Neutral Citation Number: [2016] EWHC 781 (Ch)

Case Nos: FL-2015-000005 & FL-2015-000007

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
FINANCIAL LIST

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

Date: Friday 8th April 2016

Before :

MR JUSTICE NEWEY

Between :

BNY MELLON CORPORATE TRUSTEE SERVICES LIMITED	**Claimant**
- and -	
(1) TABERNA EUROPE CDO I PLC	**Defendants**
(2) BARCLAYS BANK PLC	
(3) TABERNA EUROPEAN CAPITAL MANAGEMENT LLC	

And between :

CITICORP TRUSTEE COMPANY LIMITED	**Claimant**
- and -	
(1) TABERNA EUROPE CDO II PLC	**Defendants**
(2) BARCLAYS BANK PLC	
TABERNA EUROPEAN CAPITAL MANAGEMENT LLC	

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Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Andrew de Mestre (instructed by **Maurice Turnor Gardner LLP and Norton Rose Fulbright LLP**) for the **Claimants**
Mr Jeremy Goldring QC and Mr Daniel Bayfield QC (instructed by **Reynolds Porter Chamberlain LLP**) for the **1st Defendants**
Mr David Wolfson QC and Miss Patricia Burns (instructed by **Boies, Schiller & Flexner (UK) LLP**) for the **2nd Defendants**
Mr Antony Zacaroli QC (instructed by **Travers Smith LLP**) for the **3rd Defendants**

Hearing date: 2 March 2016
Further written submissions: 3 & 4 March 2016

Approved Judgment

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

Mr Justice Newey :

1. This case concerns sets of notes ("the Notes") issued on 31 January 2007 and 13 September 2007 by, respectively, Taberna Europe CDO I plc ("Taberna I") and Taberna Europe CDO II plc ("Taberna II"), special purpose vehicles which are the first defendants to the two claims before me. The proceeds of the Notes were used by their issuers ("the Issuers") to acquire pools of assets receipts from which are used to service the Issuers' obligations to noteholders. The assets are managed on the Issuers' behalf by a "Collateral Manager". The present Collateral Manager is in the case of each set of Notes the third defendant to the claims, Taberna European Capital Management, LLC ("the Present Collateral Manager"), but another company, Taberna Capital Management, LLC ("the Former Collateral Manager"), was the Collateral Manager until 2010. The claimants ("the Trustees"), respectively BNY Mellon Corporate Trustee Services Limited ("BNY") and Citicorp Trustee Company Limited ("Citicorp"), are the trustees of the Notes.

2. Although the present proceedings were brought by the Trustees, they take a neutral position on the issues raised. The real contest is between the second defendant to each claim, Barclays Bank plc ("Barclays"), on the one hand and the Issuers and Present Collateral Manager on the other.

3. Barclays holds the most senior notes ("the Class A1 Notes") in each structure. In the case of the January 2007 issue ("T1"), it holds €362,000,000 Class A1 Senior Floating Rate Notes due 2038. As regards the September 2007 issue ("T2"), it holds €588,000,000 Class A1 Senior Floating Rate Notes due 2038. The initial purchaser of the Class A1 Notes was the arranger of the structures, Merrill Lynch International ("MLI"), but Barclays acquired them more or less at once: on respectively 31 January 2007 and 13 September 2007. It immediately bought credit default swap protection from AG Financial Products Inc ("Assured") and agreed that Assured would act as its "Nominated Representative".

4. Barclays' case in the proceedings before me is that there have been breaches by the Issuers of their obligations and that, once the Issuers have been given formal notice of these, it will be entitled to accelerate payment of the Notes because "Events of Default" will have occurred. Two breaches of obligation are alleged in respect of each set of Notes. For present purposes, however, I am concerned only with Barclays' contention that certain swap agreements ("the Disputed Swaps") were impermissible.

5. The applications before me are for summary judgment. It is Barclays' contention that there is no real prospect of a successful defence to the claims based on the Disputed Swaps. The Issuers and Present Collateral Manager dispute that.

