and repaid, or interest received on those loans, have been recouped by the Claimant, but there are very substantial sums, totalled in the Amended Claim Form as more than £30.5m, outstanding, claimed as to 92.5% against the Second Defendant (and the First Defendant as its guarantor) and as to 7.5% against the Third Defendant. There is no dispute between the parties that the various Agreements, which originally established, and subsequently amended, the relationship between the parties, interlock, and, although they were entered into over a period of time, and between the Claimant and differing members of the Highland Group and/or the SPV, they must be read and construed together.

3. The first such agreement, in fact the originating document, is the Mandate Letter, dated 18 December 2006, by which Highland Capital Management Europe Ltd, described as the "Servicer", engaged the Claimant as "Advisor" in connection with the proposed Highlander V transaction ...

4. As anticipated and provided by the Mandate Agreement, a further package of agreements was duly entered into, on 5 April 2007. They were as follows:

> *i) The €400,000,000 Variable Funding Note Purchase Agreement ("the Funding Agreement") between the Issuer and the Claimant (described as "Variable Funding Noteholder") – and another bank simply as holder of designated accounts. This provided for the payment of the advances by the Claimant, and for repayment to the Claimant from time to time of the proceeds of and from the loans to be acquired by way of a 'rolling repayment obligation' in accordance with Clause 5 of the Funding Agreement ... The Funding Agreement contained in Clause 14, as did the ISD ... at Clause 15, an express provision of Limited Recourse against the SPV Issuer ... that the liability of the SPV was limited to its assets.*
>
> *ii) The Interim Servicing Deed (ISD) was also dated 5 April 2007. The parties were, apart from the Issuer and the Servicer, and the account bank, the Claimant and*

> *the Second and Third Defendants. This effectively provided for the running of the Portfolio and the Warehouse by the Servicer. Clause 4.2… provided for what was to happen in the event that the Closing Date (i.e. the issuing of securities) had not occurred on or prior to the Termination Date of the ISD. Clause 5.6 headed "Termination Date" is central… to the Claimant's claim against the Second and Third Defendants (and the First Defendant as guarantor) …*

5. As I have indicated, Highlander V did not take off, even in the months immediately prior to the market collapse, and on 31 October 2007 two agreements were entered into:

> *i) The 31 October Amendment Deed provided for the first extension of the longstop date for closing to 28 February 2008.*
>
> *ii) The First Loss Deposit Facility Deed ("the First Loss Deed") of the same date provided two specific benefits to the Claimant. First, the First Defendant, which was for the first time a party to one of the agreements, agreed to give, by Clause 6 … the guarantee of the Second Defendant's liability ... Additionally, the Second and Third Defendants agreed to make a "collateral advance" to the Claimant ... The total of the collateral advance was €7.5m, and it is common ground that this arose as a result of the substantial fall in the market and hence in the value of the loans which the Servicer had been buying in.*

6. Unfortunately things got no better, and, as described above, the parties agreed a further extension of the longstop date to 31 January 2009, and, as the market plummeted further, a substantial increase in the collateral advance provided by the Second and Third Defendants, to a total of €42.5m. The relevant contractual documentation was:

> *(i) An Amended and Restated Mandate Letter, now incorporating the various changes, including the new expiration date of 31 January 2009 …*
>
> *(ii) The Amendment Deed of 1 April 2008 ("the Second Loss Deed") provided inter alia for the increased collateral advance, to which I have referred above, and made clear, by paragraph 2.3(d) that the Claimant would make no further advances to the Issuer under the Funding Agreement.*

> *7. Lehman Brothers collapsed on 12 September 2008. The Claimant terminated the Mandate Letter in accordance with the terms of Clause 6 of that Letter, and, by virtue of the termination of the Mandate Letter (one of the express events entitling termination of the ISD (subparagraph (a) of the definition of Termination Date in that Agreement)) also terminated the ISD, by notice dated 30 October 2008. After exercising, on the Claimant's case, its rights pursuant to Clauses 4.2 and 4.3 of the ISD to realise the value of the loans, the assets of the Issuer, and drawing down against the collateral advance, the Claimant claims against the Defendants the shortfall as at the Final Realisation Date – defined in Clause 1.1 of the ISD as "the date on which all amounts realisable in respect of the Charged Assets have been realised and paid into the applicable Account", in accordance, as the Claimant asserts, with its entitlement under Clause 5.6, in the event 16 March 2009 ...*"

4. Clause 4.2 of the ISD is at the centre of the dispute between the parties. It is headed "*No Closing Date*", and arose in the event that, as in fact occurred, the contractual arrangements between the parties came to an end without there having been a Closing Date when the securities were issued to the public (from which it was intended that RBS would have been repaid). I quote such clause, substituting "*Highland*" for "*Interim Servicer*" and "*RBS*" for "*Funding Note Holder*":

> "*4.2 If the Closing Date does not occur on or prior to the Termination Date the Acquired Loans shall be sold in accordance with the provisions set out below:*
>
> > *(a)* [Highland] *shall have the right to purchase all Acquired Loans from the Issuer at market prices as determined by readily available quotes from independent, internationally recognised broker/dealers on commercially reasonable terms so long as there is no loss to the Loan Portfolio or as otherwise agreed between the parties, provided that in respect of any Acquired Loans not sold or agreed to be sold by the Issuer to* [Highland] *within 3 Business Days of the Termination Date,* [RBS] *will have the option to direct the Issuer to sell one or more of the Acquired Loans remaining in the Portfolio in such manner as specified below and as* [RBS] *shall determine in a commercially reasonable manner, which (for the avoidance of doubt) may include a sale of any such Acquired Loans to* [RBS] *or (if* [Highland] *so agrees)* [Highland] *at a price equal to the sum of the market values for such Acquired Loans provided:*
> >
> > > *(i) if both* [RBS] *and* [Highland] *wish to purchase an Acquired Loan, then the party that makes the*

> *higher bid thereof shall purchase such Acquired Loan at such price;*
>
> *(ii) if both* [RBS] *and* [Highland] *wish to purchase an Acquired Loan and both offer the same price thereof, then* [Highland] *shall purchase 100 per cent of such Acquired Loan at such price;*
>
> *(iii) if neither* [RBS] *nor* [Highland] *wish to purchase an Acquired Loan, then such Acquired Loan will be sold in accordance with the procedures (i) mutually agreed between* [RBS] *and* [Highland] *within 5 Business Days, or else* [(ii)] *determined by* [RBS] *acting in a commercially reasonable manner.*
>
> …
>
> *(c) if the actions specified in this clause 4.2 above are not completed to the commercially reasonable satisfaction of* [RBS] *within 30 calendar days after the Termination Date in the event of the occurrence of any event specified in paragraphs (b), (c) or (e) of the definition of Termination Date, an event of default shall be deemed to have occurred under the Variable Funding Note and* [RBS] *is hereby authorised to take whatever action it determines appropriate to sell each of the Acquired Loans still held by the Issuer.*"

The Issuer was, it is common ground, a Special Purpose Vehicle (SPV), Highland Euro CDO V B.V, not part of the Highland Group, although carrying the name of the CDO, and without any assets of its own. Although now joined as a party to these proceedings, that was as a result of the fact that Scott Law represented in the Texas proceedings that it was an assignee of claims by the Issuer, a situation which has subsequently been rectified, and the Issuer has not appeared before me, and indeed is apparently now in liquidation.

5. Clause 5.6 of the ISD, quoted in paragraph 10 of my Liability Judgment set out above, founds the liability of the Highland Defendants in the event of termination prior to what otherwise would have been the Closing Date: I set it out below, incorporating into it, in square brackets, the definition of Final Realisation Date taken from clause 1.1 of the ISD, and the definitions otherwise used in this Judgment:

> "*5.6 Termination Date*
>
> *If the Closing Date does not occur prior to the Termination Date, on the Final Realisation Date* [the date on which all amounts realisable in respect of the Charged Assets have been realised and paid into the applicable Account] *all amounts standing to the credit of each of the Accounts shall be applied in payment of all amounts due and payable*

> *pursuant to the* [Funding Agreement], *including repayment of all Advances outstanding thereunder and payment of all unpaid interest accrued thereon …. In the event that all amounts due and payable under the* [Funding Agreement], *including repayment of all Advances outstanding thereunder and payment of all unpaid interest accrued thereon are not paid in full on the Final Realisation Date …* [the Highland Defendants] *… will each unconditionally and promptly on demand pay* [RBS] *their [agreed proportionate share] … in full and final discharge of the Issuer's obligation to pay* [RBS] *such amounts …* [The Highland Defendants] *each undertake as a direct and primary obligation to pay* [RBS] *their … share.*"

6. At the liability hearing on 21 and 22 January 2010 five issues were raised for resolution, which it was common ground were the only issues requiring to be resolved, such that if RBS succeeded it would be entitled to judgment, with quantum to be assessed at a subsequent hearing. Of those five issues, only the third has any continuing relevance and, as set out in paragraph 9(iii) of my Liability Judgment it read as follows:

> "*(iii) Has the Final Realisation Date (as defined by the ISD …) occurred when the payments (if any) by the Second and Third Defendants fall to be made?*"

7. The relevant part of my Liability Judgment in relation to this issue was as follows:

> "*29. The Claimant submits that it is entitled, given the triggering of Clause 5.6, to claim amounts payable on the Final Realisation Date … namely, on its case, 16 March, after the carrying out of the various accounting processes. Mr Cox* [for the Highland Defendants] *submits that the Final Realisation Date never arose, indeed has never arisen, because there has never been a "date on which all amounts realisable in respect of the Charged assets have been realised and paid into the applicable Account.*
>
> *30. This is because the Defendants do not accept that the Claimant has complied with the provisions of Clause 4.2 of the ISD …*"

8. The Highland Defendants relied only on two contentions, namely that:

> "*32. …*
>
> *i) After exercising its right to purchase the Acquired Loans, the Claimant did not pay for them by paying the proceeds in to the Sale Proceeds Account of the Issuer, but kept the sums in reduction of the outstanding debt (and have of course given credit in the course of the Final Realisation) – the 'set-off point'.*

> *ii) In relation to one set of the loans (the Consolis Loans), the Claimant was unable to acquire the loan because of the objection of the debtor, but instead took an interest by way of sub-participation – but paying the full amount of the value of the loans – the 'Consolis point'.*"

9. I concluded as follows:

> "*38. These were indeed 'technical' arguments raised by Mr Cox, and ones which might well be described as clutching at straws. The subtext was that if there was something procedurally wrong with what occurred, either by way of a payment into a wrong account, or a failure to pay into the right account, or a slightly different mechanism of realisation of the asset, that rendered the entire process so non-compliant with Clause 4.2 that it could be said that there had not been a Final Realisation Date. I have concluded that there was not a material non-compliance with Clause 4.2(b), by reference to the variation of the provision for payment into and out of the Issuer's Sale Proceeds Account, and by virtue (due to the non-co-operation by the particular debtor) of the realisation of one particular loan by a different method than outright purchase, leaving the Issuer titularly as the creditor, but even if I were wrong in that regard, and there were technical breaches of Clause 4.2, that would not in my judgment begin to mean that there were not, by dint of the otherwise proper realisation of the loans and accounting for their proceeds, a Final Realisation, and consequently a Final Realisation Date.*"

10. I resolved all five issues against the Highland Defendants and in favour of RBS, and gave summary judgment, with quantum to be assessed. The Highland Defendants appealed my judgment, which appeal was dismissed by the Court of Appeal, by judgment dated 14 July 2010 [2010] EWCA Civ 809. It is apparent from paragraph 10 of the Court of Appeal's judgment that only two grounds of appeal were pursued before them, and neither of those were the "*third issue*" referred to above, as to which it was said by Thomas LJ to be accepted that I was plainly right. In the event, the Court of Appeal, though granting permission to appeal, dismissed Highland's appeal, concluding (at paragraph 25) that "*the construction of the agreements put forward by RBS* [was] *correct. The Judge was right in granting summary judgment under Part 24.*"

11. The quantum hearing took place on 14, 15, 16 and 17 September and 6 October 2010. Apart from expert witnesses on both sides, the only live factual witness was Mr Sam Griffiths, an RBS Leveraged Loan Trader from October 2008 and with responsibilities, subject to a Mr Ben Gulliver, the Head of Leveraged Trading, for the Highland Portfolio at the material time. Now, since August 2010, a managing director at RBS, working in the European Credit Special Situations Group, he has given oral evidence before me again at this trial, together with two witnesses who did not give evidence at the Quantum hearing, Mr Stewart Booth, employed by

RBS from March 2002 until February 2009 as Global Head of Credit Trading, and Mr Stewart Hall, a solicitor, since 2008 a Senior Legal Counsel in RBS's Global Banking and Markets Division.

12. It is necessary for me to set out extracts from my Quantum Judgment of 7 December 2010, [2010] EWHC 3119 (Comm), both because it conveniently chronicles the relevant history and because its content is central to understanding the context and nature of the claims and applications before me:

> "*3. There is no dispute about the outstanding balance of the advances. The dispute arises in respect of the sum which RBS has sought to credit against it. RBS asserts that it has correctly operated the provisions of Clause 4.2 of the ISD … and is not in breach of any obligation. Highland claim that RBS has not correctly operated the terms of that Clause, and is in breach of its equitable obligations as mortgagee, which are implied into or inform its obligations under Clause 4.2, such that Highland deny that, on a proper accounting, had RBS not been in breach of its obligations, any sum would be or is due, or indeed assert that monies would be or are owed by RBS.*
>
> …
>
> *7. The notice served by RBS dated 30 October 2008, terminating the Mandate Letter and the ISD as of 31 October, gave to Highland until close of business on 5 November to state which (if any) of the Loans were to be sold to them, no doubt by reference to the 3 Business Days, set out in Clause 4.2(a). As will be seen, in the event, of the 88 Loans, RBS itself purchased a total of 59, and 29 were sold to third parties. RBS did not take any step for the "procedures to be mutually agreed" in respect of such sale to third parties within 5 Business Days or at all in accordance with Clause 4.2(a)(iii) … What occurred is that RBS devised what has been called a* ***BWIC****, which is the acronym for an informal quasi-auction known as "****Bids Wanted In Competition****".* [I have emboldened these words for the purpose of emphasis in this judgment.] *Mr Griffiths gives this description in his witness statement:*
>
> > *"We decided to use a Bids Wanted In Competition ("BWIC") process to liquidate the portfolio. This process, in broad terms, means that a list of loans is presented to the market and potential buyers are invited to submit bids for the individual names on the list. Bids are requested within a specific timeframe and the highest bidder purchases the specific loan or portfolio (subject, in this case, to RBS matching the highest bid and acquiring a Loan or Loans itself, as contemplated by Clause 4.2 of the ISD).*

> *24. … We had previously used a BWIC to sell a large amount of assets and, given the falling market, we decided that the best values would be obtained by going to the market quickly and with a BWIC open for a limited period of time."*

8. On 5 November 2008, Mr Griffiths sent an internal memo [the 5 November memo] *to a number of his colleagues at RBS, which reads as follows:*

> *"Here is our proposed liquidation procedure for the Highland warehouse assets. Comments/feedback welcome.*
>
> 1. *RBS will obtain, where available, bid side quotes for the Highland assets from Mark-It, Reuters LPC, Merrill Lynch and Deutsche Bank for Nov 6th 2008 and record them in a spreadsheet.*
>
> 2. *RBS will notify Highland of this procedure on the morning of Nov 6th, in order to give them a head start if they would like to bid for any assets in the liquidation procedure.*
>
> 3. *On Nov 7th RBS will send out a list of all the assets in the portfolio to the market, requesting bids.*
>
> 4. *Highland will be invited to bid for assets as part of the auction.*
>
> 5. *RBS will also submit their bids in the auction.*
>
> 6. *Auction deadline to be 2pm Nov 11th."*

9. It is to be noted that, by paragraph 5, it was at that stage proposed that RBS would "submit their bids in the auction".

10. By email of 6 November 2008 ["the 6 November email"], *RBS, for the first time, notified Highland what it intended to do:*

> *"We refer to the Interim Servicing Deed and our letter dated 30 October 2008 terminating the Interim Servicing Deed. As you have not informed us that you have purchased or agreed to purchase any of the Acquired Loans in accordance with the opening lines of clause 4.2(a) of the Interim Servicing Deed, we are writing to inform you of the process we intend to follow in accordance with the proviso in clause 4.2, which process we consider to be commercially reasonable. This is set out below.*

> *Today (6 November) we are seeking indicative prices or quotes for each Acquired Loan in the portfolio from Mark-it, Reuters LPC, and other third party market makers in order to gauge its market value.*
>
> *Tomorrow (7 November) we will send out a list of the Acquired Loans to market participants (including Highland) and seek firm bids in respect of each of them*
>
> *Bids must be submitted by 2pm on 11 November*
>
> *RBS shall also be entitled to bid*
>
> *Each Acquired Loan will be sold to the highest bidder*
>
> *If there is no bid for an Acquired Loan, RBS shall purchase it at fair market value which shall be determined by RBS using the indicative quotes/prices referred to in 1 above, but taking into consideration factors such as the liquidity of the loan in question and market conditions."*

11. It is to be noted that the BWIC was to open the following day, Friday 7 November, and terminate at 2pm on Tuesday 11 November and that RBS is now simply to be "entitled to bid", and that "each acquired loan will be sold to the highest bidder", which at least would appear to imply that it would be sold to the party who places the highest bid in the BWIC, be it a third party or be it RBS itself, which will be "entitled to bid" ...

12. Highland's reaction, by email of 6 November 2008, was to "reiterate and emphasise our vigorous objection to RBS proceeding with its liquidation of the collateral as outlined in your correspondence. We consider not only ... the process you outline to be unreasonable (commercially or otherwise), but the decision to liquidate at this time to be commercially unreasonable".

13. RBS decided to include in the BWIC not only the 88 Highland Loans, but also some 40 loans from other sources. There was thus a total of some 120 loans included in the BWIC, which was notified, on RBS's evidence, to at least 200 potential bidders. The published terms included the following:

> *"• Bids are requested on individual names for the entire position shown on the spreadsheet and/or for the entire portfolio. Bids need to be received by us by email by 2pm (GMT) on Tuesday 11 November 2008 and shall be*

irrevocable and binding on the bidders until 3.30pm (GMT) on that day.

• We reserve the right not to sell all or some of the positions according to bids received and/or to sell any individual positions in the secondary market at any time, although our current intention is to sell the majority of the portfolio by way of the BWIC."

14. The BWIC (known, by way of codename, as the "Shingle BWIC") was thus open for a total of 4½ days, including a weekend, and a Tuesday which was Veterans Day in the United States, a public holiday. RBS has compiled a list of at least 117 clients with whom RBS sales people communicated about the BWIC. A number of transcripts has been disclosed and considered in evidence, of telephone conversations between some of those sales people and representatives of financial institutions.

15. Notwithstanding enquiries by RBS to Highland by two emails dated 11 November, Highland did not bid. Nor did RBS.

16. The result of the BWIC was as follows:

i) 36 Loans ("the 36") were bought by RBS by matching the price or, if more than one price, the higher or highest price, bid by third parties in the BWIC (that applies to 27 of them); as to the 9 where there were no bids in the BWIC, RBS calculated the price as set out in (iii) below.

ii) Mr Griffiths, in his statement prepared for this hearing (although not in any explanation given at the time), gave the following exposition as to why RBS decided to acquire those 36:

"52. One relevant consideration was whether RBS already owned part of the same Loan. If it did, there would be little additional work involved in monitoring the investment which made it a more attractive acquisition than a Loan which was unknown to RBS. By contrast, if RBS did not own the loan, or already had sufficient concentration in that asset, a sale to the highest third party bidder might be preferable. Another factor taken into consideration [my underlining] *was whether the relevant Loan qualified for particular accounting treatment under a global amendment published by the International Accounting Standards Board to International Accounting Standard 39 ("IAS39"). This amendment, which came*

> *into force on 13 October 2008, permitted banks to transfer, on a one-off basis, certain assets on their trading books to the banking books. The effect (in accounting terms) was that assets that were marked in the trading book on a mark to market basis could instead be accounted for on an accruals basis. Under IAS39, assets could be moved to the banking book at their 30 June 2008 mark to market value."*

He continued as follows:

> *"54.* *Post-acquisition by RBS* [again my underlining]*:*
>
> *36 of the 59 Loans were transferred to RBS' banking book under IAS39 and were therefore accounted for on an accruals basis. Some of these Loans may subsequently have been sold by RBS from its banking book but there are information barriers in place between RBS' trading and banking divisions which mean that I cannot or cannot readily access information in connection with any such sales.*"

13. I then gave an explanation as to what happened with regard to the other 52 Loans. I continued:

> "*17. RBS has consequently totalled, as being the proceeds of the 88 loans, the prices for the 36, calculated as above, plus the proceeds of the 29 Loans which were sold to third parties, plus the sums in respect of the 23 which neither they nor any third parties wished to purchase* [I describe how they were valued] ... *After subtracting that sum from the uncontroversial figure owed in respect of RBS' advances plus interest and fees, there is a shortfall of some €35m, which is what RBS claims. In making its claim for that sum in March 2009, RBS asserted on 26 March that it had "followed the process set out in [its] email of 6 November [referred to in paragraph 10 above]" and gave the account - though without any distinction between the 36 and the 52 and without reference to any such explanation as was eventually given by Mr Griffiths ... More information was sought by Highland by email of 30 March 2009, but none was given.*"

14. I then set out what had been learned by the time of my Quantum Judgment:

> "*19. What was described by Mr Griffiths in paragraph 52 of his witness statement (set out in paragraph 16 (ii) above) as "another factor taken into consideration" was in fact central to the course of action taken by RBS, both in relation to its determination of the CDO and the steps it*

took in relation to liquidation of the Loans. The true position was not revealed at the time by RBS, and has only become clear during the course of this hearing.

20. IAS/39, or more particularly the "global amendment" to it referred to by Mr Griffiths, was an answer to the real and pressing financial and accounting problems caused by the crash of autumn 2008. RBS, like other banks, took advantage of it, as they were entitled to do, immediately after its publication on 13 October 2008. On that same day, as may or may not have been coincidental, RBS received an effective injection from HM Treasury, by way of underwriting of new shares and subscription for preference shares, of £20 billion. This rendered it even more significant for RBS to be able to take advantage of the new provisions of IAS/39, which required very speedy action indeed, as the necessary steps had to be taken, in order for benefit to accrue, by 31 October 2008, i.e. 18 days later. What was permitted by IAS/39 was for assets, such as loans, held by banks like RBS on their trading book, to be reclassified, on a one-off basis, as long term investments and transferred to their banking book, provided that they were to be held long term (i.e. in the case of loans until maturity or at least for 12 months). The enormous benefit of this was that, instead of having to write down the value of such loans on their books, as RBS had already been doing, to take in the substantial diminution of value of such assets as a result of the crash, they would be entitled to value the asset at a date which could be adopted retrospectively by the bank but could not be earlier than 30 June/1July 2008, thus reconstituting the value that the asset had had as at the chosen date, retrospectively, by valuing the assets as at that date. This would have the effect of enabling the bank to write back the losses for which it would otherwise have had to account.

…

22. An exercise was immediately carried out by RBS, to see which loans could be so recategorised and transferred, by a team which included Mr Griffiths, on strict instructions from on high (a Mr Hourican) both to comply with the time limit and also to achieve as great a recoupment of losses, and hence increase in profits, as could be arrived at. Included in the loans so considered, indeed constituting a very significant part of them, were the Highland Loans, which had been properly carried on RBS' books, even though strictly not owned by them, because of their collateralised status under the CDO.

23. This exercise became, for obvious reasons, a manifest priority for RBS and Mr Griffiths, and, given that a decision had to be made as to which, if any, loans were to be capable of such classification as being investments held long term by RBS, not only did the Highland Loans have to be considered for that purpose, but it was plain that the only way in which RBS could conclude that any of the Highland loans were to be held long term would be if the CDO were terminated. Hence (although this was not revealed at the time of the summary judgment application) the motivation for the termination, albeit termination which was in the event a lawful one, was that the CDO had to be terminated by 31 October, because otherwise if the loans remained under the control of the Issuer and in accordance with the CDO, RBS could not confirm that they would be held long term. Hence, notwithstanding that Highland had been led to believe that the CDO would be continued at least until January 2009, simultaneously with the accounting exercise preparation had to be and was made for the service of the notice to terminate, to which I refer in paragraph 7 above.

24. By an email from Mr Lowe to a large number of colleagues in RBS of 15 October, he laid down the ground rules for which loans should be selected for reclassification, making it clear that "once reclassified out of the fair value category an asset may not be reclassified back in. In other words this is a one-way action". He made it plain that "in practice assets should only be reclassified if

> *there is no intention to sell or dispose of the assets in the foreseeable future*
>
> *there is no intention to ever reclassify these assets back as this is specifically prohibited …*
>
> [they] *are not impaired or a poor credit risk"*

25. On 22 October a Mr Berry from RBS Global Banking and Markets circulated an email confirming that:

> *"(1) this is a top down process i.e. it has been mandated by John Hourican, thus it is not a case of shall we do this but how we will do this (2) he recognises that there is no way we can undergo our normalised approval process for the names in the time allotted, so therefore looks to us to devise a fast-track approach … The main driver here is clear, that an opportunity arises for assets to be transferred from trading book to banking book with valuation as at end June. This has several*

> *attractions for the business, primary one being that the anticipated transfer value will allow the business to write back some profits, given that most assets have reduced in value since end June."*

26. The loans that were examined were categorised, and the two classes which were concluded to be appropriate for such reclassification were Category A, where the loans were "bullet proof, money good at par" or Category B "money good at the transfer price [i.e. value as at 30 June]". The 36 Loans were those selected by Mr Griffiths and his team from amongst the Highland Loans as fitting that description, most of them indeed being Category A.