The documentary framework

6. "Events of Default" are defined in the conditions applicable to each set of Notes ("the Conditions"). Clause 10 of the Conditions provides for any of the various events listed in clause 10(a) to constitute an Event of Default. Amongst the events identified is, by clause 10(a)(v), this:

> "***Breach of Other Obligations*** The Issuer does not perform or comply with any other of its covenants, warranties or other

> undertakings (or similar) under the Notes, the Trust Deed, the Agency Agreement, the Collateral Management Agreement … or any representation, warranty or statement of the Issuer made in the Trust Deed, Collateral Management Agreement or in any certificate or other writing delivered pursuant thereto or in connection therewith ceases to be correct in all material respects when the same shall have been made, and the continuation of such default, breach or failure for a period of 45 days (or 30 days, in the case of any default, breach or failure of representation or warranty in respect of the Collateral) after notice thereof shall have been given by registered or certified mail or courier to the Issuer (with a copy to the Collateral Manager) by the Trustee specifying such default, breach or failure and requiring it to be remedied and stating that such notice is a '*Notice of Default'* hereunder."

7. The "Collateral Management Agreement" mentioned in this clause is in each case an agreement made with the Former Collateral Manager which was the subject of novation in 2010 when the Present Collateral Manager took over. By clause 4.2(a) of each Collateral Management Agreement, the Collateral Manager covenanted and agreed that it would, among other things, "use all commercially reasonable endeavours to achieve the Investment Objective". "Investment Objective" is defined in clause 1.1 of each Collateral Management Agreement in such a way as to include:

> "to enter into Asset Swap Transactions or Interest Rate Hedge Transactions (provided that such agreements terminate on or prior to the Stated Maturity), with a view to managing currency and/or interest rate risks".

8. Clause 4.2(b) of each Collateral Management Agreement authorises the Collateral Manager to exercise various rights and, in particular, to:

> "assess entry into and/or closing out (in whole or in part) by the Issuer from time to time of any related Asset Swap Transaction in accordance with Clause 21 (*Currency Hedging*) and/or any Interest Rate Hedge Transaction in accordance with Clause 22 (*Interest Rate Hedging*)".

9. Clause 22 of each Collateral Management Agreement deals, as its heading suggests, with interest rate hedging. Given its importance, I should set out much of the clause in respect of T1 in full:

> "(a) The Collateral Manager may cause the Issuer to enter into, from time to time, one or more Interest Rate Hedge Transactions in order to manage interest rate and other risks in connection with the Issuer's issuance of, and making of payments on, the Notes and ownership and disposition of the Collateral Debt Securities such that the aggregate notional amount hedged by such Interest Rate Hedge Transactions is equal to or greater than approximately 86 per cent. of

the sum of the Aggregate Principal Balance of all Fixed Rate Collateral Debt Securities.

(b) The Collateral Manager may cause the Issuer to enter into additional Interest Rate Hedge Transactions in order to hedge any interest rate timing mismatch between the Collateral Debt Securities and the Notes.

(c) If at any time:

(i) more than 11 per cent. of the Aggregate Collateral Balance consists of Collateral Debt Securities which pay interest less frequently than quarterly; and/or

(ii) the percentage of the Aggregate Collateral Balance consisting of Fixed Rate Collateral Debt Securities is greater than 11 per cent.,

unless the Rating Agency Confirmation and the Class A1 Noteholders' Consent (if the Class A1 Notes are still Outstanding) are obtained, the Collateral Manager shall cause the Issuer to enter into one or more Form-Approved Interest Rate Hedges to hedge any interest rate mismatch (taking into consideration the payment dates in respect of Collateral Debt Securities which pay less frequently than quarterly) between the Portfolio and the Issuer's obligations under the Notes such that the aggregate notional amount hedged by such Interest Rate Hedge Transactions is equal to approximately 86 per cent. (or such other amount as agreed with the Rating Agencies and the Class A1 Noteholders' Consent if the Class A1 Notes are still Outstanding) of the sum of the Aggregate Principal Balance of all Fixed Rate Collateral Debt Securities. Entry into an Interest Rate Hedge Transaction pursuant to a Form-Approved Interest Rate Hedge document in the circumstances described in paragraphs (i) and (ii) above will not require Rating Agency Confirmation nor the Class A1 Noteholders' Consent. In all other circumstances Rating Agency Confirmation and the Class A1 Noteholders' Consent (if the Class A1 Notes are still Outstanding) will be required for the Issuer to enter into an Interest Rate Hedge Transaction."