…

29. None of this was explained or deposed to by Mr Griffiths, as is apparent from his witness statement quoted above. The impact was just as Mr Hourican would have wished, namely (as set out in the published Circular supporting the placement of new shares in RBS in November 2008) that "as a result of the reclassification, total income for the three months to 30 September 2008 was £1,442 million higher"; and in the Annual Accounts for the year ending 31 December 2008 there was, by virtue of reclassification of the leveraged finance, an increase in the profit and loss account of some £1.7 billion.

30. The following is thus entirely clear:

> *(i) By 31 October 2008, i.e. 7 days prior to the opening of the BWIC, it had already been decided, and indeed by reference to a transfer from trading book to banking book put into effect, that the 36 Loans would be retained by RBS in order to take advantage of IAS/39. They plainly had to be held on a long term basis, i.e. such that there was "no intention to sell or dispose of the assets in the foreseeable future" (see Mr Lowe's email of 15 October cited in paragraph 24 above) and thus there was no question whatever of their being sold to third parties, whether in or as a result of the BWIC or at all.*
>
> *(ii) Insofar as the 36 Loans were among the 88 Highland Loans included in the BWIC, that rendered the BWIC a sham exercise, at least so far as the 36 Loans were concerned. Mr Griffiths was driven to concede in the witness box that, so far as the 36 was concerned, it was only a "pricing exercise". There was no question of RBS bidding for them, because they had already transferred them to their banking books, nor*

any question of their allowing them to be sold to a third party – contrary to the impression given in his witness statement (paragraph 7 above).

(iii) This caused real problems for RBS's salesmen, who were tasked with operating the BWIC, and communicating with the 117 or so institutional clients of RBS. Mr Griffiths' evidence was that the salesmen were not told which of the loans ostensibly in the BWIC were for sale, so that they did not know of the 36, or which they were. This inevitably led to deception and difficulty. One relevant email communication has been disclosed. It shows a Mr Owens of RBS, asking Mr Griffiths, by email of 11 November, whether a bid by Nomura was successful. Mr Griffiths' response was "Unlikely that it will be – this is one of the assets that have already gone …". When Mr Owens responded "Ok – give me that kind of feedback and I'll go back to her [at Nomura] with the reasons and where the [market] is", Mr Griffiths replied "You cannot say the asset has already gone, but you can say we also have an 80 bid". Mr Griffiths accepted in evidence that this was untrue. The Loan in question (Autobar Term D) had not "already gone", save to the extent that it was one of the 36 which were never for sale; and there had not been a bid of 80. Mr Griffiths accepted in evidence that similar examples must have happened on other occasions, and in the transcript conversations, to which I referred in paragraph 14 above, there are examples of misleading statements to similar effect, by Mr Watkins and on two occasions Mr Woods, of the RBS sales force. Mr Griffiths was driven to say in evidence that it was:

> *"possible that we had worked out a story that there was … an initial interest from a buyer who was unnamed … a story to use in this eventuality, i.e. if an account wanted an asset that was one of the 36, then that asset – one could say, well there is already a buyer who has expressed an interest in that asset i.e. it's already gone."*

Mr Griffiths accepted that these lies, which he was knowingly putting out, and which he was causing his sales force perhaps unknowingly to put forward, did not constitute a sales process which is "commercially reasonable".

(iv) It is important to note what RBS had said in the [5 November memo and the 6 November email], *set out in paragraphs 8 and 10 above. So far as the former is concerned, both paragraphs 2 and 4 of the* [memo]

mask the sham and/or misleading process, insofar as it is suggested that Highland would be in a position to bid for the 36 Loans; while it was quite apparent that RBS, contrary to paragraph 5, was not going to submit any bids in the auction, certainly not for the 36, which they had already pre-allocated, and indeed not for any others, as RBS had carried out its exercise and decided that it did not wish to acquire any other Loans than the 36. So far as the latter email is concerned, which was what RBS was putting forward to Highland as an express indication of what it intended to do, the statement that RBS would be "entitled to bid" was somewhat disingenuous, on the basis that RBS knew that it would not be doing so, but in particular it was entirely incorrect to state that "each Acquired Loan will be sold to the highest bidder". The 36 were certainly not going to be sold to the highest bidder. The statement in RBS's later 26 March 2009 email (quoted in paragraph 17 above) was incorrect.

(v) Quite apart from the failure to disclose the true position at any time in relevant correspondence, whether by RBS or by solicitors on their behalf, at any time prior to start of this hearing, there is the significant factor of the witness statement of Mr Griffiths, set out in material part in paragraph 16(ii) above, which was not only served and relied upon prior to the hearing, but which was affirmed by him on oath as correct, when Mr Griffiths went into the witness box. I have already referred to the disingenuous nature of his paragraph 52 in paragraph 19 above. But his paragraph 54 is plainly wholly incorrect, if and insofar as, as was plainly its intention, it was stating that the 36 loans were transferred <u>after</u> the BWIC. This is plainly what "post–acquisition by RBS" was intended to mean. He is referring to the transfers to banking book, which are now known to have occurred prior to 31 October, as having been after the BWIC in November: RBS's case ... on 'acquisition' is and always has been that the sales/ acquisitions by RBS of the 36 (and of the 52) all took place after the BWIC, i.e., in relation to the 36, when the prices were calculated, as appears in paragraph 16(i) above. His statement was therefore untrue. For good measure I should add that I do not accept, at all, the statement which Mr Griffiths made in evidence, after the true position was revealed, in a somewhat half hearted way, when he suggested that if there had been a particularly good bid in the BWIC, some of the 36 Loans might, after all, not have been transferred or might have been transferred back. This

would have been wholly inconsistent with the IAS/39 exercise which I have described, and the "windfall gain" which had already been accrued, and in any event would have been well nigh pointless, so far as RBS is concerned, as it would have lost them that very substantial "windfall gain", in return only for increasing the return to Highland (with possible eventual impact on the amount of Highland's debt).

(vi) But there is another paragraph of Mr Griffiths' statement upon which the revelation of the true position has considerable impact. In paragraph 22 he said as follows:

> *"In devising the liquidation process we had two basic objectives. First, the basic commercial objective for the bank was to generate as high a market price as was reasonably possible for the Loans. The lower the prices obtained on liquidation, the greater the uncollateralised shortfall RBS would have to recover from Highland and therefore the bigger the bank's credit risk. The second was to make the process transparent so that we could demonstrate that the liquidation was a fair and reasonable way of obtaining market prices for the Loans."*

It is quite clear that in fact so far as the 36 is concerned the "commercial objective for the bank" was to secure the 36 Loans for themselves, and simply use the BWIC, as Mr Griffiths has now accepted, as a "price-fixing exercise" [or, more accurately, as I should have said, a "*pricing exercise*"]. *As for the suggestion that the process of liquidation was to be "transparent", if this was ever in the mind of RBS, it was soon discarded and, in any event, was not complied with.*

(vii) The reality, therefore, was that the 36 Loans were and were to be purchased by RBS. On the face of it, clause 4.2(a) entitles RBS to "direct the Issuer to sell them to RBS in such manner as RBS shall determine in a commercially reasonable manner, at a price equal to the sum of the market value" of such Loans. As for the 52 which RBS decided it did not wish to purchase, then pursuant to clause 4.2(a)(iii) such Loans were to be "sold in accordance with the procedures mutually agreed between" RBS and Highland, within 5 Business Days or else determined by RBS "acting in a commercially reasonable manner". RBS did not seek to "mutually agree" such procedure. They did not propose for agreement that 88 Loans should be included in a BWIC, of which 36 were not intended to be sold (with

> *the inevitable consequences referred to in paragraph 30(ii) to (iv) above), nor that the remaining 52 would be included in such BWIC, or in a BWIC of the duration referred to in paragraph 14 above, and including the "indicative marks" drawn from Mark-It."*

15. I analysed the contractual impact with regard to the 36 Loans as follows:

> "*31. Although at no time prior to the hearing was any analysis of events possible by reference to clause 4.2 by Highland, nor in any event carried out by RBS, because of its failure to disclose the true position, it became apparent on the first day of the hearing that the treatment by RBS of the 88 Loans would need to be justified by reference to two different aspects of clause 4.2.*
>
> *32. The 36 would have to be justified by reference to clause 4.2(a) itself, without recourse to its subparagraphs, colloquially called in the course of the hearing 4.2(a)(0) - given that what occurred in relation to the 36 did not fall within any of those subparagraphs. It was not a case in which both RBS and Highland wished to purchase an acquired loan ((i) and (ii)) nor a case in which neither RBS nor Highland wished to purchase the loans ((iii)). In relation to the 36, RBS is on the face of it permitted to sell (or direct the Issuer to sell) direct to itself, provided that (i) the manner in doing so is determined in a "commercially reasonable manner" and (ii) the price is at "market value" and that (iii), as is common ground … RBS complied with its equitable duties as a mortgagee upon sale of such collateral, as enlarged by the right to sell to itself given by clause 4.2(a)(0), the onus being on RBS to establish that there was no breach of such duties."*

16. So far as concerned the 36 Loans:

> "*41… there was a sale by the mortgagee to itself, not permitted to a mortgagee ordinarily, but provided for, in accordance with its terms, by this contract. The fact here is that when RBS exercised its power (i) it knew that it had already decided to take for itself the 36 in any event – IAS/39 would not permit a disposal by RBS (ii) the price at which it had transferred the Loans on its own book was by reference to the RBS internal mark, arrived at in accordance with its regular valuation of the Loans as at 30 June 2008, since which time the most recent such mark (as at 15 October 2008), had substantially fallen, and the Mark-It prices ascribed to the loans in the BWIC as their "indicative prices" had fallen still further.*
>
> *…*

45. They chose 36 out of the 88 to retain, and had done so before setting out the "proposed liquidation procedure" on 5 November. They were obliged to seek from Highland "mutual agreement" with regard to the 52. In my judgment it is plain that no genuine "mutual agreement" could be obtained if the true position were concealed from Highland. That required disclosure to Highland in order for them to be in a position to agree the procedure which was actually being carried out, namely (as now known) a BWIC (leaving aside the other factors of timing etc, to which I shall return when I deal with the 52) which would on the face of it consist of 88 Loans, but would in fact be a sale exercise in relation to only 52, while in regard to 36 it was to be a "[pricing] *exercise", relating to assets not for sale. Unless this picture were given, indeed if agreement were sought on the basis of a BWIC for all 88 assets without disclosing it, any "mutual agreement" which had been obtained would have been obtained on a misleading basis.*

…

46. iv) As a result of the failure to disclose that the 36 were preordained, the procedure for the 88, without even the semblance of "mutual agreement", was bound to be not "commercially reasonable". In respect of 36 of them, the BWIC was a 'sham'. Lies had to be told, and there could be no possibility of high pressure salesmanship to force up the prices by the RBS sales force, because there would be a real risk of losing or offending clients and contacts, if, after such an exercise in respect of the 36, they were not in the event going to be sold: and given that (on the evidence of Mr Griffiths) the sales force did not know which of the 88 were 'not for sale', then that would in the event inhibit high pressure salesmanship in respect of any of the 88.

v) Irrespective of whether the sales force knew which Loans were and which were not for sale, the bifurcated exercise of simply "price fixing" for the 36 (which were to be purchased by RBS, in whose interest clearly a lower price would be advantageous) and doing an actual sale exercise with regard to the 52, particularly if it was indeed coupled, as Mr Griffiths "postulated", with a false backup story fed to the sales force (as set out in paragraph 30(iii) above), was bound to involve a serious conflict of interest. This was in part acknowledged by Mr Griffiths (though he did not appreciate the full consequence of his acknowledgment) in his evidence, set out in paragraph 37(ii) above. But it is further established:

(a) by the very description of the bifurcated exercise by Mr Griffiths, in response to a question by Mr Johnson in re-examination:

"*Q: Highland in these proceedings seem to criticise you for using the BWIC as a pricing exercise, and at the same time criticise you for telling market participants it was not. What's your reaction to that?*

A: Um – it's a bit of damned if you do, damned if you don't scenario. It was our opinion that this needed to be – look like a real BWIC in order to gain the best price achievable and a market price.

A "*damned if you do, damned if you don't scenario" is perhaps the archetypal indication of a conflict.*

(b) by the inevitability of the lies told during the course of the BWIC (referred to in paragraph 30(iii) above).

(c) by the havering as to whether RBS were to bid in the BWIC or not (see paragraph 30(iv) above).

(d) above all by the continuing deception. The best evidence that RBS knew that they should have disclosed (and that they could not have done so) is the deception of Highland, which continued in correspondence, and indeed right through to the incorrect or disingenuous witness statement of Mr Griffiths, which he affirmed on oath in the witness box (see paragraphs 19, 30(ii), 30(v) and 30(vi) above). This is not simply a breach of contractual obligations, whether (express) in relation to "commercially reasonable manner" or (implied) failing to make material disclosure to enable a "mutual agreement", or to take reasonable steps to ascertain or obtain "market value", but constitutes, in my judgment, a breach of the equitable obligation of good faith admittedly owed by RBS, as mortgagee exercising the power of sale.

The breach of duty can be well illustrated by the very obligations of reasonableness and transparency which Mr Griffiths perversely insisted to be his objective (paragraph 30(vi) above).

47. Highland make a number of other criticisms in relation to the BWIC … But, irrespective of them, I am satisfied that the implementation of the sham BWIC, the lack of "mutual agreement" as to the BWIC, the lack of "commercially reasonable manner" in relation to its processes, renders this BWIC wholly unsustainable as a method of arriving at

> *the sale prices, the market values, of the 36 Loans. RBS was in breach of its contractual obligations and has not satisfied the onus of complying with its equitable obligations …*"

17. I concluded that, contrary to the Highland Defendants' submissions, there was not a sale of the 36 Loans by the Issuer to RBS upon their transfer to the banking book on or before 31 October 2008. I was satisfied that:

> "*53. i) The pre-31 October exercise was for the purpose of establishing which of the Highland Loans were appropriate for consideration within IAS/39. If they qualified, then they would be transferred over to the banking books, with a 30 June transfer date (as permitted by IAS/39) and consequently adopting the 30 June RBS mark as their value. It was not an exercise of buying and selling.*
>
> *…*
>
> *iii) The Warehouse Loans kept on trading book were (as set out in paragraph 22 above) not their loans, but they were in the circumstances permissibly included as if they were RBS's assets. Such Loans could be transferred by virtue of IAS/39 from trading book to banking book, without change of ownership: the issue was one of reclassification.*"

18. I accepted, at paragraph 53(iv), the evidence of Mr Lawler, the Highland Defendants' expert, that, as set out in his report:

> "*45. The amendment to IAS/39 states that reclassification of financial assets to a date between 1 July and 31 October 2008 must be made before 1 November 2008. … Therefore those entities wishing to take advantage of the amendment to reclassify financial assets retrospectively had to do so before 1 November 2008, as any reclassifications made on or after this date could only take effect from the date of the reclassification.*
>
> *46. Applied to the present case, this means that, in order to take loans onto its banking book at their 1 July 2008 values, RBS had to take that decision prior to 1 November 2008.*
>
> *47. A financial institution cannot redesignate an asset as a Loan and Receivable if it has an intention of selling it in the foreseeable future.*"

19. I concluded:

> "*54. It is plain to me that the priority for RBS was to terminate the CDO, so that they would be in a position to control the Loans, and know that they would be in a*

> *position to retain, and thus safely transfer to banking book, those Loans (36 in the event) which they felt qualified within IAS/39. They did not, at that stage, buy them: to that extent I agree with Mr Griffiths when he said: "For me, a sale or a trade happens when a price is determined". Of course, there can be circumstances in which a sale is complete, but with a price to be determined. Further, if Mr Auld be right, this was a sale where the price was determined, namely the IAS/39 value. But I am satisfied that this was not such a sale, but rather that RBS had decided that they would buy, and that they would need to conclude what "market value" was, and that, misguided though their procedure was, it was intended to arrive at the price through the mechanism of the "price-fixing" BWIC, and that the sale took place at that price, after the BWIC.*"

20. My conclusions as to the consequence of RBS's breach with regard to the 36 Loans were as follows:

> "*59. What then is the consequence in my judgment of the breach by RBS of their equitable and contractual obligations? Plainly they should, in order to comply with those obligations, have disclosed that they had already decided to acquire the 36 Loans, such that there were only 52 to be sold. I am satisfied that there would have been no agreement with Highland to put the 36 into the BWIC. RBS would have had to disclose to Highland that the purpose of putting the 36 into the BWIC would be to arrive at a price to be paid by them for the Loans which they had already determined to buy. It seems to me inevitable that in such circumstances the reason why they had decided to buy those 36 Loans would have had to be disclosed. Indeed it would have been in their interest to do so, because they would then have been able to explain, and powerfully so, why it is that, although they were to take the benefit of a June 30 2008 valuation into their accounts, because of the retrospective operation of IAS/39, nevertheless the contractual obligation was only to pay market value as of November 2008, which would, inevitably, be less (as Highland's own marks to market would show).*
>
> *60. The following factors would then come into play:*
>
> *i) Highland would know of RBS' determination to keep the 36 loans, and would no doubt attempt to hold them to ransom. However*
>
> *ii) whatever the negotiating position of Highland might have been, RBS would in my judgment have been correct in asserting that market value as at November*

2008 meant what it said (i.e. not market value as at 30 June), and if necessary could be so resolved by a court.

iii) Mr Johnson in opening described (without contradiction from Mr Auld) as appearing to be "common ground" that "at least in what the Defendants call normal market conditions, data from … Pricing Sources were used by banks by funds and by investors to mark portfolios of trading assets to market for accounting purposes". Those Pricing Sources were indeed available, even in the abnormal and falling market.

iv) Highland plainly made use of those and, perhaps, other sources in order to arrive at their own marks as at 11 November 2008, which are, as was pointed out in the course of argument, not greatly different from RBS' 15 October marks.

v) What seems to me to be an important factor is that the price at which Highland has the opportunity during the "3 Business Days" to buy is expressly defined in clause 4.2(a) as "market prices as determined by readily available quotes from independent, internationally recognised brokers/dealers" - presumably a reference to the Pricing Sources.

vi) Once RBS disclosed the position as to its desire to purchase the 36 Loans, as I conclude they should have done, then … the 'competitive provisions' – 4.2(a)(i) and (ii) - could come into play. Highland have chosen to call no evidence as to whether they would or could have bid for any of these Loans, but Mr Auld has invited me to decide on the basis of what he called a loss of a chance, but which is really the assessment of what is likely to have happened. I am entirely satisfied that I should consider issues of causation and consequence: this is not (and was hardly, if at all, argued to be) a case where a trust or a liability to account for profit arises.

61. Doing the best I can, I conclude that, had there been compliance with RBS's obligations and a full disclosure with regard to the 36, the outcome would have involved consideration of RBS's October 15 mark - which is plainly what RBS was considering when it carried out the IAS/39 exercise (and worked out the "windfall gain"), but which it would have no doubt argued by November fell to be reduced - and the Highland November 11 mark, which would have been its best calculation of the value of the 36 Loans. Taking into account (i) the desire of RBS to buy, (ii)

> *the negotiating position of Highland and (iii) the reality of what was plainly a falling market, I am satisfied that the market value of the 36 Loans was and would have been agreed to be, in the light of the above, one point over the October 15 2008 RBS mark for each Loan. There is no point in considering alternative methods to a BWIC, or targeted sales to third parties, or any other of the exercises canvassed between the parties primarily by reference to the 52 Loans, to which I now turn, because there was never any prospect of any other result than purchase by RBS.*"

21. With regard to the balance of the 88 Loans, the 52, I reached the following conclusions:

> "*74. The reality is, however, that the first point, the sham nature of the BWIC, is enough to destroy any prospect of reliance on it by RBS. Insofar as there were bids from third parties in the BWIC which were accepted as being the highest bid by RBS, there could be no confidence whatever that such prices were the market values, given the unsupportable nature of the BWIC. I am satisfied that the result is as unacceptable in relation to the prices bid for the 52 as it was for the prices bid for the 36.*
>
> *75. I am, however, unpersuaded by Highland that RBS was unreasonable in not following a targeted process in respect of 31 of the 52 loans, as is suggested. For the reasons set out above, I am satisfied that RBS was entitled to expect a speedy closure, and that they are not to be concluded to have been unreasonable in entering into an exercise (had it been a genuine one) which arrived at market values within a short time, rather than indulging in the hypothetical exercise of marketing (not to speak of dribbling out) loans over a period. I am also unpersuaded by Mr Constant, experienced though he may be in relation to the primary loan market, as compared with the more relevant experience of Mr Hood, that there would indeed have been sales available to bankers book buyers at considerably over the price at which loans were being traded. I accept Mr Hood's evidence that "the likelihood of many [such] bankers buying loans of the type that were in this portfolio is very, very limited.*
>
> *…*
>
> *77. I conclude, in the light of all the evidence I have heard, that in this difficult and falling market, these Loans - albeit that most of them (though not selected by RBS) would have been regarded as reasonable bets in the long term - would not have been valued on the basis of a possible acquisition by a hypothetical bankers book buyer after a possibly*

> *lengthy period of marketing, but by reference to the market views at the time. I conclude that the liquidation values in accordance with clause 4.2(a)(iii) ought to be - sums I suspect considerably more than those arrived at by reference to the BWIC - now calculated by taking, in relation to each Loan, the average of the RBS 15 October mark, less the WAD to allow for the passage of a further month, and the Highland 11 November mark.*"

22. Although I consequently gave judgment for RBS for some €21 million, I reached the following conclusion in my separate Costs Judgment as to the costs of the action:

> "*2. I am not going to repeat in this judgment the nature of* [my] *criticism of the Claimant's conduct … It is plain that I concluded that they ought to have disclosed matters at the outset contractually and in equity and that they continued thereafter to litigate, including serving a witness statement, on the basis that the true position was not revealed until the months of April/May/June of this year, when sufficient of the case and the true facts were revealed to enable the Defendants to put forward a pleading of their case and to instruct experts. From then on, there was, despite that, the continuing situation that Mr. Griffiths' witness statement remained on the table, so much that, indeed, even after the appropriate concessions made by Counsel for the Claimant in the course of opening, it was omitted to correct that statement. Indeed, Mr. Griffiths even went into the witness box and confirmed it to be accurate, when it was not. Nevertheless, as from June the issues were almost entirely joined between the parties.*
>
> *3. The outcome has been that, instead of a claim for over £35 million by the claimant, they have recovered something little over half of that sum. Therefore, dealing with each of the Claimant's and Defendants' positions in turn: first of all, the Claimant has misconducted itself in relation to the original claim and – more important for the purposes of the costs – the litigation, in a way which I am entitled to mark by making an order out of the ordinary. Secondly, the Claimant lost on a number of issues including of course any entitlement to rely on the BWIC. Thirdly, they have only recovered half of what they claimed and on a different basis from that upon which they claimed it.*
>
> *4. I turn to the Defendants. First, they have lost on a number of issues, including the issues as to June valuation and/or sale, which would, and would alone, have entitled them to pay nothing to the Claimant. They have also lost on issues which would have resulted in their still being liable to the Claimant, but in a lesser sum than that which, in the*

> *event, I have found and have adjudged them to be due to pay, by reference to Mr. Constant's case on bankers book buyers. Secondly, they at no stage made any payment into court or a Part 36 offer at all, even in response to a without prejudice save as to costs letter sent by the Claimant. Thirdly, they have been found liable to pay £19 million. That is a debt, which I have found to be due, as a result of the financial arrangements between the parties.*
>
> *…*
>
> *6. It seems to me that my discretion is properly exercised in this case by looking at the case in the round and not, as Mr. Auld invites me to do, to take the two sets of costs separately. Reflecting, in my judgment, properly all the arguments to which I have referred, I conclude that the right order is to make no order as to costs.*"

23. There has been no stay of the judgment, but no sum has been paid in satisfaction of it by the Highland Defendants. Although I refused permission to appeal, permission to appeal was given by the Court of Appeal to the Highland Defendants, initially only as to the 36 Loans by Buxton LJ on paper, on 8 February 2011, and subsequently on all grounds by the full Court on 16 March 2011. The hearing of the appeal has been, by agreement, adjourned pending this judgment. RBS did not seek to appeal against, and does not, for the purposes of this trial, challenge my finding in the Quantum Judgment as to the 'sham' nature of the BWIC.

24. Mr Griffiths was called by RBS to attend a disciplinary hearing, which took place on 16 December 2010. A report was made prior to the hearing by the RBS investigators, which recorded as follows:

> "*Speaking to both* [Mr Griffiths] *and Ben Gulliver in the process of this investigation, it was known at the time of the BWIC process (11 November) that these Loans were not available for sale, as they had already been reclassified by this date, because the Loans were not genuinely part of the BWIC. They would only have been sold if a bid greater than 1st July 2008 valuation was to materialise – not particularly likely given the trajectory of the credit markets since that date ...* [Mr Griffiths] *stated he wanted to preserve the BWIC process and he felt that stating the reclassified loans were not available via the BWIC process then he may jeopardise the entire event* [my underlining]."

At the hearing, Mr Griffiths is recorded as saying as follows:

> "*Wanted to put as many assets on banking book as possible at 30 June prices. S Booth mandated this – he said get as many assets in there as possible as long as they were good assets …* [D]*idn't consider Highland loan any differently to*

> *any other loan. There was obviously an opportunity to buy decent loans at market value and book them at 30 June values and take the … gain. The ability to take the gain was checked with Finance. Not questioned.*
>
> *Did this colour the decision to terminate Highland? Yes.*"

25. He further was recorded as saying that "*the court judge had called the BWIC a 'sham' but* [he] *felt that was unfair because the sales force did not know what was for sale and what was not for sale.* [He] *said he felt he was covered by stating in the cover email that the majority of the loans were for sale.*"

26. In relation to the conversation with Mr Owens in respect of Nomura described in paragraph 30(iii) of my judgment, set out at paragraph 14 above, he said:

> "*A case could be made that they did already have a buyer (i.e RBS) … SG said he should have stated that he was not going to give colour or discuss any prices but it was two hours before the end of the BWIC in a falling market. [He] said that it was a bad decision and there was never any intention to sell at 80/81, as we were never going to sell anyway.*" [My underlining.]

27. On 14 February 2011 the Texas proceedings referred to in paragraph 1 above were commenced by Scott Law and the Second Defendant against RBS, Mr Griffiths and Mr Hall. The Plaintiffs' Petition consisted of three Counts:

    i) The first related to the two extensions granted by RBS, upon provision of collateral by the Highland Defendants, in October 2007 and April 2008, referred to in paragraphs 5 and 6 of my Liability Judgment, set out in paragraph 3 above. The case is summarised in paragraphs 67-71 of the Petition, including the following:

> "*69. RBS fraudulently represented to Plaintiffs that if Plaintiffs paid RBS, then RBS would agree to extend the Termination Date. RBS, however, on information and belief, knew that there was a loophole in the Agreements that gave RBS the ability to terminate at will.*
>
> *70. Plaintiffs justifiably relied on RBS's misrepresentations and concealment of material information in deciding to extend the Termination Date. In the absence of RBS's fraudulent representations and omissions, Plaintiffs would not have entered into either the October 2007 or April 2008 Amendment Deed. Had Plaintiffs not agreed to these extensions, Plaintiffs would not have paid the additional cash collateral to RBS, and Plaintiffs would have liquidated the Warehouse and/or purchased the loans themselves well*

> *before the market crash in the fall of 2008, thereby saving Plaintiffs millions of dollars in damages.*"

ii) The second Count was of fraud in relation to the events of October/November 2008, summarised in paragraphs 72-75 of the Petition:

> "*73. … Defendants knowingly misrepresented material facts and withheld critical information from Plaintiffs as part of its scheme to acquire the 36 Loans at severely understated values. Defendants intentionally concealed its true motives from Plaintiffs, which prevented Plaintiffs from bidding on the 36 Loans in an amount near or equal to their June 30, 2008 values … RBS, by and through Hall and others at RBS, repeatedly made material misrepresentations and omissions to Plaintiffs regarding the sham liquidation sale, at the direction and approval of Griffiths and others at RBS. Defendants were highly motivated to orchestrate and conduct the fraud in order to receive large anticipated bonuses based on the windfall profits obtained from the IAS 39 Amendment reclassification and sham liquidation sale.*
>
> *74. Plaintiffs justifiably relied on the misrepresentations and concealment of material information by Defendants in deciding whether to bid on the 36 Loans. In the absence of Defendants' fraudulent representations and omissions, Plaintiffs would have bid on the 36 Loans at prices near or equal to their June 30, 2008 values, thereby ultimately reducing Plaintiffs deficiency by approximately $30 million.*"

iii) The third Count was a claim in unjust enrichment against RBS by virtue of the combination of facts alleged in the first and second Counts: it has no independent existence.

28. This led to the issue of proceedings in this Court by RBS to seek an anti-suit injunction to restrain the Texas proceedings, on the basis that:

i) If the Highland Defendants, and Scott Law as their assignee, were entitled to bring the proceedings at all, they were in breach of exclusive English jurisdiction clauses in doing so in Texas; and

ii) in any event the Texan proceedings are vexatious and oppressive, as brought in respect of matters which either have been decided (by the Liability and Quantum Judgments) or are still pending (by reference to the outstanding appeal) in these Courts; the matters sought to be litigated in Texas are the subject of res judicata, or such litigation is vexatious or an abuse of process because they either have been, or ought to have been, litigated in these proceedings.

29. Procedurally the application was founded by seeking an injunction in the 2009 Proceedings, joining Scott Law as an additional Defendant (and two other entities not now material) and in addition by bringing a further action, 2011 Folio 481 ("the 2011 Proceedings"), to enforce the jurisdiction clauses by way of injunction and damages as against the Highland Defendants and Scott Law (and the other two entities, and the Issuer who at that stage was, but seemingly is no longer, an assignor to Scott Law); in each case so as to enjoin the Texas Proceedings not only against RBS but also against Mr Griffiths and Mr Hall. I granted that injunction and joinder and ordered service out of the jurisdiction, *ex parte* on 15 April 2011. The Texas Proceedings have been stayed pending this hearing. The anti-suit injunction application is effective against the Highland Defendants and Scott Law and (in its absence) the Interim Servicer.

30. After continuation by consent of the injunctions until trial, which was ordered together with disclosure, witness statements and cross examination, this has now been the hearing of RBS's applications for permanent injunctive relief. The Highland Defendants and Scott Law defend the applications on the grounds inter alia that:

    i) The jurisdiction clauses relied upon do not prevent their bringing these proceedings in Texas against RBS and in any event against Mr Hall and Mr Griffiths, and/or insofar as they are otherwise effective as exclusive jurisdiction clauses, there are '*strong reasons*' not to grant injunctive relief in favour of RBS's applications for permanent injunctive relief within **Donohue v Armco Inc** [2002] 1 AER 749 per Lord Bingham at 24.

    ii) RBS is not entitled to such or any injunctive relief by virtue of the equitable doctrine of '*unclean hands*'.

    Any question of damages for breach of the jurisdiction agreement or equitable compensation in respect of the actions of Scott Law as assignee, i.e. whether they are available and if so in what sum, has by agreement been adjourned.

31. Further the Highland Defendants have counterclaimed to set aside the Liability Judgment on the ground that it was obtained by fraud. There is no separate attack on the Quantum Judgment, but it is common ground that it would necessarily fall away if the Liability Judgment is set aside. Scott Law relies upon the same case, i.e. that the Liability Judgment ought to be set aside for fraud, by way of its defence.

32. For the purposes of the hearing, apart from there being two additional factual witnesses called for RBS, as set out in paragraph 11 above, there have on this occasion been four factual witnesses for the Defendants, Mr Philip Braner, the Highland executive responsible at the material time, Mr Scott Ellington and Mr Andrei Dorenbaum (employed in the Highland Legal Department until 2010) and Mr Philip Young of the Highland Defendants' solicitors; and each side has called a legal expert as to Texan law, for RBS Mr Guy Harrison, a practising Texan attorney, and for the Defendants Justice Harriet O'Neill, a retired Texas Supreme Court judge. As for disclosure, there has been a great deal of additional disclosure, both because for this hearing disclosure was ordered in part on the basis of the **Peruvian Guano** [1885] 1 TLR 188 against RBS in the light of the nature of the

case and because, in respect of both parties, documents were ordered or agreed to be disclosed without reference to legal and professional privilege; so that the communications between RBS and their then solicitors Herbert Smith LLP, and between the Highland Defendants and their lawyers, could be available to the parties and the Court. In addition there has been a substantial quantity of additional documents disclosed by RBS, which the Defendants have asserted could and should have been disclosed prior to the Quantum Trial.

III The Quantum Judgment

33. I have set out above a brief history, largely by reference to the content of the Liability Judgment and the Quantum Judgment, which can suffice for a narrative of events to date. I shall now summarise the findings in the Quantum Judgment, so far as relevant to what has been now before me, by reference to four important topics. I do not do so in order to consider questions of issue estoppel, which seems to me only marginally relevant unless and until it comes to consideration of the anti-suit injunction, but so as to understand and analyse what was found at the Quantum Trial, on the basis of the then state of knowledge, and what the position now is, after I have had more evidence and considerably more disclosure of documents. These four topics are as follows:

i) Motivation of termination.

ii) Sham auction.

iii) Pre-determination as to the 36 Loans.

iv) Non-disclosure of material matters relating to (ii) and (iii) prior to the opening and oral examination in the Quantum Trial.

34. Motivation of Termination. My conclusions as to this were set out in paragraphs 19, 23 and 54 of the Quantum Judgment, quoted in paragraphs 14 and 19 above. I described IAS/39 as being "*central to the course of action taken by RBS, both in relation to its determination of CDO*" (A) "*and the steps it took in relation to liquidation of the Loans*" (B), and I referred to IAS/39 as being the "*motivation for the termination, albeit termination which was in the event a lawful one*" (C). Mr Nicholls, on behalf of RBS, submits that he is entitled to, and does, challenge the findings which I have categorised as (A) and (C), as not being necessary to the decision I made at the Quantum Trial, and in any event not material to the issues I am now deciding. He further points out that Mr Booth, who on RBS's case was the decision-maker as to termination, was not called, since his evidence was not understood to be relevant to the issues at the Quantum Trial, and has now been called. The Defendants point to a concession made by Mr Johnson, the Solicitor Advocate from Herbert Smith on behalf of RBS, in closing at the Quantum Trial, whereby he said, at paragraph 21.4, that "*it is accepted that, as at 31 October 2008 … RBS intended to buy* [the 36 loans] *from the Issuer*". But I agree with Mr Nicholls that this is not a concession as to either issue A or C. It is relevant to the issue of Pre-determination, but is not conclusive as to this issue of Motivation for Termination.

35. BWIC – A Sham Auction. My conclusions as to this were set out in my Quantum Judgment at paragraphs 30(ii), (iii), (iv) and (vi), also quoted in paragraph 14 above. As far as the 36 Loans are concerned, the salesmen were disincentivised from marketing them so as to increase the prices offered (paragraph 30(iii) and 46(v) of the Quantum Judgment, the latter quoted in paragraph 16 above), and it was simply a *pricing exercise*, but without the motivation to talk-up the prices to be obtained from third parties, as a sales force would ordinarily do. So far as the remaining 52 Loans were concerned, the sales force did not know which were up for sale, and, given the sham nature of the BWIC, there could be no confidence that the right market value/sales price was obtained (paragraph 46(iv) and 74 of the Quantum Judgment, the latter being quoted in paragraph 21 above). RBS did not intend to bid in the auction and thus add competitive value to it (paragraph 37 of the Quantum Judgment, not set out above), nor would the *highest bidder* be purchasing the Loans (alluding to the words of the 6 November email, in paragraph 5). For the purposes of this trial RBS accepts (and has not appealed to the Court of Appeal) the finding that the auction was a sham, in the sense that it was only a *pricing exercise* and by reference to the disincentivisation of the sales force and the lies told by the sales force during the BWIC. However RBS does seek to challenge the finding I made that the 6 November email was misleading or disingenuous. The case put forward by Mr Nicholls, on behalf of RBS, is that the words "*RBS shall also be entitled to bid*" meant or included a bid after the auction was closed, and that it was not required by the words "*each Acquired Loan will be sold to the highest bidder*" that such loans should be sold to a third party or to Highland making the highest bid during the auction, because, by dint of RBS's asserted entitlement to match the highest bid made in the auction, and/or of taking a "*last look*" once the auction was closed, RBS was thus being or becoming the "*highest bidder*".

36. Pre-Determination. I concluded (paragraphs 30(i), (v) and (vii) of the Quantum Judgment, quoted in paragraph 14 above), that RBS had already decided to buy the 36 Loans prior to the BWIC, in order to take advantage of IAS/39, thus enabling it to incorporate into its accounts a substantial profit by marking the 36 Loans at their value as of 30 June 2008, rather than the considerably reduced value as at 31 October 2008: and thus that there could not be a real auction in respect of the 36 Loans, as the decision was preordained. I referred, in paragraph 30(v), to the statement of Mr Griffiths in evidence, which I described as made in a "*somewhat half-hearted way*", that if there had been a "*particularly good bid in the BWIC, some of the 36 Loans might ... not have been transferred or might have been transferred back*". I said that "*this would have been wholly inconsistent with the IAS/39 exercise ... and the 'windfall gain' which had already been accrued, and in any event would have been well nigh pointless, so far as RBS is concerned, as it would have lost them that very substantial 'windfall gain', in return only for increasing the return to Highland (with possible eventual impact on the amount of Highland's debt)*". As to this, RBS does not challenge Finding (B) in paragraph 19 of the Quantum Judgment referred to in paragraph 34 above, and does not specifically set out in the pleadings a challenge to the other paragraphs referred to above (save paragraph 30(v)). However Mr Griffiths has repeated the statement I have referred to above, with some apparent backing from Mr Booth, but in even more unpromising circumstances (see paragraph 51 below), in that he asserts that

the 36 Loans might just possibly have been sold to a third party in the BWIC, if a bid had been received at or about the 30 June 2008 level.

37. I found, in paragraphs 52-54 of my Quantum Judgment (I have only set out paragraph 54 in paragraph 19 above), that such pre-determination did not constitute a sale, being a sale such as was asserted by Highland to have occurred as between the RBS trading book and the RBS banking book when the 36 Loans were transferred on or about 31 October 2008. Highland seeks to challenge my finding in that regard, both as part of its appeal to the Court of Appeal and at this hearing if I am persuaded to give some indication of a change of mind. I recognise that there has been considerably more disclosure, in which various RBS executives, including Mr Griffiths, described such transfers as amounting to 'trades' or 'sales', and indeed (as referred to in paragraph 70 below) that the profit reflected by the IAS/39 accounting revaluation was '*flashed*' on Friday 31 October. However I remain, notwithstanding such documents and such language, of the same view that there was no sale. Quite apart from what I say in paragraph 54 of the Quantum Judgment (set out in paragraph 19 above), there was not a sale between two different entities when there was a transfer between two different books of RBS, the sale was to be by the Issuer (on activation by RBS of its Power of Attorney) to RBS, and that took place after the BWIC. I remain of the conclusion that, in this regard, what was objectionable about the BWIC was not that there had been a sale of the 36 Loans, but that there had been a pre-determination that RBS would purchase the 36 Loans from the Issuer after the BWIC.

38. Non-disclosure prior to the start of the Quantum Trial. This appears in paragraph 31 (in paragraph 15 above) and paragraph 46(v)(d) (in paragraph 16 above). I refer to the "*deception of Highland which continued in correspondence and ... right through to the incorrect or disingenuous witness statement of Mr Griffiths, which he affirmed on oath in the witness box*". This finding is challenged by RBS and is said to have been not necessary for my decision.

IV This Hearing

39. I turn now to consider whether, as a result of the 16 day hearing in this case, with two additional witnesses of fact for RBS (and four for Highland) and a substantial number of additional disclosed documents, including (particularly relevant to the fourth topic of '*non-disclosure*'), the disclosure of the otherwise privileged communications between RBS and Herbert Smith, the picture has changed in relation to these four topics. As I have said in paragraph 33 above, whether or not RBS is strictly bound by my previous findings with regard to these four topics set out above, I have inevitably looked again at the evidence as it now stands, and I shall deal with each of the four topics.

1. Motivation of termination

40. There is now evidence from Mr Booth, who did not give evidence at the Quantum Trial, and there is a great deal more disclosure. I shall summarise the evidence as follows, at this stage without expressing my conclusions as to the evidence of Mr Booth, to which I return below.

41. Although Mr Booth's colleague Priscilla Lau was particularly concentrating on obtaining increased collateral from Highland, Mr Booth by, indeed before, October 15, when the IAS/39 amendment became relevant, was pressing for more collateral, but with a view to what he called (in an email of 15 October) "*optically extending*" the facility for such purpose, i.e. because, while on the face of it giving an extension, RBS would be entitled to terminate at any time, even if more collateral were provided, simply by terminating the Mandate Letter (see paragraph 27 of my Liability Judgment, not set out above, and now complained of by paragraph 69 of the Petition in the Texas Proceedings, set out in paragraph 27(i) above). This is (not surprisingly, given that wording in the email) complained of by Highland, but it certainly shows a determination by Mr Booth to terminate; and at the same time he was obtaining (as he made clear in an email of 19 October) legal advice as to how best to terminate. In the event, he sent a draft Notice to Terminate, but did not express or otherwise hold out any hope or expectation by doing so that there was anything that could prevent termination, and, in the event, Highland was not in a position (nor had any intention) to provide the collateral which RBS was seeking.

42. Mr Booth and Mr Griffiths were also involved in terminating another warehouse, the Babson Warehouse, which RBS was able to do without difficulty, and which would enable the Babson loans to be brought within IAS/39. Ms Lau circulated to, among others, Mr Griffiths, Mr Booth and Mr Gulliver, an email questioning whether the Babson termination notice needed to be served on that day, 31 October, "*in order to have the loans transferred under IAS/39*". On the same day, Mr Gulliver emailed Mr Booth, Ms Lau and Mr Griffiths about Babson, concerned that "*we could … miss our opportunity to take advantage of IAS/39*".

43. Both Mr Booth and Mr Griffiths plainly knew and intended that the Highland Loans would be included in the IAS/39 re-classification. Schedules went to and fro between them and others, including Mr Gulliver, including what were seen as the best of the Highland Loans (as set out in paragraph 26 of the Quantum Judgment (in paragraph 14 above)). At a very late stage in the proceedings, on the twelfth day of the hearing, Mr Nicholls sought to adduce an expert's report, permission for which had not been obtained at any of the directions hearings, and which had only been trailed some days earlier, and at a time after evidence was closed. His purpose was to seek to establish, by reference to such proposed expert's opinion, that the Warehouse and facility did not need to be terminated in order that IAS/39 could be operated, a point not previously raised in the Quantum Trial or at the hearing, nor relied on by any of the factual witnesses. I ruled out such proposed report, not simply by virtue of its lateness and the fact that the Defendants would have needed to respond to it with their own expert, but because:

    i) It was not at any time suggested that any such expert or other advice had been sought or obtained <u>at the time</u>, when e.g. RBS was contemplating and then activating the reclassification for the purpose of IAS/39 of either the Highland or Babson Loans.

    ii) It was quite plain that the factual witnesses called by RBS did not at any material time have any other view than that the Warehouses had to be terminated if the Loans were to be reclassified as long term loans suitable for the banking book rather than trading book and thus capable of being

reclassified; such that otherwise RBS would, in the words of Mr Gulliver in his 31 October email to Mr Booth, Ms Lau and Mr Griffiths, "*miss our opportunity to take advantage of IAS/39*", and see also Ms Lau's email of 31 October referred to in paragraph 42 above. It was not raised by Mr Booth in his evidence, when he gave an example, to which I shall return in paragraph 67 below, as to how loans could, in his view, have been sold in the BWIC even after being reclassified, but he did not suggest there was any way in which they could have been reclassified without having ceased to be available for the CDO.

44. Mr Griffiths has sought, unpersuasively, to detract from his statement made at his Disciplinary Hearing (set out in paragraph 24 above), about RBS's ability to take the gain made available by IAS/39 having *coloured* the decision to terminate Highland, by describing it as a speculation, and as derived from my Quantum Judgment. But that there was pressure from management to give the notice to terminate on 29 October is clear from Mr Hall's email of that date, and accords with the similar approach to Babson, referred to in paragraph 42 above.

45. There is no '*smoking gun*' in the additional disclosure. I tend to sympathise with Mr Nicholls' submission that my conclusion as to the motivation for termination was not a fundamental or necessary part of my Quantum Judgment, such as not to constitute an issue estoppel in respect of any matter materially in issue on this application. Now that I have the evidence from Mr Booth, I am persuaded that the Highland facility/Warehouse would have been terminated (as a result of an *optical* extension or otherwise) at or about the time it was, albeit that the deadline of 31 October for IAS/39 dictated the actual timing.

2. Sham Auction

46. There is nothing new in the evidence which assists RBS in respect of my conclusions made on the Quantum Judgment, but rather the reverse.

47. It is now clear from additional documentation – though not from any clarificatory evidence from Mr Griffiths – that there was in fact a Phase 1 and a Phase 2 in the reclassification process. The 36 Loans, being the best Highland loans (as described in paragraph 26 of my Quantum Judgment (paragraph 14 above)), formed part of Phase 1, which in the event went through by October 31. In a last minute effort to increase the number of loans that could be reclassified, and thus boost the *windfall profit* if they also could be treated as capable of being held long term and thus transferred to the banking book, 49 of the remaining 52 Highland Loans were scheduled for inclusion into a Phase 2. This was driven by the IAS/39 team answerable to Mr Hourican, but plainly involved Mr Griffiths – indeed Mr Griffiths is recorded in a telephone transcript of a conversation on 30 October with a Mr West, as telling him that "*we've submitted some more*" to go over to the banking book on the day before, 29 October; and by 31 October a schedule was circulating between (among others) Messrs Booth and Gulliver, which included the additional 49, which were still included in such schedule on 3 November when further circulated to Mr Griffiths.

48. Thus, in response to a query by Mr Griffiths, in an email of 4 November (part of the earlier disclosure but not understood in the way it is now capable of being

understood) - "*Do you have what is left in the warehouse post the move of assets to IAS/39 please*?" - Mr Laird sent a schedule which shows only three Loans left in the Highland Warehouse, described as "*very toxic*" by Mr Griffiths in an email to Mr Gulliver of 6 November at 08.57. It was only at 15.16 in the afternoon of 6 November that a Mr Fulford sent Mr Booth and Mr Gulliver an email (not previously disclosed) stating that "*all the phase 2 assets have been rejected for inclusion in the 30 June reclassification.*" It is in these circumstances that Mr Griffiths notified Mr Gulliver and Mr Laird at 15.43 on 6 November (disclosed for the Quantum Trial): "*Guys – these assets did not go in the end*", plainly a reference to the Phase 2 Loans, as Mr Griffiths accepted in evidence before me.

49. The following is thus now clear:

i) The statement by Mr Griffiths prior to the Quantum Trial in his fifth witness statement at paragraph 21, by reference to that last mentioned email that those loans (as we now know it, the Phase 2 loans) "*were excluded from reclassification in early November because Mr Gulliver and I were becoming increasingly concerned about the risk of these loans becoming impaired*", was not correct. This was a statement he made as being a matter of fact, rather than what he believed to be the case, and was part of his case then being made (see further at paragraphs 77 to 88 below) that the transfer to banking book took place <u>after</u> the BWIC, rather than before. In his seventh witness statement, for the purposes of this hearing, he explained (at paragraph 275) that he had "*overlooked the 31 October 2008 deadline*" at the time of his fifth witness statement, and in oral evidence he said that he had only very shortly before this hearing remembered about there being a Phase 1 and a Phase 2, after looking at the disclosed documents.

ii) Paragraph 34 of his seventh witness statement, for the purposes of this hearing, also requires reconsideration. When he came to give evidence, and before confirming its accuracy, he made an amendment to it, but, even with the amendment, it does not accord with what actually happened. I repeat the sentence, as it stood, and the amendment in square brackets thereafter:

> "*34. Further, <u>I do not believe that I was aware</u> of the outcome of the reclassification exercise (as it stood at the start of the BWIC) until some point during 6 November 2008 and, in particular, <u>which if any of the 36 had been accepted</u> [albeit it appears that, prior to the 6 November e-mail … I was working under the assumption that the 85 Highland Loans had been reclassified as at 31 October 2008. Further, it appears that the 36 had, to my knowledge, been cleared by Credit for reclassification on 23 October 2008 in phase 1 of the process]*."

The reference to Phase 1 is thus introduced, but even the amendment still leaves the strangely inexplicable (and obviously incorrect) statement that he was not aware until 6 November 2008 "*which, if any, of the 36 had*

been accepted" [as underlined by me above], when, to the contrary, he knew full well, since he was fully involved in Phase 1.

iii) When Mr Griffiths (and/or Mr Gulliver) told the sales force, as discussed in paragraph 51 below, that the Loans were "*all gone*" or "*all preplaced*", such instructions at the start of the BWIC – and in the case of Mr Watkins at 09.34 on 6 November - did in fact mean *all* (or all save three), because of the belief of Mr Griffiths (and Mr Gulliver) that 85 of the 88 (i.e Phase 1 and Phase 2) had *gone*, in the sense of being reclassified under IAS/39 and transferred to the banking book.

50. The other matter that has become clear, or clearer, as a result of the additional disclosure, relates to the instructions to the sales force. In paragraph 30(iii) of the Quantum Judgment (quoted in paragraph 14 above), I referred to a particular email exchange ("the Nomura email"), and to a number of transcripts then disclosed of telephone conversations between some members of the sales force and some of those with whom they were communicating during the BWIC, by way of fielding or responding to enquiries; and I recorded that Mr Griffiths accepted in evidence that (i) the contents of the Nomura email were untrue (ii) the transcript conversations were examples of misleading statements to similar effect by Mr Watkins and Mr Woods of the RBS sales force (iii) "*similar examples must have happened on other occasions*", and (iv) that it was "*possible*" that he and the sales force had "*worked out a story*", to discourage a buyer who expressed interested in one of the 36. It was thus already clear that, when he had said, in evidence at the Quantum Trial, that the sales force were told that all the Loans were for sale, that was not true.