10. Clause 22 of the Collateral Management Agreement for T2 is very similar, but the following differences are noteworthy:

i) Clause 22(c) refers to the "aggregate notional amount hedged by such Interest Rate Hedge Transactions" being "approximately equal to the percentage set out in Schedule 12 (*Hedging*)" rather than "equal to or greater than

approximately 86 per cent. of the sum of the Aggregate Principal Balance of all Fixed Rate Collateral Debt Securities". Schedule 12 in turn gives a percentage of 88.08 until May 2014 and much lower percentages after that;

ii) In clause 22(c)(i) and (ii), 11% is replaced by 5%; and

iii) Where clause 22(c) of the T1 version provides for hedges to be entered into such that the aggregate notional amount hedged is "equal to approximately 86 per cent. … of the sum of the Aggregate Principal Balance of all Fixed Rate Collateral Debt Securities", that for T2 speaks of hedging such that the percentage of the "notional of Fixed Rate Collateral Debt Securities" hedged is "approximately equal to the percentage set out in Schedule 12 (*Hedging*)".

11. Amendments to the T2 Collateral Management Agreement made by a supplemental agreement dated 19 September 2008 affected both clause 22 and schedule 12, but the changes are not important in the context of the present applications.

12. Many of the terms used in clause 22 of each Collateral Management Agreement are defined in the Conditions. Those of particular importance for present purposes include these:

i) "Class A1 Noteholders' Consent" means "a consent made by Ordinary Resolution (including by way of Written Resolution) of the Class A1 Noteholders";

ii) "Form-Approved Interest Rate Hedge" means "an Interest Rate Hedge Transaction, the documentation for and structure of which conforms (save for the amount and timing of periodic payments, the name and economics of the related Collateral Debt Security, the notional amount, the effective date, the termination date and other inconsequential and immaterial changes) to a form previously presented to the Rating Agencies and in respect of which Rating Agency Confirmation and the Class A1 Noteholders' Consent have been received (if the Class A1 Notes are still Outstanding), provided that Rating Agency Confirmation and the Class A1 Noteholders' Consent shall be deemed to have been so received in respect of any such form approved by the Rating Agencies or, as the case may be, the Class A1 Noteholders prior to the Closing Date";

iii) "Interest Rate Hedge Transaction" means "each interest rate protection transaction entered into under an Interest Rate Hedge Agreement which may be an interest rate swap transaction or an interest rate cap or an interest rate floor transaction which shall be subject to Rating Agency Confirmation";

iv) "Rating Agency" means, for relevant purposes, Fitch, Standard & Poor's Rating Services ("S&P") and Moody's Investors Service, Inc. ("Moody's"); and

v) "Rating Agency Confirmation" means, "with respect to any specified action or determination, receipt by the Issuer and the Trustee of written confirmation by each Rating Agency which has assigned ratings to the Rated Notes that are Outstanding (or, if applicable, the Rating Agency specified) that such specified

action or determination will not result in the reduction, qualification or withdrawal of any of the ratings currently assigned to the Rated Notes by such Rating Agency".

13. "Interest Rate Hedge Agreement" is itself defined in the Conditions. For the purposes of T1, the expression is stated to mean:

> "each 1992 or 2002 (as applicable) ISDA Master Agreement (Multicurrency – Cross-Border) (including any confirmations evidencing the transactions thereunder and any annexes or schedules thereto) between the Issuer and an Interest Rate Hedge Counterparty evidencing interest rate swap, cap, floor and/or currency exchange transactions entered into between the Issuer and such Interest Rate Hedge Counterparty from time to time, as the same may be supplemented, amended or replaced from time to time and including any Replacement Interest Rate Hedge Agreement entered into in replacement thereof".

The definition for T2 is the same, except that the words "payment timing" have been inserted between "floor" and "and/or currency exchange".

14. The same definitions apply in relation to T2, except that, with the T2 definition of "Rating Agency Confirmation", "and/or" has replaced "and" in "receipt by the Issuer and the Trustee of written confirmation".

15. Thus, if one or both of the thresholds given in clause 22(c)(i) and (ii) of a Collateral Management Agreement were exceeded, there was an *obligation* to undertake hedging unless Rating Agency Confirmation and Class A1 Noteholders' Consent were obtained. Such hedging was to be by way of Form-Approved Interest Rate Hedges (in which case Rating Agency Confirmation and Class A1 Noteholders' Consent would not be necessary for the specific transactions) or, with Rating Agency Confirmation and Class A1 Noteholders' Consent, other Interest Rate Hedge Transactions. The Collateral Manager was also to have *power* to cause the Issuer to enter into Interest Rate Hedge Transactions in the circumstances identified in clause 22(a) and (b).

16. The drafting of clause 22 of each Collateral Management Agreement gives rise to a number of issues of construction. I shall return to one of them in paragraphs 25-30 below.