51. It is now however clear from documents now disclosed that, in fact, there were instructions for the sales force of a much more general nature, which made it clear that (although no particular loans were identified) all/most/many of the loans were not for sale, thus inhibiting or discouraging salesmanship:

i) A transcript of a telephone conversation between Mr Griffiths and Mr Watkins, a senior salesman, timed at 09.34 on 6 November, which became referred to in the trial (for reasons that are apparent) as the "*Shakespearian conversation*":

> "*WATKINS: ... lets see what the BWIC does, I suppose, because there is going to be assets in there that Pramerica would want …, I would think.*
>
> *GRIFFITHS: Yeah, I know, but Paul, these assets are all gone anyway.*
>
> *WATKINS: Oh, are they?*
>
> *GRIFFITHS: Yeah.*
>
> *WATKINS: Oh I see.*
>
> *GRIFFITHS: Therein lies the rub.*

> *WATKINS: Right.*
>
> *GRIFFITHS: There's – the BWIC is – it has to be – it has to look authentic but it is effectively a pricing exercise.*"

In the course of his cross-examination by Mr Auld, Mr Griffiths, who had said that he had forgotten about this transcript (though he did not deal with it in his witness statement) confirmed, when questioned about this, that he did not want Highland to know that a large number of the loans was not for sale.

ii) On 8 November Mr Lofts, the Head of the Sales Force, sent an email to Mr Gulliver and Mr Griffiths asking whether "*you guys know if the Vivarte and Numericable positions on the BWIC* [both of them Highland Loans] *are gone as well?*", to which Mr Gulliver responded, in an email to Mr Griffiths, "*tell him as less as possable* [sic]".

iii) In Mr Lofts' "*month-end commentary*" to sales management he stated, by reference to the BWIC, that "*most of the assets have been pre-placed, but there should be significant informational value for the process.*" Mr Griffiths could not say whether or not he had received that document, but the significant point about it is that he accepted that Mr Lofts must have received that information either from Mr Gulliver or himself.

iv) In a telephone conversation at 16.01 on 11 November between Mr Griffiths and Mr Laird, Mr Griffiths reassured Mr Laird, in an answer specifically as to the Highland Loans put into the BWIC, that "*nothing that's gone for phase 1 of IAS is going to be sold*".

v) At 10.40 on 11 November Mr Griffiths confirmed to Mr Griggs of RBS that what a Mr McCormack of RBS had eight minutes earlier confirmed to him was correct, namely that "*there was no Casema* [another of the 36] *left for BWIC, as all this was all sold to the IAS bank book*".

vi) In a further previously undisclosed transcript, Mr Griffiths himself spoke to a Mr Wainer of Morgan Stanley at 13.26 on 11 November expressly discouraging him from bidding for one of the 36 – Amadeus – when he said: "*Amadeus, you don't want to go there. Again we've had a big ... we've had a big investor look at that one and they've kind of said they'll pay what they need to.*" Mr Griffiths' purported explanation or justification is that the "*big investor*" was a reference to RBS itself.

52. The picture is thus far wider than a few isolated conversations by members of the sales force, and far wider than the generalised statement, upon which RBS place some reliance, made by Mr Watkins in his advertisement to third parties of the terms of the BWIC on 7 November at 06.11 namely:

> "*We reserve the right not to sell all or some of the positions according to bids received and/or to sell any individual positions on the secondary market at any time, although*

> *our current intention is to sell the majority of the portfolio by way of the BWIC.*"

53. The desire of Mr Griffiths, expressed to Mr Watkins, that the BWIC "*has to look authentic*", was successful to the extent that a considerable number of bids were made, including at least 72 for the 36 Loans. Subject to the obvious sensitivity in relation to the 36, where steps were plainly taken to discourage third parties, be they Nomura or Morgan Stanley, there were 104 Loans left for sale in the BWIC, 52 of the Highland Loans, once it was appreciated that the Phase 2 Loans had not gone through, and another 52 Loans not derived from Highland (29 of them from the Babson Warehouse). As for the 36, not only is there some clear evidence of discouragement, as set out above, but there is certainly no sign of the reverse, namely the sales force encouraging increased bids from third parties in the hope of getting someone to bid something close to the June 2008 values.

54. But against this background must be set statements made by Mr Griffiths in his seventh witness statement (for this hearing) which, particularly as they do not address the documents at paragraph 51(i), (iii) and (iv) above, sit uncomfortably with the content of all of the paragraph 51 documents: I underline the passages which are especially difficult to reconcile.

> "*60. … my belief is that RBS did intend by the 6 November … Email to represent that it would offer the loans for sale by competitive bid, which it did (having regard to RBS' contractual priority right, which it would only have forgone in relation to any Loans it wished to acquire if a particularly attractive bid had been received from a third party). As I recall, a particularly attractive bid for the 36 would have been considered one which was at or very close to the value of the asset concerned as at 30 June 2008. In the event, no bids in that range were received for the 36 and, on the one or two occasions at the time and subsequently in cross-examination when I may have described the 36 as not being for sale or used words to that effect, I meant that in the sense that no attractive bids were likely to be, or had been, received as the market had moved significantly lower since 30 June 2008 …*"
>
> *77. … the 36 were for sale albeit that in practice RBS would only have foregone its priority to acquire them if sufficiently attractive bids were received from third party bidders.*
>
> *79. There was no intention that the marketing effort undertaken to solicit firm bids (in respect of the Loans for the 36) should be inhibited for any reason ... In particular, it is my recollection that the sales team were not provided with a list of the 36* [a statement not challenged by the Defendant] …

> *80. A problem did however arise in a small number of cases where third party bidders sought "colour", by asking whether the level at which they intended to submit or have submitted a bid for one of the 36 would prove successful. Such request for information are not uncommon. There were occasions on which I had direct involvement when accurate information may not have been provided. These instances are regrettable …*
>
> *89.* [After dealing with the Nomura email and (only) four of the six documents set out in paragraph 51 above, he states in relation to the conversation with Mr Wainer] *… I can ... see that my statement that "we've had a big investor look at that one and they've kind of said they'll pay what they need to" (which I cannot now recall making, but was probably intended to reflect RBS's interest in that loan) might arguably have dissuaded Mr Wainer from bidding. If this was the case, I regret making that statement.*"

Notwithstanding the *Shakespearian conversation* recited in paragraph 51(i) above he still said in answer to questions from Mr Dunning that he believed Mr Watkins "*was of the impression that the assets were still for sale*".

55. Apart from evidence, of which, as I have said, there is nothing new which assists RBS, what is new is their argument, or development of it.

56. Mr Griffiths continues to assert that it was just possible that the 36 Loans might have been sold, but the new documents referred to above make that argument even more implausible, coupled with the falling market since June 2008 and the absence of any effort to achieve June 2008 prices, to which I have referred in paragraph 53 above.

57. The next contention is the reference to what is called the "*last look*", an expression I do not recall having been used during the Quantum Trial. It is used by RBS to seek to establish that what occurred, and was entitled to occur, was that, after the close of the auction, in which RBS did not need to bid, it could have a *last look* (by reference to the bids that had been made during the auction), before deciding whether to acquire the loan. It is obviously directed to the 36 Loans (because it is not suggested that at any time RBS had any interest in any others) and is designed to detract from, or reverse, my conclusion as to the misleading nature of the 6 November email (particularly paragraphs 4 and 5). In the previously privileged correspondence it first makes its appearance in a note of a telephone conversation by Herbert Smith about disclosure with Mr Griffiths and Mr Hall, which is recorded as follows:

> "*Did RBS bid as part* [of] *BWIC?*
>
> *No, but had last look at the asset.*"

The explanation now given is that the word "*bid*" in the 6 November email, in the sense of "*RBS shall also be entitled to bid*" encompasses a "*bid*" outside the

auction. And, it is said, this is why Mr Hall changed the wording of the 5 November memo (paragraph 5) to how it was expressed in the 6 November email (paragraph 4).

58. There are a few problems with this: first the very way the answer to Herbert Smith's question is expressed, as set out above: secondly, that, in the course of his evidence at the Quantum Trial, Mr Griffiths stated that, by the time of the 6 November email, RBS had "*still not ruled out at least the option of bidding*", which must have been using "*bidding*" in its normally understood sense: thirdly there is the fact that it seems from a previously undisclosed document that, as at 5 November, Ms Lau believed (in an email sent to Mr Griffiths, Mr Gulliver and Mr Hall) that RBS would be bidding in the auction, to which Mr Gulliver responded (copied to Mr Hall and Mr Griffiths) that "*we will have the bids for you tomorrow morning.*" Mr Griffiths accepted at the Quantum Trial, during questioning by Mr Auld, that the implication of the wording of the 6 November email was that if RBS made a bid it would be in the auction.

59. But the real problem seems to me to be that there was no question of a *last look*. RBS had already decided to buy the 36 – they were "*all gone*". A *last look*, a reserving of an opportunity to make a bid (in the sense of a bid outside the auction or, as described by Mr Hall in cross-examination, a bid which is, in effect, "*an offer to purchase an asset, I mean, it is not like, we're not going to send an email to ourselves saying "Dear RBS ... We offer 68 for this loan*"), is wholly inconsistent with a situation in which, as here, the 36 had already been transferred to banking book, RBS was going to acquire them, and it was only a question of fixing the price. The move to banking book meant, as Mr Griffiths himself said in an email of 30 October to (among others) Mr Gulliver, that having been moved to banking book, the loans "*therefore should drop off our risk system*". The only evidence of anything which could, but plainly does not, amount to a *last look*, is the reference in paragraph 44 of Mr Griffiths' fourth witness statement (for the purposes of the Quantum Trial), when he describes how, after the BWIC closed at 2pm on 11 November 2008, Mr Gulliver and he "*pulled together the various bids received to ascertain the highest bids*".

60. The other argument that is put forward by RBS is by reference to what I called, in paragraph 32 of my Quantum Judgment (quoted in paragraph 15 above), Clause 4.2(a)(O), namely where none of the three numbered subparagraphs to Clause 4.2 of the ISD arose and "*RBS is on the face of it permitted to sell (or direct the Issuer to sell) direct to itself, provided that (i) the manner in doing so is determined in a commercially reasonable manner and (ii) the price is at market value (iii) ... RBS complied with its equitable duties as a mortgagee upon sale of such collateral, as enlarged by the right to sell to itself given by Clause 4.2(a)(O), the onus being on RBS to establish that there was no breach of such duties.*" This is rechristened by RBS as RBS's "*priority right*".

61. In paragraph 62 of his seventh witness statement for the purposes of this hearing Mr Griffiths said:

> "*What needs to be borne in mind is that it was common ground that RBS had an option to purchase the Loans at market price in priority to anyone else and so some process*

> *had to be put in place to determine the market price it would pay.* "

This option depended of course upon compliance with all three matters which I have set out in paragraph 60, being (i) to (iii) from my judgment. Highland did not know that the BWIC auction was being used as a *pricing exercise* in relation to the 36 Loans which RBS had already chosen to acquire. If Mr Hall be right, he too did not know that, and thought that the BWIC was simply a valuation methodology to facilitate a *last look*.

62. Even without that, it seems to me that the (unannounced and unexplained) operation of a BWIC simply for the purposes of effecting the alleged priority right, followed by a *matching* of the highest competitive bid in the auction by RBS, is not what was intended by Clause 4.2(a)(O), and is certainly not what is set out in the 6 November email; even if Mr Hall did take the trouble to delete the reference to bidding *in the auction*, and shift the chronology around from the 5 November memo, so that the reference to "*each Acquired Loan will be sold to the highest bidder*" came after the reference to 2pm rather than before it, and without making clear that *highest bidder* is in fact to mean *highest bidder but with RBS having priority over any earlier equally high bid by a third party*. Even if Highland could have worked out, by construing Clause 4.2(O), that a matching bid by RBS after the auction could count as a *highest* bid, Highland would not have known the rest: RBS's previous determination to acquire the 36 Loans (having transferred them to its banking book) but also, as Mr Dunning pointed out, in what was advertised as an auction, the avoidance, by such already predetermined buyer, of any risk of RBS's underbidding, and of any risk of any third party overbidding, and above all the absence of any real prospect of pushing up the price being offered by any third party. The handling of the 36 Loans was left to a sales force inhibited from pushing up the prices, not only because favoured clients (no doubt such as Morgan Stanley), could be upset if they were encouraged to bid higher and found out that there was never any intention to sell to them, and in any event because any raised price would lessen the amount of RBS's *windfall profit*.

63. I see no cause to change my conclusion on this topic, even if I were free to do so.

3. Pre-Determination

64. As referred to in paragraph 34 above, this was effectively conceded by Mr Johnson at the Quantum Trial. Mr Griffiths continues to contend, perhaps slightly less *half-heartedly* than last time, that there was still a chance of the 36 Loans being sold in the auction, notwithstanding that (i) they had already been transferred to banking book, (ii) there was no prospect of the CDO continuing once that had occurred, and (iii) there was no prospect in the falling market of obtaining a price anywhere near the 30 June value, which was the enticing foundation for the *windfall profit*, and in the light of the clear picture given by the documentary evidence as to the instructions to the sales force (paragraph 51 above). Cross-examined by Mr Auld in relation to what he said to Mr Watkins, he said:

> "*If I had said to Paul "these assets are all gone anyway, subject to you getting a bid at the 1 July level", it would materially, probability-wise, be virtually the same as me saying, "These assets are all gone". So I am talking in shorthand here ... the likelihood is that the loans would not be sold. The loans were for sale if an incredibly high bid came in ... in the low-chance probability or the low-probability chance that a bid near the 1 July 2008 levels was received, it would be possible that it wouldn't be a pricing exercise because we would have been selling that asset."*

65. Cross-examined by Mr Dunning, he accepted that it was a "*very, very small probability*" that anyone would have bid for the Loans at the 1 July level, and he said:

> "*I, in my mind, ruled it out as a possibility, but it was a non-zero probability.*
>
> *Mr Dunning: You ruled it out in your own mind; that's right?*
>
> *A: Yeah, because I live in –*
>
> *Q: The real world.*
>
> *A: A world that trades things at market price.*"

66. This was his attempt to deny the inevitable, and to explain away the clear picture that the Loans were described to the sales force as "*all gone*".

67. Mr Booth made an attempt to support the proposition that the 36 Loans were in fact for sale to third parties in the BWIC. His suggestion is, in my judgment, purely an afterthought, and does not support Mr Griffiths, since Mr Griffiths himself did not understand what Mr Booth had in mind – as do not I. Mr Booth's suggestion was that, although the 36 Loans had been transferred to banking book (and had to be so by 31 October on the basis that they would be held long term), if in the course of the BWIC (notwithstanding the absence of any attempt to butter up such a customer) someone had offered to buy one of the 36 Loans, that could have been accommodated by what he called "*shorting the banking book*", or on another occasion "*shorting the warehouse*". The suggestion, as I understand it, is that, notwithstanding that such a loan had already been transferred to banking book and would therefore be acquired by RBS to take the benefit of IAS/39, a bid from a third party could be entertained, upon the basis that RBS would then go out into the market and find another tranche of such Loan at a price which would enable it to fulfil such obligation to such third party. Alternatively, I suppose, although none of this was made clear, it could be done by selling the loan to the third party and then buying in another loan for the banking book. As I have said, Mr Booth did not explain himself and Mr Griffiths did not understand it. The fact is however that this does not appear to me to be a practicable solution at all. In order to qualify for IAS/39, it would have to be shown that the loan in question

was not only to be held long term but (was the same loan as) had been held on and since 30 June 2008 – otherwise anybody could have bought in loans in order to take advantage of IAS/39. In any event, there is no evidence whatever of anybody, not least Mr Booth or Mr Griffiths, having this in mind at the time – there is just one mention of the word *shorting*, but in a different context, relating to the Babson Warehouse.

68. Mr Nicholls made a different suggestion on behalf of RBS, namely that, given that the requisite intention for IAS/39 was to hold the loan in the long term, that intention fell to be tested at the date of transfer to banking book, and so, if the unlikely event had occurred that an unmissable opportunity came up to sell that loan to a third party (at or close to 30 June prices), then that would or might have justified a subsequent sale without falsifying the IAS/39 position. It seems to me wholly unlikely that anyone would have taken that risk, given how many millions of pounds hung on the success of IAS/39, all for the sake of the sale of one small Highland Loan in the BWIC 10 days or so after the necessary formulation of that intention to hold long term. But in any event there is no sign of any such suggestion in the evidence.

69. The proof of the pudding is not only in the instructions to the sales force, but in what happened when there was the outside possibility of an interested third party, such as either Nomura or Morgan Stanley, when there was not a cosying up but a hurried closing down of discussions, coupled with a dishonest explanation. I am satisfied that no one in RBS, least of all Mr Griffiths and Mr Gulliver, had in mind the sale to any third party of any of the 36 Loans, nor any possibility, as Mr Griffiths effectively conceded in the passage quoted in paragraph 65 above, of (as he had put it in paragraph 60 of his witness statement) "*a particularly attractive bid ... from a third party ... at or very close to the value ... as at 30 June 2008*."

70. That the position was preordained prior to the BWIC is further made clear by other documents forming part of the recent disclosure. In a transcript of a telephone conversation between Mr Griffiths and Mr West of 29 October, Mr Griffiths explained to Mr West that he and others were currently in the process of setting up a banking book into which the IAS/39 Loans were to be transferred, and in the conversation, referred to in paragraph 47 above, on the following day he told him of the additional, Phase 2, Loans. He then explained, as appears from a further transcript, to a Mr McDermott that the consequence of the transfer of the Loans from trading book to banking book would be a "*big number*" profit for his department. On 3 November, in a further transcripted telephone conversation between Mr Griffiths and Mr West, he referred to the fact that they had "*flash*[ed] *for all of our IAS/39 P & L on Friday*". That occurred; and, in a further transcripted telephone conversation between Mr Griffiths and Emma Pick of 5 November, he discussed the fact that such profits, being the difference between the price of which the Loans were transferred to the banking book and their 30 June price, should all be credited to his department or desk. It is right to say that at that stage he thought the profit was going to include the Phase 2 Loans, which, in the end, he learned it did not, but that the windfall profit was treated as occurring, as he asserted for the benefit of his desk, when the relevant Highland Loans were transferred to the banking book, is utterly clear, and that he knew that the 36 Loans were included in that transfer and that profit.

71. I see no reason to change my conclusion, but every reason to confirm it, that the 36 Loans were never for sale in the BWIC. The key was and is the transfer from trading book to banking book on or before 31 October 2008.

4. Non-Disclosure/Concealment

72. Mr Griffiths and Herbert Smith both approached the early stages of the litigation on the basis that as little information as could be vouchsafed to Highland in correspondence should be given. Even after the decision was made to seek summary judgment on issues of liability, that remained their plan. At a meeting between Herbert Smith, including Mr Johnson, and Messrs Griffiths and Hall on 18 November 2009, Herbert Smith pointed out that there would have to be another hearing on quantum in any event, and that there was a risk of addressing what were called "*quantum-related issues*", because they might "*muddy the waters*" and effect the timing of the application: Mr Griffiths expressed his preference not to include any issues of quantum at the summary judgment application. At an earlier meeting with Herbert Smith on 12 October 2009, Mr Griffiths had referred to the balance between the chances of not succeeding on the summary judgment by giving too much information, and not succeeding by virtue of a lack of co-operation in answering questions.

73. The summary judgment application was limited to identified issues of liability only. Under Herbert Smith's guidance, Mr Griffiths deposed on 27 October 2009 to a witness statement in support of the Part 24 application to the effect that he did not believe "*that the Defendants have any real prospect of successfully defending RBS's claims on issues of liability*" and did not know of "*any other reason why the issues of liability arising on RBS's claim or the counterclaim should be resolved at a trial.*" On 22 November 2009 Mr Griffiths sent an email to Mr Griggs of RBS asking for his help, because he was "*trying to figure out what we did with all the Highland Warehouse assets back in November last year*". On the same day he emailed Mr Hall and Herbert Smith to say that he had "*now pulled all relevant emails from my archives, being all emails containing the words Highland or Highlander between July and the end of November 2008 and all emails containing the word "shingle"*". He said:

> "*There is quite a lot of evidence that the portfolio disposal process was real and carried out properly, however some communication would have been oral, so not all of the processes* [are] *captured here.*"

74. He said he was working on a spreadsheet, and on 24 November 2009 he sent to those recipients such spreadsheet "*detailing the provenance of the liquidation prices and also what happened to the loans post liquidation.*" It is quite clear that it was as a result of all that that for the first time Herbert Smith were informed about IAS/39, and at a meeting on 15 December between Mr Griffiths and Mr Hall and Mr Johnson and others at Herbert Smith there was discussion of IAS/39, the use of the 30 June mark, and the use of the word *windfall.* Mr Johnson is recorded as saying that there were points to draw out:

> "*Windfall – part of RBS' motive to terminate. They say we need to look at quantum to look at liability … no further*

> *ev*[idence] *needed to be introduced: more ev*[idence] *dangerous – convince court matter of construction.*"

There is no express reference in that meeting to the date of 31 October 2008, which was an integral part of IAS/39.

75. There was much more discussion of IAS/39 in the conference between Herbert Smith and Mr Griffiths and Mr Hall after the summary judgment, on 29 March 2010. Mr Griffiths (at paragraph 6.4) explained that a one-off reclassification of assets from the trading to the banking book had been permitted and that all such assets had to be declared before October 2008. At paragraph 6.6 the following is recorded:

> "*SG stated that he did not want "the waters to be muddied" by reference to the IAS/39 procedure:* [Highland] *may argue that the real price was the June 30 price as opposed to the November 11 price, which would erode RBS' claim significantly.* [Herbert Smith] *said that it was likely that* [Highland] *would make such arguments anyway: the only way to neutralise them is to explain that this was done correctly.*"

Mr Nicholls points out that the use of the expression *muddying of waters* used by Mr Griffiths was simply the same as that used by Mr Johnson four months earlier, but I am not sure this is of great significance.

76. The concern that Mr Griffiths had, as recorded in paragraph 6.6, about the feared '*erosion*' of RBS's claim is reflected later in an email of 13 May 2010, when he says that he is updating his spreadsheet as requested to show "*what the approximate difference in claim would be if we used June 30th marks as opposed to liquidation price for the loans in the Highland warehouse. The claim would be ~ EUR25mm less. I resent doing this and think that we should forget about this number. Why are we getting ourselves wrapped up with this argument?*"

77. However it is important to see what else is recorded as having been said at that 29 March meeting:

i) At paragraph 5.1 Herbert Smith are recorded as asking whether "*RBS bid on any assets in the shingle BWIC. SG explained that it did not, as if, when all bids were in, RBS was willing to pay more than the highest third party bid for any particular asset it was able to acquire the asset by doing so*". It is obvious that Mr Griffiths was explaining that that - i.e. after the BWIC – would be the time and manner in which RBS could acquire the loan, rather than by any reference to the fact that the decision to acquire had already been taken, and that all that was being done was achieving a market value by reference to the amount of third party bids. When cross-examined by Mr Auld, Mr Griffiths said that he believed that at that conference he "*told Herbert Smith that the sale, reclassification took place by the end of October*", this by reference to a later Attendance Note dated 21 April 2010 of a meeting between Mr Griffiths and Herbert Smith to discuss his witness statement, to which I shall return. There is certainly no sign in the

Attendance Note of the 29 March meeting of such a statement, and indeed, as will appear, it would be inconsistent with what was discussed between Herbert Smith and Mr Griffiths, and indeed passed on by Herbert Smith to Highland, thereafter.

ii) In fact, the indication, even from the 29 March minute itself, is to the contrary, not only by reference to paragraph 5.1, above set out, but also to Mr Griffiths' explanation of the BWIC in paragraph 5.3:

> "*SG confirmed that if RBS considered the highest third party bid to be reasonable RBS would sell the relevant asset, if the highest third party bid was too low, RBS would take the loan onto their own books at the highest bid price until it came back up. The decision to sell an asset would depend on whether the highest third party bid was close in amount to where the asset was last trading.*"

iii) In a Herbert Smith handwritten note of the same 29 March meeting, there is a record of a question by Herbert Smith, asking who decided which loans RBS was to take, and suggesting that a document circulated on 30 October could indicate "*pre-determination*". Mr Griffiths' answer is recorded as being: "*make decision on BWIC day*".

78. At a further conference on the following day, Miss Stares of Herbert Smith records Mr Griffiths as having explained that "*whilst assets that were within the IAS had to be declared by the end of October 2008, in reality the assets that RBS bought and transferred to its banking book were not transferred immediately but, rather, at some point before the year end*" (my underlining).

79. The consequence of these instructions given by Mr Griffiths to Herbert Smith was two letters written by Herbert Smith to Highland's solicitors, on 15 April and 14 May 2010.

80. The first such letter explained that "*the IAS/39 review having been carried out, a list of the loans which were deemed eligible* [my underlining] *for transfer to banking book was finalised*", and asserted "*how RBS accounted for a loan post-acquisition has no bearing at all on its market value for the purposes of clause 4.2*". In the course of cross-examination by Mr Auld, Mr Griffiths accepted that, if Herbert Smith had been told by him that the Loans were transferred to the banking book before the BWIC, they would not have said what they did, and he said that he does not know "*a year and a half after it happened … what my knowledge and recollection was about IAS at this time*".

81. He gives express instructions to Herbert Smith on 21 April 2010 that "*sold approximately 30% to RBS banking book. Those loans going onto the banking book stayed with the warehouse for the time being and then re-designated to the banking book in late 2008/early 2009* [my underlining]. *Some loans can go onto the banking book with IAS/39 marking*". In the course of cross-examination by Mr Auld, he said, with regard to this, that "*the transfer to banking book happened on*

> *31 October, but I don't know whether my knowledge at this time was that I had appreciated that date*".

82. This was the time of preparation of his lead (fourth) witness statement for the Quantum Trial, and he approved paragraph 54 of it, which I have set out in paragraph 16 of my Quantum Judgment (quoted and underlined in paragraph 12 above, and criticised in paragraph 30(v), set out in paragraph 14 above), as incorrectly stating that the 36 Loans were transferred to banking book after the BWIC, which is of course what Herbert Smith had been told, and hence no doubt had so drafted on his behalf.

83. He confirmed this in terms to Herbert Smith on 11 May 2010, in answer to Ms Stares' question "*What to keep and what to transfer decided on 11* [November]." Mr Griffiths is recorded as answering "*Wouldn't have made decision before knew what bids to take*". Mr Griffiths accepted before me that this statement was untrue, but said that he did not think he knew the true position at that time.

84. On 13 May 2010, Ms Stares records that she and Mr Griffiths had discussed trying to identify a record of the Warehouse P & L, reflecting profit booked as a result of the re-designation of Loans acquired, and records that Mr Griffiths "*thought that profit was probably booked shortly after 11 November 2009*." This appears to have resulted in Mr Griffiths' response, by email of later the same morning, that he had been trying to analyse and reconstruct the decision process "*that went on as to which loans were sold to banking book*", and states "*from what I can tell, there is a very good correlation* [my underlining] *between those loans that were accepted into IAS/39 and those that were put onto the banking book*", and he asks "*how does this tally with my witness statement thus far?*"

85. It is difficult to see how he could have said, after the analysis that he said he had done, that there was simply "*a very good correlation*", in the light of what he knew had occurred. In cross-examination, he again stated that this was eighteen plus months after the IAS/39 process and the Warehouse liquidation process, and that he was still trying to "*reconstruct a state of knowledge*" and "*never sought to mislead Herbert Smith*". Nevertheless this plainly formed the basis of the second Herbert Smith letter to which I have referred above, namely that of 14 May 2010, which now post-dates and cross-refers to Mr Griffiths' fourth witness statement, and states in terms at page 2 that the Warehouse Loans were either sold to third parties on 11 November or were (later) transferred to the banking book. Mr Griffiths' response, when questioned about this letter in cross-examination, was that "*Herbert Smith had all the information and more information than me at this point*".

86. On 21 May 2010 Mr Griffiths reported to Mr Gulliver by email that:

> "*IAS/39 is the major worry right now – Highland appear to be claiming that because we put some of the assets on the banking book at June 30 levels, we should have given them credit for that. It's a nonsense argument of course but one that we need to deal with.*"

87. In cross-examination Mr Griffiths said that he believed that by 4 June (when he had an exchange of correspondence with Ms Stares, which appears to have led to the inaccurate statement in paragraph 21 of his fifth witness statement, referred to in paragraph 49(i) above), he did not know/had not realised that assets had gone into the banking book prior to the BWIC, and he said "*I don't recall when my eyes were opened, my knowledge changed. I think it might have been when the expert reports set out the process that was done.*"

88. The experts' reports were prepared and served by the beginning of July. On 19 July, an important litigation memorandum was prepared by Herbert Smith in draft and submitted to, among others, Mr Griffiths and a Mr Hopper, who was the member of the RBS legal department who had become responsible for the litigation. Mr Hopper made some comments. In paragraph 18 of the draft, in relation to the recited contention by Highland that they should have been given credit at the 30 June value, Mr Hopper asked: "*Therefore we reclassified them by the time of the BWIC and were unable to sell them even if we wanted?*" In paragraph 25(i), in relation to the statement "*it is alleged that RBS offered loans for sale in the BWIC that it had no intention of selling*", Mr Hopper asked "*Is this true or simply alleged? Any regulatory issue if we offered loans for sale when they were not*". Particularly if Mr Griffiths, even if not alive to the point before, had now - the experts' reports having been received - appreciated the position, it appears surprising that he did not react with concern to these questions by Mr Hopper, particularly as he was asked to comment upon the memorandum. They did not apparently raise any concerns, but, it seems, largely because the position was still being pursued (uncorrected by Mr Griffiths) that there was no decision (as opposed to a wish) to acquire the Loans until after the BWIC. The sentence which followed on from that which I have recited above in paragraph 25(i), remained in the final form of the draft, namely: "*There is nothing wrong (RBS will contend) with using the BWIC to ascertain the market value of those loans it wished to acquire itself*" (my underlining).

89. Just a couple of days prior to the start of the Quantum Trial, Mr Griffiths emailed himself a question: "*What about the timing? IAS list finalised 31st Oct, liquidation carried out 11th Nov – real sale? What if Highland had wanted to buy assets? (Defer to accountant?).*" As I have set out in paragraph 30(v) of the Quantum Judgment (set out in paragraph 14 above), Mr Griffiths nevertheless confirmed his statement, which included the incorrect paragraph 54. Having re-read the transcript of the Quantum Hearing, I have noted that the position was only articulated as a result of a question asked by me of Mr Johnson towards the beginning of the hearing, when I asked him how he justified the BWIC as genuine when it appeared that RBS had already decided prior to the BWIC to purchase the 36 Loans. That still seems to me to be the significant factor, such that it is pre-determination to acquire the pre-selected 36 Loans for the purpose of acquiring the IAS/39 benefit (as opposed to making a list of those it would like to acquire after the BWIC) which means that the Highland argument referred to by Mr Griffiths (to Mr Gulliver) was far from being a "*nonsense argument*".

90. Notwithstanding the fact that Mr Griffiths' witness statement remained unaltered, it is apparent that by the start of the Quantum Trial the fact that loans had already been transferred to banking book prior to the BWIC – if not its total significance –

had been known to Highland (see paragraphs 11.5.6, 11.5.8 and 12.2 of Mr Auld's opening submissions for the Quantum Trial).

91. Mr Griffiths' evidence is that he had forgotten that the 36 Loans had been transferred to banking book – sold/traded (see paragraph 37 above) – prior to the BWIC, so that he was not deliberately giving incorrect information to Herbert Smith.

92. The Defendants submit that this is wholly unlikely. The following matters are material to this:

i) IAS/39 and the opportunity for massive profit resulting from it was a crucial event for RBS and unlikely to have been forgotten. Mr Griffiths himself, in an email at the time to Mr Gulliver, described IAS/39 as "*awesome … we are making the bank rich*".

ii) He was responsible for (or at any rate party to) drawing up the schedules and devising the list of those loans, in particular in his case Highland loans, which were suitable to be transferred to banking book.

iii) He set up the new book, confirming by his email of 30 October to Mr Gulliver and others that the assets "*have been moved to banking book and therefore should drop off our risk systems*".

iv) He was, as set out in paragraph 70 above, concerned as to which desk or department should get the benefit of the profit thus achieved; he totalled up the profit resulting from the transference of the Loans (at that stage Phase 1 and Phase 2) to banking book at 30 June values, and he flashed the profit.

v) He was responsible for the BWIC and giving instructions to the sales force and even on his own case (as described at the Quantum Trial – paragraph 30(iii) of the Judgment (paragraph 14 above)) for the cooking up of a story for salesmen to tell anyone who became too interested in the 36 Loans. He had only just joined RBS, and this was his first major transaction for them (after his re-registration with the FSA had been delayed as a result of a complaint during his previous employment), and he himself recognised the unusual nature of the BWIC in his *Shakespearian conversation*, referred to in paragraph 51(i) above.

vi) Immediately after the BWIC, he launched straight into the calculation of the values and, from March 2009, attempted negotiation with Highland, at all times knowing that it was important to negotiate, and if necessary litigate, from a position which paid no regard to (and did not disclose) the fact that the Loans had been transferred to banking book at 30 June prices.

vii) In his various statements referred to by me in paragraphs 76 to 86 above, both to Herbert Smith and in his witness statement, he was in no doubt: it was at no stage a question of uncertain recollection, and he had of course had, being in charge of the handling of the litigation, plenty of opportunity to check the position (which on a number of occasions he said to Herbert Smith that he had done).

viii) Apart from apologising, in paragraph 289 of his seventh witness statement in respect of paragraphs 52 and 54 of his fourth witness statement, that "*the chronology which applied to the IAS/39 exercise was not made clear in the preparation of this evidence*", he has given no explanation either there or in oral evidence as to precisely when he had forgotten and when he remembered that the transfer to banking book had antedated rather than post-dated the BWIC.

ix) Lack of recollection was not part of his account at the disciplinary hearing, when he made the statement which I have recorded in paragraph 24 above that he "*wanted to preserve the BWIC process and … felt that stating the reclassified loans were not available by the BWIC process … may jeopardise the entire event.*"

93. The alternative explanation is that, at all times both prior and subsequent to litigation, he had the concern set out in paragraphs 75 and 76 above, leading to a slow eking out of instructions to Herbert Smith, first by reference to IAS/39, but, at no stage, at any rate as set out in history above, as to the predetermination of acquisition of the 36 Loans. In the event, when the matters all came out at the Quantum Hearing, although Highland did indeed latch on, with vigour, to the 30 June price, for the reasons I gave in my judgment, that case was not successful, although certainly RBS obtained judgment for very much less than they were seeking and would have wished; but it is worth noting the belief of the RBS investigator, in his report for the purposes of the disciplinary hearing of 6 December 2010:

> "*I believe fear that disclosure would have weakened the case is central to the issues here in this investigation.*"

V The Suppressed Fact

94. What was not disclosed was that, as a result of IAS/39, the 36 Loans had been transferred by RBS from its trading book onto its banking book at 30 June prices, and a 'profit' crystallised, by reference to the fall in value since that date, by 31 October, before the BWIC, and that the 36 were thus not for sale to third parties in the BWIC. This was not revealed until at or about the opening of the Quantum Trial. I shall call this the 'Suppressed Fact'.

95. Also not known was the fact that there was a knock-on effect on the 52 Loans which were in fact available to third parties in the BWIC (and had not been transferred to banking book at 30 June prices):

i) The fact that the RBS salesmen did not know which (if any) of the loans were for sale in the BWIC meant, as I concluded in paragraphs 46 and 74 of my Quantum Judgment (set out in paragraphs 16 and 21 above), that the BWIC was not an appropriate method for arriving at the market value of the 52. This became clear only at or shortly after the opening of the Quantum Trial.

ii) It was not revealed, or at any rate capable of being understood, until disclosure was given for this trial, that there were two phases of the IAS/39

> reclassification, as explained in paragraphs 47 and 48 above, although the decision not to proceed with Phase 2, and thus with the other 49 Loans, was not communicated to Mr Griffiths until 6 November after he, and his superior Mr Gulliver, had given instructions to the sales force based upon the belief that all the Highland Loans had "*gone*", as set out in paragraph 49 above.

I am not however persuaded that the effect of this was realised, or at any rate appreciated, by Mr Griffiths. So far as the 52 Loans are concerned RBS's own interest was to achieve a higher price from a third party. In any event, I am not persuaded that he remembered this aspect, and thus not satisfied that he suppressed it.

96. I therefore leave aside the issue of this 'knock-on effect', and concentrate only on the Suppressed Fact. As to that, I am satisfied that Mr Griffiths had an anxiety not to disclose it, either to Herbert Smith or to Highland, because he appreciated that there was an inevitability that, if it were revealed, Highland would argue that the 30 June prices/value should be taken as the *market value* of the 36 Loans for the purposes of Clause 4.2 of the ISD, and that he hoped, indeed anticipated, that the case would settle in the meantime, given that Highland's internal valuations of the Loans were not much different from those being put forward by RBS. Mr Griffiths revealed to Herbert Smith in December 2009 the existence of IAS/39, and by March 2010 that reclassification of the 36 Loans took place by reference to 30 June prices. But he led them to believe, by not disclosing the Suppressed Fact, that the transfer of the 36 Loans to RBS's banking book had only occurred <u>after</u> the BWIC when RBS decided to acquire them. This was therefore the case as made by Herbert Smith on RBS's behalf to Highland, and hence put to the experts instructed by both sides for the Quantum Trial. Reliance was then placed by Highland on 4 June 2010, in its Particulars of Defendants' Case Regarding Quantum, on the 30 June values, but without the additional boost to such a case derived from the Suppressed Fact, which only became known or appreciated at, or shortly before, the opening of the Quantum Trial.

97. Once it was revealed, and Highland was able to rely on it before me at the Quantum Trial, although it had some effect on the result (see paragraphs 59-61 of my Quantum Judgment), ironically it did not, in the event, prove the match winner for Highland, which I am satisfied that Mr Griffiths had feared it would or might.

98. Subsequent to the Quantum Trial, there has, as set out in paragraph 51 above, now been the disclosure of further revealing conversations/instructions between Mr Griffiths and the sales force; but he has come to Court, and given evidence, at this hearing denying that he suppressed the Suppressed Fact. His explanation has been that he had, by the time he instructed Herbert Smith and thereafter, forgotten that the 36 Loans had been transferred to the banking book <u>before</u> the BWIC. It is wholly unclear when it is that he now says he remembered the true position, given that (i) if, as he said (see paragraph 87 above), he did so at the time of the experts' reports, he did not reveal the position to Herbert Smith, but permitted paragraph 25(i) to remain in the Litigation Memorandum of 19 July (ii) he went into the witness box at the Quantum Trial and confirmed the accuracy of the statement which continued to affirm the truth of the fact that the 36 Loans were only transferred through RBS's banking book after the BWIC.

99. I am satisfied that he had not forgotten, for the reasons set out in paragraph 92 above, but that he simply did not want to reveal the Suppressed Fact, knowing or fearing its materiality. Thus I have disbelieved him in these proceedings. He was vigorously cross-examined by two experienced leading Counsel, and I make allowance for that fact, but he quite plainly time after time had no answer for their penetrating questions, such that, by the end of day 9 of the hearing, at the end of his third day in the witness box, I was driven, in the absence of Mr Griffiths, to comment to Counsel, without any criticism, that the cross-examination amounted to "*just punching, punching and punching a man who is already down*."

100. For the sake of completeness, I do not find that either of the other two factual witnesses called on this occasion (but not at the Liability Trial) by RBS have lied, although neither of them was particularly impressive.

101. As to Mr Hall, Scott Law only attacks him on the basis of his role in relation to the 6 November email. Highland however assert that he must also, by virtue of his presence at meetings up to 6 November, have known about the Suppressed Fact. I conclude that he did not act competently in relation to the BWIC, because he could and should (as he now accepts) have done a better job of drafting the 6 November email. Although I am satisfied that he must, both because of the number of people involved in IAS/39 and the priority being given to it, have known about it, I am not satisfied that he knew about its effects or consequences in any detail, or that he consequently appreciated that the 36 Loans (or the Phase 2 49 Loans) had been transferred to the RBS banking book by 31 October, or that, by reference to that fact or to IAS/39 itself, RBS was to all intents and purposes bound to buy (at least 36 of) the loans, rather than simply contemplating whether to purchase or not. In his redraft of the 5 November memo so as to turn it into the 6 November email, he should plainly have made it clear - which he certainly did not do by the simple removal, without further explanation, from the 5 November memo of the words "*in the auction*" and re-ordering the subparagraphs - that RBS were to have an opportunity to purchase any of the Loans by matching the highest bid placed by a third party during the auction. However I am not satisfied that he knew that they were in fact going to acquire all the 36 Loans willy-nilly, and that no third party was in fact going to get a look in, nor that he knew that the BWIC was thus a flawed or sham exercise in relation to the 36, or indeed the 52. I am not satisfied that Mr Hall lied in evidence before me at this hearing.

102. As to Mr Booth, he is no longer employed by RBS. I find that he was, being no doubt nervous as to the effect of any admissions he might make, far too insistent as to his state of mind in respect of the closure of the Highland Warehouse. He said, in his witness statement (paragraphs 20 and 25), that the IAS/39 amendment, and consequent reclassification of assets, was "*not at all relevant to my decision to terminate the Highland V Warehouse*", and he more or less stuck to that in cross-examination. I have no doubt that he had decided to terminate the Highland Warehouse in the light of the dramatic and continuing fall in the market, the insufficiency of the existing collateral, and what he (as we now know, having heard the evidence of the Highland witnesses, rightly) believed was the lack of intention on Highland's part to provide any more, or certainly sufficient, collateral. It was thus necessary for him (and I am satisfied that it was his decision) to terminate the Highland Warehouse. The Babson Warehouse (some of

whose assets were also being reclassified as a result of IAS/39) was also terminated. It was plainly necessary in his view to terminate the Highland Warehouse, and it was plainly convenient that it be done at a time when, as he knew, some of the Highland Warehouse loans were, like Babson, to be reclassified. The Babson Warehouse was not in fact terminated until after 31 October. Although notice to terminate the Highland Warehouse was hurried on by the imminence of 31 October, so that the precise date of the decision to terminate may well be said, as Mr Griffiths described the decision to terminate in his disciplinary hearing (see paragraph 24 above), to have been *coloured* by the ability to book the loans at 30 June prices and take the 'profit', nevertheless I am satisfied that Mr Booth would, in any event, have terminated the Warehouse. That is what he was keen to impress upon the Court. I was certainly unpersuaded by Mr Booth's assertion that IAS/39 was "*not relevant to*" his decision to terminate the Warehouse. I was also unimpressed by his plainly retrospective suggestion about how the 36 Loans might still have been for sale in the BWIC (paragraph 67 above). But I do not find he has lied.

103. The consequence is therefore that I find that of the three witnesses called by RBS at this hearing, one has lied. Mr Gulliver was not called. I am asked by Mr Nicholls not to speculate as to what he would have said or indeed why, although still employed by RBS, he has not been called. He was Mr Griffiths' superior at the time. He was, by reference to the evidence of Mr Griffiths, plainly party to the giving of the instructions to the sales force, in advance of the BWIC, as to the loans being "*all gone*" (and was copied into the email from Mr Lofts of 8 November enquiring whether "*the Vivarte and Numericable positions on the BWIC are gone as well*"), he was fully involved with the Highland Loans both before and after the BWIC, and he was the recipient of Mr Griffiths' email of 21 May 2010 referred to in paragraph 86 above. It would however not be fair for me to reach any conclusions as to Mr Gulliver.

104. What I can conclude is that Mr Griffiths was, subject to Mr Gulliver's oversight, in charge of the BWIC, and fully involved in and knowledgeable of the reclassification, the transfer to the banking books and the recognition of the '*profit*' (as set out in paragraph 70 above), and that he was certainly in charge of the litigation and of the instructions to Herbert Smith. He is the one who has been put up by RBS to give the relevant evidence, to be its "*mouthpiece*" (Mr Griffiths' own description of his role in relation to his first witness statement, used in paragraph 200 of his (seventh) witness statement for these proceedings), and he is asserted by Mr Nicholls, in paragraph 300 of his written closing submissions, to have been "*a truthful witness*". I have found that he was not truthful, when he says that, by the time he gave instructions to Herbert Smith (and despite the fact that he had at all times responsibility for and opportunity to consult all relevant documentation, and indeed must have given the impression to Herbert Smith that he had done so), he had forgotten the Suppressed Fact. I conclude that, in purportedly giving his explanation to the Court as to how it came about that the Liability Judgment was given, and the preparations for the Quantum Trial were carried out, in ignorance of the Suppressed Fact, he has lied, and that he did indeed suppress it for as long as he could, in the hope that it would remain undiscovered. What is the consequence of that?

VI Setting aside the Liability Judgment.

105. This is the first issue which I have to decide (see paragraph 31 above). Highland counterclaim that the Liability Judgment should be set aside, and Scott Law asserts, by way of defence to RBS's reliance on the judgment, that it was procured by fraud (**Spencer Bower and Handley: Res Judicata** (4th Ed) at 17.04). The case that is put is that the judgment was obtained as a result of fraud by RBS. This involved consideration of the following:

i) The fraud – being concealment by Mr Griffiths (on the basis of my findings – I have not found such concealment in respect of Mr Hall):

ii) Causation:

iii) Lack of knowledge on the part of Highland (it is common ground that negligent failure to discover the truth would not be sufficient, even if it were relevant):

There is then a further issue raised by Mr Nicholls, namely:

iv) Whether there has been an election by Highland against setting aside, such as to preclude the present application.

106. The law as to the requirement for fraud (issue (i)) is not in dispute between the parties, by reference to the **Ampthill Peerage** [1977] AC 547, namely that it must be "*conscious and deliberate dishonesty*". In this case that means deliberate, dishonest concealment of the Suppressed Fact. As Mr Nicholls points out, by reference to **Clerk and Lindsell on Torts** (20th Ed) at 18-21 to 18-24, the Claimant must show that the fraud existed at the relevant time – in this case the time when the Liability Judgment was obtained. This is not a case of deliberate misstatement, where it must be shown that the party making the statement was "*without honest belief in the truth of the statement at the time of making it*", but, because it is a case of alleged dishonest concealment, Mr Griffiths must be shown to have been without honest belief that he did not need to make the disclosure or that by concealing the facts he was thereby deliberately putting forward a false case.

107. So far as causation (issue (ii)) is concerned, the law has recently been considered at length by Langley J in the **Odyssey** (**Sphere Drake Insurance Plc v The Orion Insurance Co Plc** (judgment 11 February 1999), in which he discussed various authorities (including **Jonesco v Beard** [1930] AC 298). Although he referred to the judgment of Phillips LJ in a two-member Court of Appeal in **Gaillemar Sarl v McClelland** (judgment 19 February 1996), he was inevitably most influenced by the decision of the House of Lords in **Hunter v Chief Constable of the West Midlands Police** [1982] AC 529. He first analysed what he called the "*practical factors*" and, at page 174 (2), he said:

> "*There is a difference in principle between a test of materiality which looks only to the materiality of the evidence to the impugned decision and one which looks to its materiality to the final result in the sense of what the*

> *decision might be if the matter were re-tried with honest evidence. I think this distinction (which could often be expected to be irrelevant in practice) is not reflected in the language of many of the authorities. But in my judgment the relevant test must look to the impugned judgment which it is alleged was "obtained" by fraud. … Moreover, if a case arose in which the court could readily determine that despite some perjury the outcome would not have changed I see no reason why it should not and every reason why it should so decide on ordinary principles of causation.*"

108. In relation to the jurisdiction of setting aside judgments said to have been obtained by fraud or allegedly perjured evidence he said at page 175:

> "*The existence of the jurisdiction will be self-defeating unless it is limited to circumstances in which it can be plainly demonstrated that the successful party has dishonestly obtained the fruits of victory*".

109. After citing from the speech of Lord Diplock in **Hunter**, he concludes (at 179) that **Hunter's** case is authority that "*a judgment obtained by perjured evidence is, like any judgment obtained by fraud, liable to be set aside, but there must be apparently credible evidence as to the fraud or perjury which not only was not available at the trial and could not have been obtained with reasonable diligence for use of the trial <u>but which is such as entirely changes the aspect of the case</u> in the sense that it must be <u>likely to be decisive</u> of the outcome of the claim in question* [his emphasis]".

110. He referred to the words of Phillips LJ in **Gaillemar** (a case in which an appeal from an order striking out a claim to set aside a judgment on the ground that it had been obtained by fraud was dismissed) that:

> "*What is the proper test to be applied? In my judgment, the fraud must be such as at least to put the validity of the judgment in doubt before it can so taint the judgment as to justify setting it aside.*"

111. In my judgment, the words of Phillips LJ could have been approached simply by reference to the fact that he was articulating what was "*at least*" necessary, when in the event he was concluding that the case did not even reach that low threshold at the interlocutory stage. But, in any event, Langley J preferred (page 183), as I do, the "*judgments and test in Hunter's case … and in particular as expressed in the words of Lord Cairns … that the fresh evidence must be such as entirely changes the aspect of the case. Those words require that the court must form the impression that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Not only is Hunter's case recent and high authority and authority directly in point but in establishing a slightly stricter test it gives preference to the justice of the finality of judgments between the same parties.*" He concluded "*There is nothing illogical or unjust in limiting the circumstances in which a resulting final judgment can be impugned by one of the parties to cases where fresh evidence demonstrates that a party has*

dishonestly set out to deceive and in effect succeeded in deceiving the court. If it were otherwise the risk of never-ending litigation and thus injustice to the successful party is apparent."

112. Laws J put it very succinctly in **Tuvyahu v Swigi** (judgment 26 October 1998) that "*the false evidence must be shown to have been an operative cause of the court's decision to give the judgment for the defendant.*" Both sides refer to the decision of David Steel J in **Kuwait Airways Corporation v Iraqi Airways Corporation** ("**Perjury II**" [2005] EWHC 2524 (Comm) at 197 to 199, where he states as follows:

> "*197. It is accepted by the parties that I should adopt the same principles in regard to the question of deliberate concealment as that in regard to perjury. The disparity between the concealed (or perjured) evidence and the new evidence would be material if it "entirely changed the nature of the case", see* ***Hunter*** *...* [and] ***Odyssey*** *... This is precisely the same approach as was agreed by the parties and was adopted by me in Perjury I: see [2003] 1 Lloyds 448 at 467.*
>
> *198. I recognise the difficulties of analysis that such principles may import in their train. To "entirely change the nature of the case" at least requires material which was likely to be decisive of the outcome. However, it is important to have regard to the relevant outcome. In my judgment the question of materiality is to be assessed by reference to its impact on the evidence supporting the original decision and not to its impact on what might be the decision if the matter were retried on honest evidence (see* ***Odyssey*** *p119).*
>
> *199. In short I accept that KAC must persuade me that the whole validity of the relevant part of the judgment is in doubt. Thus at this first stage, when considering whether to set aside part of the first judgment, the court has to be persuaded that the fresh evidence would in fact have fundamentally changed or undermined the way in which the first court approached and came to its conclusions and thus that IAC "dishonestly obtained the fruits of victory".*"

113. There is no law particularly relevant to issues (iii) and (iv), and I shall deal briefly with them before turning to my conclusions in the light of the above authorities with regard to issues (i) and (ii). As for (iii), it is clear that Highland did not know the Suppressed Fact at the time of the Liability Judgment (and indeed not until the opening submissions at and/or shortly before the commencement of the Quantum Hearing). The evidence of the Highland witnesses to the contrary really could hardly be gainsaid, and Mr Griffiths himself was somewhat stumped in the course of cross-examination by Mr Auld, when it was put to him that if he was asserting that he (who had full involvement) had forgotten the position, it was hardly likely that Highland should have appreciated it.

114. As for issue (iv), with regard to election, the suggestion is that Highland elected against setting aside the Liability Judgment when it successively (i) appealed the Liability Judgment (ii) fought the Quantum Judgment and (iii) appealed the Quantum Judgment. It is clear that Highland did not have the knowledge necessary to constitute a valid election until at least the beginning of the Quantum Hearing, and I do not conclude that there was any active election, irrevocable or otherwise, in Highland's then continuing with that trial rather than seeking an adjournment. Although there was no express reservation of any right to apply to set aside the Liability Judgment when Highland sought permission to appeal, and obtained such permission, in respect of the Quantum Judgment (and although Highland are not challenging in their appeal my valuation of some 18 of the 52 Loans) I do not conclude that, by following the former remedy, they elected against the latter.