17. It is also relevant to note clause 11.3 of the Trust Deed relating to each of the two sets of Notes. This provides:

> "The Issuer shall procure that the Portfolio and the Accounts shall at all times be managed in compliance with the provisions of the Collateral Management Agreement, this Trust Deed and the Conditions."

The Disputed Swaps

18. The Disputed Swaps were entered into in the context of a restructuring that a Spanish property company, Metrovacesa SA ("Metrovacesa"), undertook in 2007. By an agreement dated 12 January 2007, MLI provided Metrovacesa with a €75 million credit facility. Interest was initially payable at 3 month EURIBOR plus 1.10%. However, a structured coupon was introduced by two supplemental agreements of 1 June 2007.

19. MLI transferred its rights in respect of €47 million of the facility to the Issuers in two stages. In the first place, on 31 January 2007 it entered into a novation agreement with Taberna I under which €20 million of the commitment under the credit facility agreement was transferred to the latter company. Later in 2007, a further novation agreement served to transfer €27 million of the commitment to Taberna II.

20. The Disputed Swaps were apparently entered into in order to hedge the interest rate risk on the loan to Metrovacesa. That relating to T1 dates from 31 May 2007. The T2 swap agreement was entered into on 26 September 2007 and confirmed in writing in January 2008. Under the terms of each swap agreement, Merrill Lynch International Bank was to make quarterly payments based on 3 month EURIBOR plus 1.25% to the relevant Issuer and to receive quarterly payments based on 3 month EURIBOR plus 0.10% if 3 month EURIBOR was equal to or less than 3%, 0.60% if 3 month EURIBOR was more than 3% but less than 5% or 1.10% if 3 month EURIBOR was greater than or equal to 5%. Each of the swap agreements also allowed Merrill Lynch International Bank to opt by 13 January 2012 to change the basis on which the payments it received were calculated to either 3 month EURIBOR plus 1.10% or 5.45% (plus a percentage calculated by reference to underlying reference spreads).

Summary judgment

21. When considering whether to accede to an application for summary judgment, the Court must consider whether the respondent has a "realistic" as opposed to a "fanciful" prospect of success (see *Swain v Hillman* [2001] 1 All ER 91, at 92). For a case to have the requisite prospect of success, it must "carry some degree of conviction" (see *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA 472, at paragraph 8), but "the proper disposal of an issue under Pt 24 [of the Civil Procedure Rules] does not involve the judge conducting a mini-trial" (see *Swain v Hillman*, at 95) and the Court "should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case" (*Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), at paragraph 15). On the other hand, as Moore-Bick LJ said in *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 (at paragraph 12):

> "It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the

> respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better."

22. If it is possible to show by evidence that, although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on a question of construction (see the *ICI* case, at paragraph 14).

Barclays' case

23. According to Barclays, the thresholds set in clause 22(c)(i) and (ii) of the Collateral Management Agreements had been exceeded when the Disputed Swaps were entered into. It was thus, it is said, incumbent on the Issuers to enter into Interest Rate Hedge Transactions. Such transactions had, moreover, to be Form-Approved Interest Rate Hedges unless they had Rating Agency Confirmation and the Class A1 Noteholders' Consent. In fact, so Barclays alleges, the Disputed Swaps were not Form-Approved Interest Rate Hedges yet lacked Rating Agency Confirmation and the Class A1 Noteholders' Consent. They did not therefore meet the requirements of clause 22 of the Collateral Management Agreements. The result, Barclays maintains, is that, when the Issuers have been given notice in accordance with clause 10(a)(v) of the Conditions, Events of Default will have occurred, in consequence of which Barclays will be entitled to accelerate payment of the Notes.

The issues

24. The issues that arise can be addressed under the following headings:

    i) The scope of the last sentence of clause 22;

    ii) The applicability of clause 22(c);

    iii) Class A1 Noteholders' Consent;

    iv) Rating Agency Confirmation;

    v) Form-Approved Interest Rate Hedges; and

    vi) Is any breach continuing?

The scope of the last sentence of clause 22

25. Clause 22 of each Collateral Management Agreement concludes:

> "Entry into an Interest Rate Hedge Transaction pursuant to a Form-Approved Interest Rate Hedge document in the circumstances described in paragraphs (i) and (ii) above will

> not require Rating Agency Confirmation nor the Class A1 Noteholders' Consent. In all other circumstances Rating Agency Confirmation and the Class A1 Noteholders' Consent … will be required for the Issuer to enter into an Interest Rate Hedge Transaction."