115. I turn to the question of issues (i) and (ii) in the context of setting aside the Liability Judgment for fraud, which must of course be proved, albeit on the balance of probabilities, nevertheless to a high standard (**Hornal v Neuberger Products Limited** [1957] 1QB 247). There are two aspects which appear to me to arise directly out of the fact that this was a summary judgment, obtained on a Part 24 application, in respect of issues of liability only:

    i) Mr Auld, and Mr Strong, to whom Mr Auld passed the baton in the making of oral closing submissions, emphasised the importance in a summary judgment application of the required statement by an applicant that he believes there is no defence (see Mr Griffiths' words recited in paragraph 73 above). At a time when there has been no disclosure, and thus no obligation on the Claimant to disclose documents which may support the case for the Defendant, and no opportunity for the Defendant to trawl through the Claimant's documents, it is the more important that the Court and the Defendant should not be misled.

    ii) On the other hand the very fact that such a summary application takes place at the stage prior to disclosure (absent the course which can, in appropriate cases, be followed by a defendant of obtaining disclosure prior to summary judgment – see **Grindlays Bank Ltd v Henson** (Robert Goff J QB (Comm) 17 July 1980) means that such simple failure to disclose will not automatically lead to a conclusion that there has been a misleading or deliberately false picture presented at the summary judgment stage. Although I have found that Mr Griffiths deliberately concealed the Suppressed Fact, and did so right up to the start of the Quantum Trial, it seems to me clear that he believed that the evidence related to quantum, to the value of the loans. Herbert Smith plainly were advising (see for example paragraphs 72-74 above) that there did not need to be disclosure relating to quantum; and I would need to be satisfied, to the relevant standard, that, at that stage of proceedings, his failure to disclose the Suppressed Fact was deliberate and dishonest.

116. I turn to the crucial question of causation. There are three ways in which Mr Auld and Mr Strong put Highland's case as to the effect of the failure to disclose the Suppressed Fact on the Liability Judgment, i.e. on the outcome of the Part 24 application:

i) Repudiation and acceptance of repudiation.

ii) No Final Realisation Date.

iii) Had the suppressed fact been revealed, it would have been apparent that there might be such an impact on quantum that, even upon resolution of all the identified issues of liability against the Claimant, judgment on liability would not have been issued, or that **Miles v Bull** [1969] 1QB 258, whereby leave to defend can be granted on Part 24 if there is (as Rule 24. 2(b) now provides), some "*other compelling reason why the case or issue should be disposed of at a trial*", might have operated.

It is fair to say that the case as finally developed in this regard by Highland was not expressly pleaded. RBS, while reserving its position as to the absence of such pleading, points to the somewhat elusive and incremental way in which it has been argued.

117. The background to this is that Highland point to the pleading in paragraph 21.1 of the Particulars of Claim in the 2009 Proceedings, in which there was a positive assertion that the liquidation procedure, which it intended to follow, was "*considered to be commercially reasonable*". Such a case, and submissions to that effect by Mr Johnson on behalf of RBS at the Summary Judgment application, led to my judgment, in which, when dealing with the third issue (set out at paragraph 6 above), I recited:

> "*Mr Johnson submits that the reality is the requirement for a proper and arms length realisation of the loans*"

and then set out my conclusion on this issue, in paragraph 38 of the judgment, quoted in paragraph 9 above, whereby I referred to the "*otherwise proper realisation of the loans and accounting for their proceeds*". Highland submits that, had the Suppressed Fact been revealed, then, at any rate in relation to the 36 Loans, this could not have been said.

(i) Repudiation and Acceptance

118. Highland submits that, by the course RBS took, it was in repudiatory breach of Clause 4.2 of the ISD (set out in paragraph 4 above) and/or of the ISD, and that Highland accepted such repudiation at the time, by objecting to the course being taken by RBS, even without specific knowledge of what was involved, and playing no part in the BWIC, or would have accepted it had they known and (insofar as necessary) do accept it in these proceedings. Had the Suppressed Fact been revealed at the time of the Liability Judgment, Highland would have resisted the Part 24 application by reference to such case of repudiation, and such defence would have succeeded or, at any rate, would have been sufficiently arguable to prevent there being a judgment on liability.

119. RBS makes out a particularly powerful case in response to this, notably in a Note by Mr Nicholls and Ms Hutton, dated 30 March 2012:

i) The ISD had already been terminated prior to the operation of clause 4.2, which can and does only come into play following termination, such that there could be and was no repudiatory breach of the ISD.

ii) The transfer of loans to banking book, and the writing back of profit to the profit and loss account in respect of the 36 Loans, did not involve any breach of the ISD. Clause 4.2 was a method of arriving at market value for the purpose of calculating the amount due after termination, and if, as I found in the Quantum Judgment, the steps taken by RBS failed to adopt a proper procedure for such calculation, then the market value as at November 2008 was required to be calculated in a different fashion, effectively as I so calculated it in my Quantum Judgment.

iii) There was and could be no acceptance of a repudiatory breach of the ISD, given that the ISD had already terminated.

iv) Insofar as it is asserted that there is now an acceptance of repudiation, it is plainly too late to do so, in that the contract has been affirmed by Highland seeking to apply Clause 4.2, retaining at least some of the values in respect of the 52 Loans, in the Court of Appeal.

v) Insofar as, in closing, Mr Strong sought to put a different case, namely that, if there was a breach of the ISD, Highland were released from their obligations, being akin to those of a guarantor:

a) They were not a guarantor, but had an independent obligation, one indeed over and above, and replacing, any liability of the Issuer (see paragraph 4(i) of my Liability Judgment, cited in paragraph 3 above), and as is also clear from the last sentence of Clause 5.6 of the ISD, set out in paragraph 5 above, and my conclusions in paragraphs 10 to 19 of my Liability Judgment (not set out above).

b) Even if Highland's obligations were analogous to those of a guarantor, a failure to obtain the proper value of a security did not discharge a guarantor's liability in **Skipton Building Society v Stott** [2001] QB 261 CA.

c) But in any event Clause 2.1 of Schedule 7 of the ISD provides that Highland's obligations under Clause 5.6 "*shall not be discharged, diminished or in any way affected as a result of … any … act, omission, circumstance matter or thing which, but for this provision, might operate to release or otherwise exonerate* [Highland] *from any of their obligations under* [it]."

120. I am satisfied that for those reasons, had such a case in repudiation/discharge from obligation been run at the Part 24 stage, it would have been concluded to be unarguable (see further below as to any **Miles v Bull** argument).

(ii) No Final Realisation Date

121. The contention is that, had the Suppressed Fact been known – the 36 Loans not for sale because they had already been transferred to banking book prior to the BWIC – Highland would have been able to contend at the Part 24 proceedings (I refer to paragraph 5 above) that no Final Realisation Date (as there defined) would have occurred at all, so that no obligations under Clause 5.6 would have arisen. This is the argument which was run at the Part 24 application as the "third issue", and I have set out the relevant paragraphs of my Liability Judgment in this regard (paragraphs 9(iii), 29, 30, 32 and 38) in paragraphs 6 to 9 above. What was being contended before me at the Part 24 hearing was that, because there had been alleged breaches of procedure in Clause 4.2 (which I concluded not to have occurred but, if they had occurred, to have been *technical*), therefore the Final Realisation Date had not occurred. I rejected this argument. It is now said that, had it been known that there were breaches of, or non-compliance with, the procedures provided for by Clause 4.2, which were more than *technical*, specifically in relation to the failure to adopt a "*commercially reasonable manner*" with regard to the determination of the market price, I would then have concluded that (it was at least arguable that) the Final Realisation Date had indeed not arisen: further, or in the alternative, that in the light of **Alghussein v Eton College** [1988] 1 WLR 587, RBS could not be permitted to take advantage of its own wrong. The consequence would be that the Final Realisation Date would not have taken place at all, although Highland suggest that it may subsequently be found to have taken place at some later date, as and when all or each of the 88 Loans were or had been liquidated or repaid.

122. I am satisfied that this argument is and would have been unarguable:

i) my conclusion as to the argument on absence of a Final Realisation Date in my Liability Judgment was not predicated upon there having been only a *technical breach* by RBS, but would apply, in my judgment, whatever the alleged breach or non-compliance. If there were no Final Realisation Date because of a breach of Clause 4.2, then there could never be a Final Realisation Date. In fact, however, there had been lawful termination of the ISD, and Clause 4.2 was thus required to be operative as at November 2008 (not by reference to some uncertain date or dates in the future). The 88 Loans were realised, albeit that I have concluded that insufficient credit was given by RBS to Highland. The Final Realisation Date is the date of realisation, and the loans have been realised.

ii) **Alghussein** does not avail Highland, where termination had lawfully occurred, and the monies advanced by RBS fell to be repaid after due credit. I have calculated the due credit which fell to be given, which was more than was given after RBS operated Clause 4.2, in what I concluded to be otherwise than a *commercially reasonably manner*.

iii) Even on the basis that there was, as I concluded, a breach of an equitable obligation, the result still is that the Court ensures that the correct amount of money due is calculated and paid (as in **Downsview Ltd v First City Corporation** [1993] AC 295 and **Meretz Investments NV v ACP Ltd** [2007] Ch 197).

(iii) Disputed Quantum or Miles v Bull

123. I turn then to the fallback contention by Highland that, had the Suppressed Fact been revealed, it would have been arguable at the Part 24 stage that no sum was due, or at any rate considerably less than the more than €30m then being claimed. Highland submit that they would have argued at the Part 24 hearing that if, in respect of the 36 Loans, Highland were arguably entitled to the 30 June value, that would reduce the claim very substantially, and, even though on any basis there would still have been a substantial amount due in respect of the 52 Loans, Highland would have argued that the *knock-on effect* - which in the event caused me to increase the credit due to Highland, as I found at the Quantum Trial - might (in the absence of any expert evidence at that stage) have arguably so increased the sums to be credited in respect of the 52 Loans as to cancel out any liability. Thus, by reference to a combination of a broadbrush argument that there might be no quantum and reliance upon **Miles v Bull**, even if Highland had lost on the two additional arguments on liability discussed above (as I have found they would have done), there might still have been leave to defend given, and no Liability Judgment.

124. The first difficulty in the way of this argument is that, whatever the issues left outstanding as to quantum, it is, in my judgment, highly probable that the Court, after rejecting, as I did in the event, the issues that were before me, and the additional two issues, would have given judgment, as I did, in respect of all issues of liability, leaving quantum to be tried as it was, even against the possibility that the quantum might have been reduced to little or nothing, i.e. that outstanding issues of quantum would not have prevented judgment on all issues of liability, such as in fact took place.

125. Even assuming however, that, either by reference to a ruling at the Part 24 stage (contrary to my conclusions above) that one or other of the two liability points were arguable, or by reference to **Miles v Bull**, or by reference to the possibility that judgment on liability would not have been entered because of uncertainties as to quantum, it still needs to be shown that this can avail Highland (and Scott Law) in the present circumstances. Highland submit that, if I were to conclude that they would have been given leave to defend or that judgment on liability would not have been given at the Part 24 application for one or more of the reasons above, I can thus be satisfied that the judgment that was entered should be set aside, as obtained by fraud. This requires me to consider not only whether Mr Griffiths was, at the stage of the Part 24 application, dishonestly concealing information which he knew he ought to disclose, but also that such dishonest non-disclosure by him was *operative* (**Tubyahu**) or "*entirely changed the nature of the case*" (**Hunter**, **Odyssey**) or that RBS plainly "*dishonestly obtained the fruits of victory*" (**Odyssey**, **Iraq Perjury II**).

126. The reality is that normally, where it is sought to set aside a judgment obtained by fraud, what would happen thereafter on a retrial is uncertain, or at any rate unknown, and it may well be difficult, if not impossible, to consider "*what the decision might be if the matter were re-tried with honest evidence*" (**Odyssey** at 174(2)). But in this case, the case has been tried with all the evidence, including the previously Suppressed Fact, and I have the full position now before me. I am able to conclude that:

i) The two 'new' defences of repudiation and no Final Realisation Date are not arguable and would have failed.

ii) The quantum, after full consideration of all the facts, including the Suppressed Fact, is such that there is still a substantial amount owing by Highland to RBS, namely the amount of some €21m.

Conclusion as to Setting Aside Judgment

127. Thus, I can *readily determine*, indeed have determined, that:

i) despite the fraudulent concealment *the outcome would not have changed* (**Odyssey** at 175(2)).

ii) whereas the question of materiality is not to be assessed by reference to its impact on what might be the decision if the matter were retried on honest evidence (**Iraq Perjury I** at 198), this is not a question of *might be*, there *has been* a decision on honest evidence.

128. Put another way, it would be pointless to set aside this judgment, since, if the case were retried, the same result would follow, so far as liability and quantum is concerned, as has occurred. Highland suggest that there may be some unanswered questions (e.g. as to the precise circumstances of Phase 2), but I am entirely satisfied that, by reference to the facts and disclosure that were in the event before me at the Quantum Trial (which have not materially changed as a result of the considerable further disclosure now before me) the result in the Quantum Judgment is correct and reflects the true position, including the previously Suppressed Fact. I am satisfied therefore that the judgment should not be set aside and that, if it were, judgment to the same effect would be given.

129. Even if there were dishonest concealment therefore, I do not conclude that the judgment on liability should be set aside. However, I am not persuaded in any event that there was at the stage of the Part 24 application dishonest concealment by Mr Griffiths. Although the Suppressed Fact had not at that stage been revealed to Herbert Smith, I am not persuaded to the relevant standard of proof that Mr Griffiths, knowing or believing, and being advised, that information relating to quantum did not need to be disclosed, was dishonestly concealing a matter which he knew ought to have been revealed. Clearly he ought to have told the true position to Herbert Smith and left them to decide what to disclose, but I do not conclude that he was deliberately and dishonestly concealing the information at that stage, albeit that I do so conclude in respect of the periods which followed and leading up to the trial on quantum. However my conclusion in this regard is not in the event determinative, because of the conclusion I have reached above that the judgment on liability should not be set aside.

VII The Anti-Suit Injunction

130. The following issues arise:

i) Is there a relevant jurisdiction clause?

ii) If so, does it provide for the exclusive jurisdiction of the English courts for any claim by Highland against RBS?

iii) Does it apply to Scott Law as assignee?

iv) What is the ambit of such clause?

v) Does it prevent claims against Hall and Griffiths?

vi) What is the impact of comity on such clause, if any?

vii) If there is no exclusive jurisdiction clause, can the Texas proceedings be said to be vexatious and/or an abuse as brought by Highland and/or Scott Law against (i) RBS (ii) Hall and Griffiths?

viii) Are there '*strong reasons*' not to enforce such a clause at the suit of RBS and/or is the doctrine of '*unclean hands*' an answer to RBS's claim for injunctive relief?

(i) Jurisdiction Clauses

131. There are jurisdiction clauses in a number of the Agreements which governed the CDO, but only four of them are relied upon by RBS, those set out in (ii), (v), (vi) and (vii) below, though RBS places principal reliance on the First Loss Deed (in (v)):

i) The Mandate Letter of 5 April 2007 contained in its original form, and as amended/restated on 25 March 2008, (at Clause 10) what is conceded to be a non-exclusive English jurisdiction clause, together with an English law provision.

ii) The ISD, also of 5 April 2007, to which RBS, the Issuer, the Interim Servicer and the Second and Third Defendants were the (relevant) parties contained the following material clauses:

> "*22.1 Jurisdiction*
>
> *The Issuer irrevocably agrees that the courts of England shall have jurisdiction to hear and determine any suit, action or proceedings, and to settle any disputes, which may arise out of or in connection with this deed (respectively "Proceedings" and "Disputes") and, for such purposes, irrevocably submits to the jurisdiction of such courts. The Issuer irrevocably waives any objection which it might now or hereafter have to the courts of England being nominated as the forum to hear and determine any Proceedings and to settle any Disputes and agrees not to claim that any such court is not a convenient or appropriate forum.*
>
> *22.2 Non Exclusive Jurisdiction*

> *The submission to the jurisdiction of the courts referred to in this clause 22 (Jurisdiction) is for the benefit of* [RBS] *and shall not (and shall not be construed so as to) limit the right of* [RBS] *to take Proceedings against the Issuer in any other court of competent jurisdiction nor shall the taking of Proceedings in any one or more jurisdictions preclude the taking of Proceedings in any other jurisdiction (whether concurrently or not) to the extent permitted by applicable.*
>
> *22.3 Process Agent Appointment*
>
> *The Issuer hereby appoints TMF Management (UK) Limited … to receive service of process on its behalf as its authorised agent for service of process in England …*"

Again there was a provision (by Clause 21) for English law to govern it.

iii) The Funding Agreement (also of 5 April 2007), to which only the Issuer and RBS were (relevant) parties, contained, in Clause 16, an English law clause, and then the three subclauses dealing with jurisdiction identical to those in the ISD.

iv) The Debenture, also of 5 April 2007, between RBS and the Issuer contains, by Clause 20, an English law clause and, by Clause 21, an exclusive jurisdiction clause (expressed to be for the benefit of RBS only).

v) The First Loss Deed, of 31 October 2007, to which the Interim Servicer and the First, Second and Third Defendants and RBS were the only parties, provides, by Clause 12, an English law clause, and then by Clause 13 as follows:

> **"*13.1 Jurisdiction***
>
> *The Parties irrevocably agree that the courts of England shall have jurisdiction to hear and determine any suit, action or proceedings, and to settle any disputes, which may arise out of or in connection with this deed (respectively "Proceedings" and "Disputes") and, for such purposes, irrevocably submits to the jurisdiction of such courts. The Parties irrevocably waive any objection which each may now or hereafter have to the courts of England being nominated as the forum to hear and determine any Proceedings and to settle any Disputes and each Party agrees not to claim that any such court is not a convenient or appropriate forum.*
>
> *13.2 Non Exclusive Jurisdiction*

> *The submission to the jurisdiction of the courts referred to in this clause 13 (Jurisdiction) is for the benefit of* [RBS] *and shall not (and shall not be construed so as to) limit the right of* [RBS] *to take Proceedings against another Party in any other court of competent jurisdiction nor shall the taking of Proceedings in any one or more jurisdictions preclude the taking of Proceedings in any other jurisdiction (whether concurrently or not) to the extent permitted by applicable law.*"

vi) The 31 October [2007] Amendment Deed, to which the Issuer, the Interim Servicer, the Second and Third Defendants and RBS were the only relevant parties, contains the following provisions of relevance:

> "*2.3 Save as varied by this Amendment Deed, the* [ISD] *and the* [Funding Agreement] *shall each remain in full force and effect upon the terms and conditions set out therein respectively.*
>
> *…*
>
> *3.1 Each Party acknowledges and agrees with the other Party that this deed together with any other documents referred to in this Amendment Deed constitutes the entire and only agreement between the Parties.*
>
> *3.2 If any of the provisions of this Amendment Deed are inconsistent with or in conflict with any of the provisions of the* [ISD] *or* [Funding Agreement] *then, to the extent of any such inconsistency or conflict, the provisions of this Amendment Deed shall prevail as between the Parties.*
>
> *4. PROVISIONS OF THE* [ISD] *APPLICABLE*
>
> *The provisions of clauses 15 (Limited Recourse), 16 (No Petition), 18 (Notices), 19 (Counterparts), 21 (Governing Law) and 22 (Jurisdiction) of the* [ISD] *shall apply, mutatis mutandis, to this Amendment Deed as if they were set out herein and references to* [ISD] *were replaced by references to "this Amendment Deed".*"

vii) The Second Loss Deed (being the further Amendment Deed of 1 April 2008), to which RBS, the Issuer, the Interim Servicer and the First, Second and Third Defendants were all parties, effected an amendment to all of the ISD, the Funding Agreement and the First Loss Deed, and contained identical provisions to those in the First Amendment Deed, which I have set out above, save to make express reference additionally to the First Loss Deed as also being amended.

132. Mr Nicholls' case is that the clause in the First Loss Deed is plainly (and sufficiently) an exclusive jurisdiction clause, binding upon the Defendants (and Scott Law as assignee), and such as to entitle him to an injunction. If it be necessary he also relies upon the ISD, as amended by the two subsequent Amendment Deeds. He recognises, as was forcefully pointed out by the Defendants, that the clause in the ISD plainly only applied to the Issuer. However he submits that this is overtaken by the Amendment Deeds:

    i) The First Amendment Deed amends the provisions of the ISD, as there appears. It is not simply that the provisions of the jurisdiction clause, expressly referred to in Clause 4, apply "*as if set out herein*", but that there is then additionally the usage of the words "*mutatis mutandis*", which Mr Nicholls submits makes plain that the provisions are thus to apply to all of the parties to the ISD and the Funding Agreement who are now parties to the Amendment Deed which amends them, and not just to the Issuer.

    ii) The second Amendment Deed (the Second Loss Deed) makes the position even clearer, Mr Nicholls submits, as, in addition to amending the ISD and the Funding Agreement (and the First Amendment Deed), it now also amends the FLD, to which the First Defendant was a party, such that, the Issuer, the Servicer and all the Highland Defendants are now parties and, he submits, governed *mutatis mutandis* by the provisions of the jurisdiction clause, as it states.

133. The Defendants submit that the meaning of *mutatis mutandis* cannot be stretched so as to add additional parties into the jurisdiction clause, particularly given that the jurisdiction clause in the ISD specifically related only to the Issuer when it could have been applied to the Second and Third Defendants, who were parties to that Agreement. Mr Dunning suggests that it may be that the jurisdiction clause in the ISD was inserted in relation to the Issuer because it was considered that there might be some doubt about there being jurisdiction against the Issuer, a Dutch Company, unlike the American companies, given the possible impact on jurisdiction of the European element.

134. I am not persuaded that the *mutatis mutandis* provisions of the Amendment Deeds can be stretched so as to subject any other parties than the Issuer to the jurisdiction provision in the ISD. I agree that such clause can only be relied upon by RBS as against the Issuer, now in liquidation.

(ii) Exclusive Jurisdiction

135. There is no doubt about the governing law of the First Loss Deed being English. There are two arguments raised by the Defendants, which intertwine. The first is as to whether Clause 22.1 of the First Loss Deed is exclusive (as far as concerned the Defendants), and the second is whether it is, as described by Steyn LJ in **Continental Bank v Aeakos SA** [1994] 1WLR 588 at 594, merely *transitive*, in the sense of involving an agreement by the Defendants to submit the disputes to the jurisdiction of the English courts, but not necessarily exclusively so.

136. Mr Nicholls relies strongly on the contrast between Clause 22.1 and Clause 22.2. If Clause 22.2 provides in terms that the jurisdiction of the English courts

provided for in Clause 22 is non-exclusive so far as RBS is concerned, it ought to follow that it is exclusive, in the absence of such exemption, so far as concerns the Defendants (similarly so, though, as I have found, only as between RBS and the Issuer, in the identical provision in the ISD). The Defendants however point to the use of the words *exclusive jurisdiction* in the Debenture, such as to make it plain that, experienced lawyers being involved in the drafting of these agreements - see what was said about careful drafting of clauses in a series of contracts with the assistance of lawyers in **ACP Capital Ltd v IFR Capital Plc** [2008] 2 Lloyd's Law Rep 655 at para 24 per Beatson J - if no such wording is used, then its absence is significant. Since the jurisdiction is not provided to be exclusive, it must be non-exclusive, and simply *transitive.*

137. It is plain however that whether a clause provides for exclusive jurisdiction or not is a question of construction, and that the express word *exclusive* does not need to be used. I referred in **Starlight Shipping Company v Allianz Marine** [**The Alexandros T**] [2012] 1 Lloyd's Law Rep 162, at paragraphs 20 to 23, to passages in **Briggs & Rees: Civil Jurisdiction and Judgments** (5th Ed) at 4.45 and **Dicey, Morris and Collins: The Conflict of Laws** (14th Ed) at 12-092 and to **Sohio Supply Co v Gatoil (USA) Inc** [1989] 1 Lloyd's Law Rep 588 CA and **Svendborg v Wansa** [1997] 2 Lloyds Law Rep 183, upon which Mr Nicholls relied; and I cited Steyn LJ in **Continental Bank** where he said "*it would be a surrender to formalism to require a jurisdiction clause to provide in express terms that the chosen Court is to be the exclusive forum*" (at 594a).

138. In particular Mr Nicholls relied upon the decision of Field J in **Bank of New York Mellon v GV Films** [2010] 1 Lloyds Law Rep 365, where he reached a conclusion that a clause, in similar terms to that in Clause 22.1 (and where there was, like here, an express liberty to the other party (alone) to bring proceedings in any other court of competent jurisdiction), "*clearly show*[ed] *that the intention of the parties was that the courts of England are to be the exclusive jurisdiction so far as proceedings brought by* [the one party] *are concerned*" (at para 14). This is a far more analogous case than **The Fesco Angara** [2011] 1 Lloyd's Law Rep 399, upon which the Defendants relied, and one entirely consistent with the authorities set out in **The Alexandros T**, to which I have referred above. I have reached the same conclusion as did Field J.

(iii) Assignment

139. Scott Law accepts that, if the Texas Proceedings can be restrained as being vexatious and/or an abuse at the instance of RBS as against the Highland Defendants, then, since they are assignees of some of the Highland Defendants, they too can be restrained on that basis. They did not however accept that they could be restrained by way of reliance upon the contractual provisions of the jurisdiction clause, since they have not become bound by them. It may be that this is not any longer materially in issue before me, because the heat appeared to go out of the argument once it was agreed between the parties that all issues of damages or compensation arising out of alleged breach of the jurisdiction clause would be adjourned over to another occasion (see paragraph 30 above). The Defendants placed reliance upon the decision of the Court of Appeal in **Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd** [2005] 1 Lloyd's Law Rep 67, in which an anti-suit

injunction, which had been granted by Moore-Bick J at first instance, was discharged by the Court of Appeal, where an arbitration clause was unsuccessfully relied upon against a party said to be a statutory assignee of the contract containing the clause, although an effective remedy was given on a different basis). **Through Transport** has been criticised both in **Dicey** (at 16-092, particularly note 37) and in **Raphael**: **The Anti-Suit Injunction** at 10.14-10.17. In particular it is pointed out by Mr Nicholls (and by **Raphael**) that earlier authority, in particular the Court of Appeal decision in **The Jay Bola** [1997] 2 Lloyd's Rep 279 CA, was not cited in **Through Transport**, and is apparently inconsistent with it.

140. In **The Jay Bola** at 286 Hobhouse LJ stated:

> "*These authorities confirm that the rights which the insurance company has acquired are rights which are subject to the arbitration clause. The insurance company has the right to refer the claim to arbitration, obtain if it can an award in its favour from the arbitrators, and enforce the obligation of the time charterers to pay that award. Likewise, the insurance company is not entitled to assert its claim inconsistently with the terms of that contract. One of the terms of the contract is that, in the event of dispute, the claim must be referred to arbitration. The insurance company is not entitled to enforce its right without also recognizing the obligation to arbitrate.*"

Aikens J in **Youell v Kara Mara Shipping Co Ltd** [2002] 2 Lloyd's Law Rep 102 reached a similar conclusion, and Colman J in **The Front Comor** [2005] 2 Lloyd's Law Rep 257 at paras 59-72, distinguished **Through Transport**, hinting, as **Raphael** suggests, that it might have been decided *per incuriam*, when he concluded that a subrogated insurer was not entitled to ignore an arbitration clause binding upon the insured, such that its rights against the debtor were to be viewed as subject to the clause. Scott V-C in **The Jay Bola** was entirely satisfied that "*an action brought to prevent a contractual assignee from suing on the contract otherwise than in accordance with an arbitration clause contained in the contract is … an action brought to enforce the contract*", by reference to the provisions of the then jurisdictional gateway.

141. RBS sought permission to amend its pleadings to claim in the alternative a right in equity to restrain Scott Law from pursuing claims otherwise than in accordance with the exclusive jurisdiction clause, and compensation for breach of that equitable right. At the end of the day Mr Dunning seemed to accept the argument that he was unable to rely upon **Through Transport**, and limited himself to submitting that there could be no remedy by way of damages or compensation. In any event, I am entirely satisfied that if RBS is entitled to enforce the exclusive jurisdiction clause against the Highland Defendants, then it is also entitled to do so as against Scott Law claiming under them, and by reference to their alleged rights against RBS, if they otherwise fall within the exclusive jurisdiction clause. As agreed, I reserve the question of damages or compensation.

<u>iv) The Ambit of the Clause</u>

142. The material question is whether the claims made in the Texas Proceedings fall within the exclusive jurisdiction clause contained in the First Loss Deed. There are, as summarised in paragraph 27 above, two claims in those proceedings, contained in three counts, the first relating to the extension of the CDO and the second to its termination, both said to be based upon alleged fraudulent misrepresentations and/or fraudulent concealment of information. Damages are claimed for fraud, and compensation for unjust enrichment. RBS contends that both claims fall within the jurisdiction clause in the First Loss Deed, as being *proceedings* or *disputes* which "*arise out of or in connection with*" the First Loss Deed. The Defendants submit that the claims, both because they are claims in tort, and because they are alleged not to relate to the First Loss Deed, but only possibly to the Mandate or to the ISD or to the First Amendment Deed, do not fall within the clause.

143. The first and most significant question, as I am satisfied, is the interrelationship of the agreements relating to the CDO, so that the agreements are intertwined and they each contribute to the working out of the CDO. I stated, in paragraph 2 of my Liability Judgment, and have set out in paragraph 3 above, my conclusion that:

> "*There is no dispute between the parties that the various Agreements, which originally established, and subsequently amended, the relationship between the parties, interlock and, although they were entered into over a period of time, and between the Claimant and differing members of the Highland Group and/or the* [Issuer], *they must be read and construed together.*"

Again, in paragraph 4 of the Liability Judgment, I referred to "*a further package of agreements*". No point was taken at the time, or on appeal, that my description of what was common ground between the parties was not correct. Indeed the Court of Appeal, in the judgment of Thomas LJ, set out the same:

> "*3. It was common ground that the three agreements, which were subsequently varied in October 2007 and March and April should be read and construed together …*
>
> *4. … Therefore two amending agreements were made by agreements dated 31 October 2007 …* [the First Loss Deed and the First Amendment Deed] …
>
> *11. … as the agreements were part of an overall scheme, I have approached the construction of the agreements in accordance with the principles set out …*"

144. In any event, the relevant wording within this exclusion clause is "*in connection with*", and the jurisdiction in that regard has been transformed by (and indeed even before) **Fiona Trust v Privalov** [2007] 4 AER HL ("**Fiona Trust HL**"). The position both in that regard and in relation to interconnected agreements is succinctly stated by Lord Collins in **UBS v HSH Nordbank** [2010] 1 AER (Comm) 727 at paras 82-83:

> "*82. Are these claims within the dealer's confirmation jurisdiction clause? I accept UBS's submission that the proper approach to the construction of clauses agreeing jurisdiction is to construe them widely and generally: see Donohue v Armco Inc … at [14]. I also accept that in the usual case the words 'arising out of' or 'in connection with' apply to claims arising from pre-inception matters such as misrepresentation: see Fiona Trust* [HL] *… Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc [2009] 2 AER (Comm) 129 and Ashville Investments Ltd v Elmer Contractors Ltd (1989) QB 488.*
>
> *83. But the essential task is to construe the jurisdiction agreement in the light of the transaction as a whole. As I suggested in Satyam Computer Services Ltd v Upaid Systems Ltd … [2008] 2 All ER (Comm) 465 at [93], whether a dispute falls within one or more related agreements depends on the intention of the parties as revealed by the agreements.*"

145. The position has been reiterated in a number of authorities since **Fiona Trust HL**, including **Cinnamon European Structured Credit Master Fund v Banco Commercial Portugues SA** [2009] EWHC 3381 (Ch) per Sir William Blackburne at para 39 and **Maple Leaf Macro Volatility Master Fund v Rouvroy** [2009] 2 AER (Comm) 287 per Andrew Smith J at para 199, and in particular, in a passage which was not doubted in the Court of Appeal (2008) EWCA Civ 1091 per Flaux J, in the Commercial Court in **Deutsche Bank AG v Asia Pacific** [2008] 2 Lloyd's Law Rep 177 at para 45, where he said that:

> "*Both alternative claims would be claims "in connection with" the credit agreement, even on the law as it stood before Fiona Trust. The claim in misrepresentation is clearly in connection with the credit agreement, a point so obvious that it was not even argued in Donohue v Armco Inc … per Lord Bingham of Cornhill at para 14. To like effect is the judgment of Peter Gibson LJ in DSM Anti-Infectives BV v SmithKline Beecham [2004] EWCA Civ 1199 at para 33.*"

146. I am likewise so satisfied. The claims in tort, relating to the circumstances of the extension and termination of the CDO are all claims '*in connection with*' the First Loss Deed, being part of *the interlocking package of agreements*.

(v) Hall and Griffiths

147. The next question is whether RBS is entitled to rely upon the exclusive jurisdiction clause to restrain proceedings not only against itself, but also against Messrs Hall and Griffiths, who have been joined in the Texas Proceedings as personal defendants, on the basis that they made the fraudulent misrepresentation or fraudulently concealed the facts the subject matter of the second count, i.e.

relating to the termination of the CDO (they are not alleged to be involved in the first count, relating to the extension of the CDO). The acts referred to are primarily Mr Hall's sending of the 6 November email and Mr Griffiths' operation of the BWIC, as to which the conclusions in my Quantum Judgment are relied on, and, at paragraph 73, by way of summary of the case, it is alleged that:

> "*RBS, by and through Hall and others at RBS, repeatedly made material misrepresentations and omissions to Plaintiffs regarding the sham liquidation sale, at the direction and approval of Griffiths and others at RBS.*"

No other allegation is made as to Hall and Griffiths than as to their acting on behalf of RBS, and rendering RBS liable as a result.

148. It is not sought to be argued by RBS that Hall and Griffiths have been joined simply as a tactical ploy, or as a way of avoiding the effect of the exclusive jurisdiction, but RBS simply makes two basic submissions:

i) it is well established from numerous authorities, as for example per Bingham LJ in **EI du Pont de Nemours & Co v Agnew** [1987] 2 Lloyd's Rep 585 at 589, that litigation in one place and at one time is, if it can be achieved, preferable, and the jurisdiction chosen by the parties in this case is that of the English courts

ii) RBS has an interest in protecting its employees.

149. Clause 22.1 applies the exclusive jurisdiction provision to "*any suit, action or proceedings and … any disputes, which may arise … in connection with*" the ISD, and the dispute between the Defendants and Hall and Griffiths, which is, so far as relates to Count 2, the same dispute as that between the Defendants and RBS, similarly is said to arise *in connection with* the First Loss Deed, as I have concluded above.

150. There are two countervailing arguments put forward:

i) Teare J, in **Morgan Stanley & Co International plc v China Haisheng Juice Holdings Co Ltd** [2009] EWHC 2409 (Comm), at paragraph 27, considered that the exclusive jurisdiction clause before him (which was not identical to the clause before me, being "*with respect to any … proceedings relating to any dispute … in connection with this Agreement, each party irrevocably submits to the exclusive jurisdiction of the English courts*") could not "*reasonably be understood to mean that* [the parties] *promised each other that claims arising … in connection with the Master Agreement were to be submitted to the English court regardless of whether the claims were against the other or a non-party to the Master Agreement*". He concluded, at paragraph 31, that he was "*unable to accept that CH has promised to sue MSAL in England. Its promise extended only to claims against MSIP*".

ii) In **The Hornbay** [2006] 2 Lloyd's Rep 44, the view appears to have been taken by Morison J (at para 32) that, by suing the shipowners' agents in

> Columbia, and not the shipowner, the claimants in that case were "*intent on seeking to avoid the parties' contractual bargain*", so that an injunction to restrain the Columbian proceedings against such third party was obtained by the shipowners. In **Deutsche Bank AG v Highland Crusader Offshore Partners LP** [2009] 2 Lloyd's Law Rep 61, I followed **The Hornbay** in granting an anti-suit injunction, where the defendants had brought proceedings in Texas against the claimants and its servant or agent, and although I neither found, nor was invited to find, that there was any such similar motive as was imputed in **The Hornbay**, I concluded (at paragraph 34) that an injunction should be granted in respect of the claim against the servant or agent, as well as against the company as his employer or principal, because "*no substantive ground has been put forward as to why or whether there is any claim against him which is not in reality one made against his principals/employers and in connection with the agreements and transactions*".

151. In this case, as the claim is framed in the Texas Proceedings, although Hall and Griffiths are plainly sued as being, and having acted in, the employment of RBS, and although plainly they are unlikely to be able personally to meet the very substantial damages claimed in the Texas Proceedings, there is, on the face of the Texas Petition, a claim in fraud against them, which, as I have said, is not suggested to be simply a tactical ploy. Mr Nicholls relies on the obiter dicta of Lord Scott in the House of Lords in **Donohue v Armco**, where, although no anti-suit injunction was in the event granted, Lord Scott would have been in favour, if one had been granted in support of the exclusive jurisdiction clause in that case, of granting an injunction to restrain proceedings not only against the claimant but against identified non-parties. He said as follows:

> "*61. In my opinion, an exclusive jurisdiction clause in the wide terms of that with which this case is concerned is broken if any proceedings within the scope of the clause are commenced in a foreign jurisdiction, whether or not the person entitled to the protection of the clause is joined as defendant to the proceedings. An injunction restraining the continuance of the proceedings would not, of course, be granted unless the party seeking the injunction, being someone entitled to the benefit of the clause, had a sufficient interest in obtaining the injunction. it would, I think, be necessary for him to show that the claim being prosecuted in the foreign jurisdiction was one which, if it succeeded, would involve him in some consequential liability. It would certainly, in my opinion, suffice to show that if the claim succeeded he would incur a liability as a joint tortfeasor to contribute to the damages awarded by the foreign court.*
>
> *62. This point is of direct relevance in the present case. In the New York proceedings, which I must analyse more fully in a moment, several claims are made, but most of them are based upon the allegation that Mr Donohue, Mr Atkins, Mr*

> *Rossi and Mr Stinson conspired together fraudulently to extract in various ways substantial sums of money from the Armco group of companies. If the allegations can be made good, the liability of the conspirators would be a joint and several liability. There are substantial issues as to which of the claims fall within the language of the exclusive jurisdiction clause but I think it is clear that some of them do. Of the four alleged conspirators only Mr Donohue and Mr Atkins are contractually entitled to the benefit of the exclusive jurisdiction clause. Mr Atkins has settled with Armco, so it was Mr Donohue alone who commenced an action in this country for an injunction enforcing the clause. If Mr Donohue is entitled to an injunction enforcing the clause he is entitled, in my opinion, to an injunction that bars the continuance of the claims in question not only against himself but also against Mr Rossi and Mr Stinson with whom he is jointly and severally liable. If claims against Mr Donohue are within the clause, then so too are the corresponding claims against Mr Rossi and Mr Stinson. Mr Rossi and Mr Stinson are not contractually entitled to enforce the clause, but Mr Donohue is, in my opinion, entitled to ask the court to enforce it by restraining the prosecution in New York of all claims within its scope in respect of which Mr Donohue would be jointly and severally liable.* "

152. Mr Nicholls further points to the decision of Norris J in **Winnetka Trading Corporation v Julius Baer International Ltd** [2008] EWHC 3146 (Ch), in which Norris J relied upon, and put into effect, the words of Lord Scott, granting an injunction in respect of proceedings against a non-party, because (at paragraph 29) "*If the claim proceeds against JBIL in this country and as Winnetka says that JBIL was BJB's agent, then prima facie JBIL has a claim for indemnity against its principal BJB. It therefore has an interest in seeing that the proceedings are brought in Guernsey*" (and he granted a stay to that effect). The Defendants point out that there is no right of indemnity available to a fraudulent tortfeasor, such that the precise reasoning of Norris J would not apply in this case. However, it is clear that a claim for contribution does arise in such circumstances (see **K v P** [1993] Ch 140 – and as adumbrated by Lord Scott in respect of the fraud/conspiracy claims in **Donohue** itself, being the sufficient interest which he would otherwise have found). Further, submits Mr Nicholls, even if RBS could not be obliged to indemnify Messrs Hall and Griffiths, that would not mean that they could not in fact choose to do so.

153. Further, Mr Nicholls refers to the decision of Flaux J in **The Marielle Bolten** [2010] 1 Lloyd's Law Rep 648 where he concluded (for reasons given at paragraphs 57 to 62) that, on the facts of that case, the claimants had, for a number of reasons, a sufficient interest in obtaining an anti-suit injunction to restrain the defendants from continuing with proceedings against non-parties in Brazil. Quite apart from any desire or obligation to pay an indemnity or a contribution to Messrs Hall and Griffiths, I am satisfied that what Mr Nicholls describes as the

obvious reputational damage for RBS resulting from the making of a claim as to what Messrs Hall and Griffiths have allegedly done during their employment, in itself gives RBS a sufficient interest. I would accordingly conclude that to restrain the Texas Proceedings, not only against RBS, but also against Messrs Hall and Griffiths, falls within the ambit of the exclusive jurisdiction clause and/or is a proper consequence of it.

(vi) Comity

154. The Defendants rely upon comity with the courts of Texas to oppose the grant of an injunction. Not only do they rely in this case upon an assertion that the grant of an anti-suit injunction, rather than leaving it to the foreign court to decide whether it should continue with proceedings on an application made to it for a stay, would be offensive to a friendly foreign court, but in this case there has been evidence from the Texan law experts referred to in paragraph 32 above. Retired Justice O'Neill expressed her opinion, with which Mr Harrison did not agree, that the Texas court would be offended at what it would regard as an interference by the English court. Although Justice O'Neill referred on a number of occasions to an injunction being granted by this Court against the Texan court, which is not of course the case, she did make it clear that she understood that such injunction would not be so expressed, and that it would only be an injunction against the parties, and she drew analogies with the interrelationship between the courts of the different states within the United States.

155. The disagreement between the experts, and the expression of such opinion by Justice O'Neill, were both carried through with great courtesy. I do not feel I need to resolve that dispute, and I address the question of comity just as I would if I knew that without such express (contested) evidence a friendly foreign court were ready, willing and able to deal with proceedings, in a situation in which I was being asked, as here, to grant an anti-suit injunction based upon an exclusive jurisdiction clause. In **Through Transport** at paragraph 91, the Court of Appeal (in the absence of any evidence that the Finnish courts were actually offended) expressed the view that there was "*no reason why any court should be offended by an injunction granted to restrain a party from invoking a jurisdiction in breach of a contractual promise that the dispute would be referred to arbitration in England*", just as an English court would not be offended in the reverse situation. **Raphael**, at 8.15, noted a number of cases in which evidence, such as I have heard in this case, as to whether the foreign court would in fact be offended, has apparently been ruled out, or was, as in **The Front Comor**, regarded as irrelevant (see per Colman J at 266 to 268). **Raphael** suggests (at 8.17) that the question should be "*rephrased to ask whether the foreign court would have a <u>legitimate</u> ground to object to the anti-suit injunction*" so as to replace the concept of 'offence' by an '*objective assessment of the demands of the comity between jurisdictions*'. We are of course dealing here with a jurisdiction, albeit a friendly one, outside the Judgment Convention countries, where, as a result of **Turner v Grovit** [2004] ECR I-3565, anti-suit injunctions are no longer available.

156. The Defendants point to the words of Rix J in **Credit Suisse First Boston (Europe) v MLC (Bermuda) Ltd** [1999] 1 Lloyd's Law Rep 767 at 780, where he said that "*the question of comity remains an important consideration*" referring to the case of **Bamberger** [1996] CLC 1757, where the courts had been struggling

with the question of competing European jurisdictions, in the days prior to **Turner v Grovit**. However it is significant that he concludes the passage by stating:

> "*Moreover, outside* [my underlining] *the sphere of the exclusive English jurisdiction clause, the importance of the question of comity has been recently underlined in the speech of Lord Goff of Chieveley in* ***Airbus Industrie v Patel*** *[1998] 1 Lloyd's Law Rep 631.*"

157. But within the sphere of exclusive English jurisdiction clauses, I am satisfied that comity has no place:

i) Lord Bingham, in **Donohue v Armco** at para 24, in the passage referred to by me in paragraph 30(i) above, and to which I shall return at paragraph 173 below, and in contrasting the case of anti-suit injunctions with applications for a stay, he says that "*considerations of comity arise in the one case, but not in the other*".

ii) Toulson LJ, in **Deutsche Bank AG v Highland Crusader Offshore Partners** in the Court of Appeal ("**Deutsche Bank CA**") [2010] 1 WLR 1023 at para 50, states that "*an injunction to enforce an exclusive jurisdiction clause governed by English law is not regarded as a breach of comity, because it merely requires a party to honour his contract.*"

158. Given the applicability, as I have found, of the exclusive jurisdiction clause, questions of comity do not in my judgment arise.

(vii) The Texas Proceedings

159. RBS submits that the Texas Proceedings are vexatious and/or an abuse, and are simply an attempt to deprive them of the benefit of their judgment. It does so by reference to the application of the principles of res judicata and/or issue or cause of action estoppel (see e.g. **Arnold v National Westminster Bank plc** [1991] 2 AC 93) and/or by reference to the principles akin to estoppel enshrined in **Henderson v Henderson** [1843] 3 Hare 100, as recently reiterated in **Johnson v Gore Wood & Co** [2002] 2 AC 1 and **Stuart v Goldberg Linde** [2008] 1 WLR 823 CA. Had I set aside the Liability Judgment (and consequently the Quantum Judgment), there would have been no issue of res judicata or estoppel, but I have not done so. Similarly, if I had done so, and thereby reopened the English proceedings, then there would have been the issue of parallel proceedings (undesirable, but not automatically oppressive: see Toulson LJ in **Deutsche Bank CA** at 1052G-H), but I have not done so.

160. An anti-suit injunction can be granted, by reference to a non-exclusive jurisdiction clause in favour of the English courts, or otherwise, by reference to establishing that commencement and/or continuation of proceedings in the foreign court would be vexatious or oppressive. The principles of *forum non conveniens* are only one example of this jurisdiction (albeit normally linked to questions as to whether a jurisdictional gateway has been achieved), but, although such questions are briefly canvassed in this case on both sides, they are not significant and do not begin to

feature as factors in the equation. The real question is that there have been the proceedings in this Court, which have been brought to judgment, and judgment in favour of RBS. **Briggs & Rees** (in **Civil Jurisdiction and Judgments** (5th Ed) 2009) suggest, by reference to Lord Diplock's categorisation in **British Airways v Laker Airways Ltd** [1985] AC 58, that injunctions to protect an applicant from vexatious or oppressive behaviour can be seen as being granted in aid of an equitable right not to be victimised by such behaviour.

161. Questions of comity plainly arise in such cases, as made clear by Toulson LJ in **Deutsche Bank CA**, at para 50(f), where, after referring to exclusive jurisdiction clauses as an exception (as set out in paragraph 156(ii) above), he continued:

> "*In other cases, the principle of comity requires the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for any English court to arrogate to itself the decision how a foreign court should determine the matter. The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention.*"

162. RBS places primary reliance upon the decision of the Court of Appeal in **Masri v Consolidated Contractors International (UK) Ltd** [2009] QB 503. After a judgment in favour of the claimant in the High Court in London, the unsuccessful defendants sought to issue proceedings in the Yemen, disputing their liability to the claimant. Giving the lead judgment, Lawrence Collins LJ cited at paragraph 83 Robert Goff LJ's reference in **Bank of Tokyo Ltd v Karoon** [1987] AC 45 at 63 to the "*public interest in the finality of litigation*" and to the fact that "*courts had granted injunctions restraining persons properly amenable to their jurisdiction from relitigating abroad matters which had already been the subject of a judgment of the court of the forum*". By reference to **Bank of Tokyo**, to the **South Carolina Insurance Co case** [1987] AC 24 at 41 and 45 and to **Turner v Grovit** [2002] 1 WLR 107 HL, particularly per Lord Hobhouse at para 28, he referred to the need to protect English proceedings and the English jurisdiction as being a legitimate subject matter for an English court, and he concluded, at 95:

> "*But the present case is not a case where the foreign court has given a judgment with which an English injunction would be inconsistent. It is simply a case in which the judgment debtors are seeking to re-litigate abroad the merits of a case which, after a long trial, they have lost in England. In my judgment it is a classic case of vexation and oppression, and of conduct which is designed to interfere with the process of the English court in litigation to which the judgment debtors submitted.*"

163. RBS submits that this applies exactly also to this case, as supplemented by the wider English jurisdiction to protect by way of restraining abuse of the process the litigation of matters which, if they did not exactly fall within earlier proceedings, could have done so (**Henderson v Henderson** etc above). The principle as so extended was restated in **Elektrim SA v Vivendi Holdings** [2009] 1 Lloyd's Law Rep 59 when Lawrence Collins LJ stated (at paragraph 85) by reference to **Masri** that "*an injunction may be granted to protect the process of the English court, and in particular to prevent the re-litigation abroad of issues which have been (or should have been) the subject of decision in England:*"

164. As for the claims against Messrs Hall and Griffiths, the **Henderson v Henderson** jurisdiction is submitted by RBS not to be limited to actual parties to the earlier proceedings if (as stated by Megarry VC in **Gleeson v J Wippell & Co Ltd** [1977] 1 WLR 510 at 515F-G) there is a "*privity of interest*" between a defendant successful in an earlier action and a third party:

> "*For a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him … there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party.*"

165. This was approved by the House of Lords in **Johnson v Gore Wood & Co** per Lord Bingham at 32G, and was further considered by the Court of Appeal, per Thomas LJ, in **Aldi Stores Ltd v WSP Group Plc** [2008] 1 WLR 748 at 759. For the reasons set out in paragraphs 150 to 152 above, RBS submits that there is such a sufficient identity of interest.

166. It is therefore necessary to consider the content of the Texas proceedings, and first Count 1 (and the interrelated part of Count 3). This is an allegation that the extension of the CDO was procured by fraud (as set out in paragraph 27(i) above). This is <u>not</u> based upon any disclosure of documents or evidence given in the Quantum Trial. Mr Griffiths was not even employed by RBS at that time. No particularisation is given in the body of the Texas Petition. The nub of the claim is set out in paragraphs 31 to 33:

> "*31 … in short, Plaintiffs were led to believe that if they made all the payments, the Termination Date was extended until January 31, 2009.*
>
> *32 … Based on RBS's representations, and Plaintiffs' payment of the additional cash collateral, Plaintiffs believed that RBS would not terminate the transaction until January 31, 2009.*
>
> *33 … On information and belief RBS knew that … it could always take control of the Warehouse by exploiting a loophole in the Agreement.*"

It seems to me plainly arguable that this case could have been made before me on the Part 24 application, as follows. If justified, it could have led to rescission of the Second Amendment Deed of 1 April 2008. The Highland Defendants had known since termination took place in October 2008 that any expectation they may have had that, by supplying additional collateral, they could have a guaranteed extension until January 31 2009 was induced by RBS and ill founded (and indeed it appears that they have now issued proceedings against their then United States lawyers in respect of their allegedly negligent advice in that regard). Thus, by February 2010, when the matter came before me on the Part 24 Application, if there is sufficient now for such a case as is made in Count 1, then there was sufficient then (nothing new having been forthcoming since then, as discussed above). Not only did the Highland Defendants not so allege before me on the Liability Judgment, but it is apparent, from paragraph 21 of the judgment of Thomas LJ in the Court of Appeal, that the Highland Defendants did bring forward a new argument on appeal, which was not this argument:

> "*The new argument advanced to us was that even if Highland's construction of the Termination Date was wrong, RBS was not entitled to terminate the* [ISD], *because it had in the Second Amendment Deed given up the right to terminate the* [ISD] *if it gave notice terminating the Mandate Letter. That was because, when the parties agreed in April 2008 to provide €32.375m by way of further collateral and the longstop was extended to 31 January 2009, there would have been no commercial sense in providing additional collateral, if after that agreement RBS could have brought about a Termination Date under the* [ISD] *at any time by terminating the Mandate Letter. In effect Highland would have paid the further sum for nothing.*"

This argument was rejected by the Court of Appeal. It was not put as a case of fraudulent misrepresentation. If such a case were justifiable at all, it could have been because, as I have said, nothing new has arisen since.

167. Count 2 (and the consequential part of Count 3) arises by reference to the facts of the Quantum Trial, and indeed relies on some parts of my findings in the Quantum Judgment. However the claim in fraud and/or unjust enrichment in the Petition is put in the following way (already partially set out in paragraph 27(ii) above):

> "*63. But for RBS's intentional misrepresentation and concealment of material information, Plaintiffs would have bid on the 36 Loans at the BWIC at prices near or equal to the amounts that RBS recorded on its banking books. According to RBS's books, the June 30, 2008 prices for the 36 Loans totalled $106 million – approximately $30 million more than the credit that RBS gave Plaintiffs.*
>
> *64. Therefore, had RBS disclosed to Plaintiffs that it already had transferred the 36 Loans to its banking books and was going to purchase them in accordance with the*

> *ISD's contractual provisions, Plaintiffs would have bid RBS up by an amount equal to RBS's windfall gain of more than $30 million. In other words, but for RBS's fraud, Plaintiffs would owe approximately $30 million less to RBS.*
>
> *…*
>
> *66. … On information* [and] *belief, RBS has made and is making a considerable profit on the 36 Loans and 23 Loans that it fraudulently purported to acquire in the sham BWIC. RBS acquired these loans in an irrational market in a sham auction that RBS designed to achieve the lowest possible prices. In other words, RBS unfairly purported to acquire loans at a steep discount that, on and information and belief, will pay off in full with interest in the long term. On information and belief, as a result of its fraudulent acquisition of the 36 Loans and 23 Loans, RBS has unjustly received tens of millions of dollars.*
>
> *…*
>
> *74. Plaintiffs justifiably relied on the misrepresentation and concealment of material information by Defendants in deciding whether to bid on the 36 Loans. In the absence of Defendants' fraudulent representations and omissions, Plaintiffs would have bid on the 36 Loans at prices near or equal to their June 30, 2008 values, thereby ultimately reducing Plaintiffs' deficiency by approximately $30 million.*
>
> *…*
>
> *78. … On information and belief, RBS has obtained substantial and unjust benefits from its fraud on plaintiffs … on information and belief many if not all of the 36 Loans and 23 Loans that RBS acquired are performing and, as RBS predicted, have been or will be repaid in full with interest. Because RBS purported to acquire these loans at grossly understated values, on information and belief, RBS will earn considerable profits on these loans.*"

168. This is on its face inconsistent (particularly the parts I have underlined) with the judgment that I gave after a full hearing at the Quantum Trial. I have set out in paragraphs 20 and 21 above the significant parts of my judgment in this regard, but I summarise as follows:

    i) My conclusion as to the loss suffered by the Highland Defendants as a result of breach of equitable obligations and breach of contract (based upon the same false statements as are relied upon in the Texas Proceedings) was not that Highland would have bid for the 36 Loans, but that there would have been the outcome set out in paragraph 61 of my judgment.

ii) Similarly with regard to the 52 Loans, the basis of calculation was not on the basis that they fell to be calculated as if there had been no realisation, but by reference to the calculation set out in paragraphs 74 to 77 of my judgment.

And I then concluded my judgment:

> "*78. I must, therefore, ask Counsel and solicitors to carry out the calculations as a result of my conclusion that the 36 Loans should be calculated in accordance with paragraph 61 above and the 52 Loans in accordance with paragraph 77 above.*"

169. Thus with regard to Counts 2/3, it seems to me clearly arguable that:

i) If the Highland Defendants have a case in fraud, such as they have pleaded, they knew the facts by the outset of the Quantum Trial (see paragraph 90 above, and my Costs Judgment quoted in paragraph 22 above).

ii) In any event the measure of damage and/or recovery of loss pleaded by the Plaintiffs in the Texas Proceedings is inconsistent with my judgment.

170. I return to the question of comity and the words of Toulson LJ, set out in paragraph 160 above. At paragraph 56 he relies upon **Barclays Bank Plc v Homan** [1993] BCLC 680, at 686-688, per Hoffmann J to state that:

> "*... where the court is not enforcing a contractual right under English law, the normal assumption is that an English court has no superiority over a foreign court in deciding what justice between the parties requires and, in particular, that both comity and common sense suggest that the foreign judge is usually the best person to decide whether in his own court he should accept or decline jurisdiction, stay proceedings or allow them to continue. In other words, there must be a good reason why the decision to stop the foreign proceedings should be made by an English judge rather than a foreign judge, and cases where justice requires the English court to intervene will be exceptional*."

171. I have had the benefit of the evidence of the Texas law experts, from which the following appears:

i) Justice O'Neill advises that the Texas Courts recognise, as one would expect (paragraphs 41-42 of her Report), the concept of res judicata, or claim preclusion, but also (paragraph 43) the concept of "collateral estoppel or issue preclusion", which includes a situation in which "*the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit*". Whether it is co-extensive with **Henderson v Henderson** is not fully clear.

ii) Res judicata and collateral estoppel can be the proper subject of a summary judgment motion. Mr Harrison agrees as to this, and he adds (though Justice O'Neill appears to disagree) that a Texas court would look to English law to determine the preclusive effect of an English judgment. But this is left as an open question in the experts' joint memorandum, and indeed in oral evidence.

172. The basis upon which the proceedings are vexatious and/or an abuse is therefore that the Texas Proceedings are said to be re-litigation or repetition of the English proceedings between the same parties (save as to Messrs Hall & Griffiths and as to Scott Law which recognises, as set out in paragraph 139 above, that the principle can extend to them) and/or litigation of matters that were or could or should have been included in those proceedings. Plainly that matter could be decided by this Court. It could (subject to the unanswered query as to which law would be applied by the Texas courts and as to the precise ambit of the Texas law as to issue preclusion if Texas law applied), be resolved by the Texas court. Hoffmann J described a case in which an English judge rather than a foreign judge made a decision to stop the foreign proceedings as exceptional, but it seems to me that where the issues will revolve around the proper analysis of the effect of an English judgment, and where the English judge who is to make such assessment is the same judge as gave that judgment, and is wholly familiar with the proceedings, that might amount to such exceptional circumstances. Toulson LJ, in the passage cited in paragraph 161 above, considered that "*the stronger the connection of the foreign court with the parties in the subject matter dispute, the stronger the argument against intervention*". In this case there is clearly a strong connection with the English courts. On the other hand the Texas courts will be best equipped to know precisely what is involved in the proceedings before it. I shall return to this question of what might be called the balance of comity, when I consider the last of the issues arising on this anti-suit injunction application.

(viii) "*Strong reasons*" and "*unclean hands*"

173. If, as I have found to be the case, there is an exclusive jurisdiction clause of which the Highland Defendants are in breach, and by which Scott Law as assignee is bound, then matters of comity do not arise (see paragraphs 153 to 157 above), and *strong reasons* are required if the English court is not to grant an anti-suit injunction. This arises from the speech of Lord Bingham in **Donohue v Armco** at paragraph 24, which expanded and clarified the similar words of Millett LJ in **The Angelic Grace** [1995] 1 Lloyd's Law Rep 87 at 96. Lord Bingham said as follows:

> "*If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court ordinarily exercises its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance*

> *with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word 'ordinarily' to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitled to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case.*"

174. Three matters can be made clear:

i) In **Donohue** in fact an injunction was refused (after the defendant gave an undertaking not to enforce any multiple or punitive damages awarded in the New York proceedings) because the New York proceedings were continuing in any event against other parties, so that the grant of an injunction would have led to inappropriate parallel proceedings. In the light of my conclusion that an injunction would be available to restrain the Defendants from continuing the Texas Proceedings not only against RBS but also against Mr Hall and Mr Griffiths, that factor does not arise here.

ii) The claim that was sought to be brought in the New York proceedings was in that case, as here, a claim based upon allegations, as I have said in paragraph 152 above, effectively of fraud.

iii) Lord Bingham gives no definition of what would amount to "*strong reasons*", which are said to "*depend on all the facts and circumstances of the particular case*", but, apart from dilatoriness, the example that is given is "*other unconscionable conduct*".

175. "*Unclean hands*" is a well-established concept applicable by way of a defence to any claim for equitable relief. There is a good deal of authority, with which I shall deal, discussing the concept and its applicability, whereas "*unconscionable conduct*" for the purpose of qualifying as a strong reason to resist an anti-suit injunction based upon an exclusive jurisdiction clause has not been discussed in the authorities, but is simply left to the *facts and circumstances of the particular case*. Counsel before me naturally had to make their submissions not knowing whether I was going to find that an exclusive jurisdiction clause applied, or whether I was simply going to rest my decision upon RBS's alternative case based upon the alleged vexatiousness/abuse of the Texas Proceedings. If I were to conclude only as to the latter, then the Defendants would need to establish (it being common ground that the onus is upon them) that RBS is disentitled to relief by reference to its *unclean hands*. Implicit in Counsel's submissions, and in my view rightly, was that, if there were insufficient to engage that concept, then there would be insufficient unconscionable conduct to amount to *strong reasons*: It is

clear from Mr Nicholls' submissions in closing, and I do not understand the other Counsel to disagree, that, on the facts of this case, if I found sufficient *unclean hands*, I would also find *strong reasons*. I shall therefore begin by my consideration of the Defendants' case on *unclean hands*.

176. This doctrine has a quaint terminology, but it is regularly used in the authorities and in academic sources, even to the extent that where a party has taken steps to put right or, in appropriate cases, apologise for, his previous misconduct, such action is described as "*washing his hands*" (see **Meagher, Gummow and Lehane's Equity: Doctrines and Remedies** (4th Ed) ("**Meagher**") at 3-130. It seems to me to be just a branch, but an important one, being available wherever an equitable remedy is sought, of the principle that abuse of the court process can lead to the court depriving a party of a remedy already obtained (e.g a freezing order obtained as a result of non-disclosure) or which would otherwise be granted. It is plain, as was said by the Court of Exchequer in Equity in **Attwood v Small** VI Clark & Finelly 232 at 447, that "*general fraudulent conduct*" or "*general dishonesty of purpose*" is not sufficient. This can most clearly be seen in the somewhat surprising decision of the House of Lords in **Grobbelaar v News Group Newspapers** [2002] 1 WLR 3024, where the claimant, who had been disbelieved by a jury and found to have been dishonest in relation to entering into two corrupt agreements to throw matches in return for bribes, was nevertheless held entitled to an injunction to restrain The Sun from repeating an allegation that he actually did throw matches. Lord Scott, at 3058, was "*somewhat reluctantly persuaded, on balance, that the grime on Mr Grobbelaar's hands is not such that he should be exposed to a repetition of that allegation*".

177. Mr Dunning, in a helpful review of the authorities (to which Mr Nicholls equally helpfully responded), attempted to read into the various examples of cases where equitable relief either has or has not been refused a distinction as to whether the misconduct was, as he put it, *extrinsic* or *intrinsic* to the litigation, with relief only being refused in the latter case. I do not think however that the cases can be so differentiated, and I shall very briefly summarise them below with only cursory, if any, reference to the facts. In my view the only really helpful guideline is that laid down in the very first of the cases, namely **Dering v Earl of Winchelsea** [1787] 1 Cox 318, in which Lord Chief Baron Eyre, at 319, stated, in relation to the proposition that a party's ill conduct can disable him from equitable relief, that "*if this can be founded on any principle, it must be that a man must come into a Court of Equity with clean hands; but when this is said, it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for*".

178. I set out such brief review of the cases:

i) **Dering**: the misconduct was extrinsic. There was held to be no sufficient connection between it and the equitable relief sought – no "*immediate and necessary relation*".

ii) **Attwood**: the conduct was again extrinsic: no connection with the transaction sued on.

iii) **Moody v Cox and Hatt** [1917] 2 Ch 71. The conduct was held not to have a sufficient connection with the relief sought as to deny the plaintiff relief. Again, it was, in Mr Dunning's terms, extrinsic. Scrutton LJ, at 87, followed **Dering** in concluding that "*equity will not apply the principle about clean hands unless the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for*".

iv) In **Armstrong v Sheppard & Short Ltd** [1959] 2 QB 384 the plaintiff was deprived of relief. It was plain that his conduct was *intrinsic*. He misled the defendants and attempted to mislead the court, in relation to the existence of a conversation with the defendant, which was or would have been central to his claim.

v) In **Willis v Willis** [1986] 1 EGLR 62, again the plaintiff was deprived of his relief. The conduct was intrinsic. The plaintiff used a letter in support of his court proceedings which he knew was false. Contrary to Mr Nicholls' submissions, I am satisfied that (as Parker LJ himself says at 63L-M) it was the unclean hands which deprived the plaintiff of his relief, irrespective of whether he would in any event have failed.

vi) In **Memory Corporation plc v Sidhu** [2001] WLR 1443, the case might have been founded on more general principles of discharge of freezing orders, but it was expressly put by the Court of Appeal (in particular per Robert Walker LJ at 1457E) upon the basis of the clean hands doctrine. The conduct of the claimant was intrinsic, in the sense that it related to conduct in the proceedings, but was held not to comply with the *immediate and necessary relation* test.

vii) In **Grobbelaar** (referred to above), the conduct was intrinsic, in the sense that the injunction was in the event granted by the House of Lords when hearing an appeal from the decision of the Court of Appeal in the proceedings in which he had been disbelieved by the jury. Lord Scott (at 3057) however held that the *grime* on Mr Grobbelaar's hands was not sufficiently closely connected with the equitable remedy he was seeking.

viii) In **Gonthier v Orange Contract Scaffolding Ltd** [2003] EWCA Civ 873 the conduct was intrinsic. The claimant had (see paragraph 33) "*asserted, right down to the hearing itself, a claim for an equity in its favour, an equity which depended on expenditure by it, but had very substantially exaggerated that expenditure*", and had indeed fabricated and concocted documents for such purpose. Plainly the conduct was intimately connected with the relief sought.

ix) In **Richardson v Blackmore** [2005] EWCA Civ 1356 the petitioner used a forged letter in s459 proceedings – hence intrinsic – but Lloyd LJ concluded (at paragraph 61) that "*his conduct is neither sufficiently serious nor sufficiently closely related to the Respondents' unfairly prejudicial conduct to make it appropriate for the court to exercise its discretion so as to refuse to grant him a remedy … which it would otherwise grant.*"

x) In **Fiona Trust & Holding Corporation v Privalov** [2008] EWHC 1748 (Comm), Andrew Smith J referred to Lord Scott's dictum in **Grobbelaar** (in paragraph 175 above) and to the *immediate and necessary relation* test. He recognised (at paragraph 18) that unsuccessful trickery could also deprive a claimant of equitable relief. The conduct was intrinsic, in the sense that the complaint was of non-disclosure by the claimants and allegedly unlawful methods used by investigators engaged by the claimants. However Andrew Smith J concluded that such conduct fell "*far short of … showing a sufficient connection between the alleged misconduct and the equitable relief that the claimants seek*".

xi) Finally, Mr Jeremy Cousins QC, sitting as a Deputy Judge of the Chancery Division, in **Murphy v Rayner** [2011] EWHC Ch, refused relief where the claimant had persistently lied and made false allegations, and (at paragraph 348) he concluded that there was "*an immediate and necessary relation between the depravity and the equity sued for*", although, in the event, at paragraph 349-352, he concluded that he would in any event have denied relief, without the need to resort to the clean hands principle.

179. It is apparent therefore that there are some cases in which the conduct was *intrinsic*, namely dishonest or improper conduct carried out in the very proceedings, but was considered not to have a sufficiently close connection to the equity sought or not to be sufficiently serious. I fear that, *pace* Mr Dunning, I can do no better than adopt, as does **Meagher** at 3-130, the proposition that "*for the defence of unclean hands to operate at all, the impropriety complained of "must have an immediate and necessary relation to the equity sued for'*"". In **Spry: Principles of Equitable Remedies** (8th Ed), at 247, an attempt is made to dig a little deeper in explaining what "*immediate and necessary relation*" means, namely "*that the plaintiff seeks to derive advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief*". In **Snell's Equity** (32nd Ed), the editors state that equitable relief will not be refused if "*the defendant's conduct, although reprehensible, is not sufficiently connected to the claim under consideration.*"

180. However much guidance therefore that I can be given, by reference to examples of cases, there is no doubt that, as Lord Scott said in **Grobbelaar** (at 3057F) "*whether there is or is not a sufficiently close connection must depend on the facts of each case*", as Andrew Smith J said in **Fiona Trust**: "*the enquiry whether the maxim is to be applied is, of its nature, fact-sensitive*" and as is said in **Spry**, at 246, "*whether on any particular occasion the behaviour of the plaintiff has been sufficiently improper to lead to a refusal of relief is a matter which is within the discretion of the court*".

181. I must therefore reach my own conclusion, although very much more informed, I expect, than most other judges in such a situation, given that I have had the benefit of presiding over three trials between these parties, extending over some 25 hearing days, not counting a number of interlocutory and pre-trial hearings, and over a period of more than two years.

182. There are two factors which I am entitled and indeed obliged to take into account in my considerations:

i) As referred to in paragraph 176 above, a claimant can *wash its hands* i.e. a conclusion can be reached by the court that any previous misconduct is and can be explained or exonerated, if not persisted in.

ii) As **Spry** makes clear, at 246, the court in exercising its discretion can take into account not only the gravity and nature of the impropriety, but other matters, such as hardship to the parties.

It is also common ground that, as referred to in paragraph 30 above, if I refuse equitable relief, the question of entitlement to damages for breach of the exclusive jurisdiction clause, and/or any compensation in equity, to which RBS claims in any event to be entitled, is not resolved and would be reserved to a future occasion.

VIII Conclusions as to *unclean hands* and/or *strong reasons*

183. The issue therefore is, within my discretion, and by reference to the particular facts of this case, whether I conclude that (i) there has been sufficiently serious improper conduct by RBS (ii) such misconduct has an *immediate and necessary relation* to the equitable relief sued for, being the injunctive relief to restrain the Texas Proceedings.

184. I make no finding that there was any non-disclosure by RBS at the time of the ex parte application before me in respect of the injunctive relief or service out of the 2011 proceedings. I have also not made any material finding in relation to Mr Hall or Mr Booth. I have found that Mr Griffiths deliberately concealed the Suppressed Fact until at or immediately before the Quantum Trial. This had the intended effect that Highland, faced with expensive and time-consuming proceedings, might have settled on terms which did not reflect the true, but concealed, position; and is also very likely to have affected the disclosure exercise, since the issues were far less apparent to Herbert Smith, and that may well be the reason why, quite apart from the 'privileged' disclosure, there has been such a substantial amount of additional disclosure for the purpose of this hearing, which was not, and should or would have been, disclosed for the Quantum Trial – although, in the event, the additional documentation has not changed, but only confirmed, my conclusions previously reached, as I set out in paragraphs 39 to 71 above.

185. This conduct therefore ceased, but since the Quantum Trial:

i) Mr Griffiths lied at this hearing. This involved:

a) statements in his witness statements for the hearing which are untrue or misleading in the respects underlined in paragraphs 49(ii) and 54 above, and the unsustainable statement in the course of his oral evidence, also set out and underlined at the end of paragraph 54.

b) his persisting in a case as to bidding, last look and intention to sell with regard to the 36 Loans which (i) was unsupportable in the light of the disclosed documents, as discussed in paragraphs 46 to 71 above (ii) was backtracking upon what he himself had said at the

disciplinary hearing – I refer in particular to the underlined passages in paragraphs 24 and 26 above.

ii) Centrally, Mr Griffiths was untruthful in giving as his explanation at this hearing that he had forgotten the Suppressed Fact, and had only remembered it at some later stage (see in particular paragraphs 92, 98, 99 and 104 above).

186. By the time of the Quantum Judgment, his conduct had been unsuccessful, in that there was no settlement, and the facts were revealed at the Quantum Trial, but (see paragraph 178(x) above) that does not prevent the operation of the *unclean hands* concept. Since the Quantum Trial, as set out in paragraph 185 above, his conduct has continued and been persisted in, and there has thus not been any relevant *washing* of the hands insofar as they were and are relevantly *grimy*.

187. Mr Griffiths was and is RBS's main witness, upon which the case has wholly depended, and they have continued to assert, in terms, in Mr Nicholls' closing skeleton, that he is a witness of truth (see paragraph 104 above).

188. I conclude that there has been up to and including this last hearing improper conduct by RBS through Mr Griffiths, and that it was serious.

189. Does such misconduct have an *immediate and necessary relation to the equity sued for*? The relief which RBS seeks is an injunction to enforce the jurisdiction clause. No part of the misconduct which I have found relates to the existence of the jurisdiction clause, its construction or its enforceability. Messrs Dunning, Auld and Strong have, in their various submissions, emphasised their contention that RBS is seeking relief to protect the English jurisdiction, when RBS has abused the jurisdiction. That would be so if RBS's claims were (or were primarily) in respect of vexation/oppression, but it is the more straightforward remedy of contractual enforcement (in relation to the exclusive jurisdiction clause), to which I have found they would otherwise have been entitled by way of the equitable relief of an injunction, upon which they rely.

190. The situation here is somewhat unusual, because RBS does not itself put forward any case in reliance on Mr Griffiths for enforcement of the jurisdiction clause. Indeed the ex parte application, though it tells the story, was primarily reliant upon the Agreements, the relevant clauses and my judgment.

191. However, RBS has needed Mr Griffiths to respond to and rebut the case put forward by the Defendants, in defence to it. There has been some discussion, particularly by the Defendants, as to whether Mr Griffiths had to give evidence, or whether he could simply have been 'jettisoned' by RBS. It seems to me, particularly as RBS has relied upon Mr Griffiths as a witness of truth, that it was essential for them to bring him forward with the case that (i) the Liability Judgment should not be set aside for fraud and (ii) the injunctive relief sought should not be refused because of Mr Griffiths' unclean hands. They needed his evidence and, in the event, I have found that it has been dishonest at this hearing.

192. Understandable emphasis has been placed by Mr Nicholls upon his submission that I could and should not rely upon the fact that I effectively made findings of

dishonesty against Mr Griffiths at the Quantum Trial. I agree that that would or could have been past history (or could and would have led to a *washing of the hands* prior to this hearing). But I rely upon the matters that I have found in paragraph 185 above, all being matters which post-date the Quantum Trial and which have been a central part of this hearing.

193. I look to see whether, and to what extent, there would be hardship to RBS if I refuse the injunctive relief it seeks. It will face the Texas Proceedings, as will Mr Hall and Mr Griffiths, in whose interest, as set out in paragraphs 147 to 153 above, RBS has also sought this injunctive relief. However, although Highland and Scott Law have chosen their preferred jurisdiction, I have no reason to doubt that they would have at least considered the bringing of such proceedings in this jurisdiction – if there be factual substance to them (and if there is not such substance, then no doubt that will become speedily apparent in Texas).

194. There appear to me to be two potential matters of hardship to be considered:

i) The first and most significant is the fact that in Texas, unlike in this jurisdiction, there is a jurisdiction to grant (and, in [b] of the prayer to their Petition, the Defendants have sought) "*multiple, special, punitive and/or exemplary damages*", in addition to that sought in [a] – "*compensatory, consequential and/or monetary damages*". The Defendants and each of them have been prepared to give an undertaking similar to that given by the Defendants and New York claimants in **Donohue** (there referred to at paragraph 39). They are prepared, if such would be the deciding factor in my declining the grant of an anti-suit injunction, to give an undertaking not to seek multiple or punitive damages in the Texas Proceedings, by which I understand the reference to be to, and to include, what are referred to as "*special and/or exemplary damages*" as well, thus leaving the damages claimed in the Texas proceedings to be as per subparagraph [a] of the prayer in the Petition. I shall incorporate such undertaking in my Order.

ii) The other concern, which has clearly formed an important part of the RBS case, is that the Defendants are and ought to be precluded from bringing the Texas Proceedings (both Count 1 (with the relevant part of Count 3) and Count 2 (ditto)) because of the principles of res judicata and/or issue estoppel and/or **Henderson v Henderson** abuse (and see paragraph 172 above). I have set out, in paragraphs 162 to 169 above, what seems to me to be the strong case which RBS has in that regard. But by refusing the equitable relief which RBS seeks, I am not preventing RBS from running that case. I am simply leaving it, as in any event I would have been urged to do by the Defendants if there had been no exclusive jurisdiction clause, to the Texas court to resolve. By reference to the two experts' reports, that court appears to me to be well able to do so.

195. Having therefore considered the questions of hardship, I am not persuaded to do other than conclude, in the light of my findings above as to *unclean hands*, that there are *strong reasons* why I should not grant an injunction enforcing the exclusive jurisdiction clause in favour of RBS.

IX Result

196. I therefore refuse Highland's application to set aside the Liability Judgment, and dismiss Scott Law's defence in that regard, and also dismiss RBS's applications in both proceedings for injunctive relief.