26. The parties differ as to the significance of the final sentence. Mr David Wolfson QC, who appeared with Miss Patricia Burns for Barclays, argued that the sentence applies wherever the clause 22(c)(i) and (ii) thresholds have not been exceeded, with the result that any Interest Rate Hedge Transaction entered into under clause 22(a) or (b) requires Class A1 Noteholders' Consent as well as Rating Agency Confirmation (unless at least it is a Form-Approved Interest Rate Hedge). In contrast, Mr Jeremy Goldring QC, who appeared with Mr Daniel Bayfield QC for the Issuers, and Mr Antony Zacaroli QC, who appeared for the Present Collateral Manager, each submitted that the sentence is applicable only in the context of clause 22(c) and, hence, does not bite on Interest Rate Hedge Transactions entered into pursuant to clause 22(a) or (b).

27. Mr Wolfson focused on the words "In all other circumstances" at the beginning of the last sentence of clause 22(c). These refer back, he said, to the "circumstances" identified in the preceding sentence: i.e. those "described in paragraphs (i) and (ii) above". That being so, Mr Wolfson maintained, the last sentence of clause 22(c) must have been intended to operate whenever the thresholds specified in clause 22(c)(i) and (ii) are not exceeded and, thus, in relation to the exercise of the powers conferred by clause 22(a) and (b).

28. Mr Goldring, on the other hand, stressed that the relevant sentence is included in clause 22(c). If, he said, the sentence had been meant to apply generally, and not just where hedging is obligatory under clause 22(c), the draftsman could have been expected to have included wording to that effect in clause 22(a) and (b), to have specified that those sub-clauses are subject to clause 22(c) or to have made the sentence into a freestanding sub-clause. The words "In all other circumstances" relate, Mr Goldring submitted, to circumstances in which an Interest Rate Hedge Transaction is entered into under clause 22(c) otherwise than pursuant to a Form-Approved Interest Rate Hedge document.

29. Since I am dealing with applications for summary judgment, I do not need to arrive at a final conclusion on this point, which I do not find easy. I am inclined, however, to think that Mr Goldring's construction is the preferable one. It would, as it seems to me, be odd for the draftsman to have put the material sentence at the end of a particular sub-clause (viz. clause 22(c)) if the intention had been for it to apply in relation to other sub-clauses. Further, while the sentence in question is less clear than it might be, it can, I think, fairly be read in the way suggested by Mr Goldring, so that the "other circumstances" are those in which hedging is undertaken in the context of clause 22(c) other than "pursuant to a Form-Approved Interest Rate Hedge document". Taken together, the penultimate and final sentences of clause 22(c) may be said to spell out what could anyway be inferred: that, where hedging is undertaken in compliance with clause 22(c), Rating Agency Confirmation and Class A1 Noteholders' Consent are not required for Form-Approved Interest Rate Hedges but are otherwise necessary. It might, moreover, be said that there is sense in imposing a requirement for Class A1 Noteholders' Consent in relation to clause 22(c) alone

because the portfolio can be regarded as under stress where a clause 22(c)(i) or (ii) threshold has been exceeded.

30. In the circumstances, I consider it to be at least well arguable that the Disputed Swaps did not require Class A1 Noteholders' Consent unless clause 22(c) was in point.

<u>The applicability of clause 22(c)</u>

31. Did, then, clause 22(c) of the Collateral Management Agreements apply to the Disputed Swaps?

32. A clause 22(c) threshold will have been exceeded if more than 11% (or 5% in the case of T2) of the "Aggregate Collateral Balance" consisted of "Collateral Debt Securities which pay interest less frequently than quarterly" or the percentage of the Aggregate Collateral Balance consisting of "Fixed Rate Collateral Debt Securities" was greater than 11% (or 5% in the case of T2).

33. Basing himself on arithmetic set out in a document sent with a letter dated 1 March 2016 from Boies, Schiller & Flexner, Mr Wolfson argued that the thresholds had plainly been exceeded when the Disputed Swaps were entered into. I did not understand Mr Goldring or Mr Zacaroli to disagree.

34. Late in the day, however, the Present Collateral Manager developed an argument to the effect that the Disputed Swaps need not have been entered into in compliance with clause 22(c) even if the thresholds had been exceeded. In this connection, Mr Zacaroli relied on a witness statement made on behalf of the Present Collateral Manager by a Mr Morgan McClure on 2 March 2016 (i.e. on the day of the hearing) and corrected in a further witness statement dated 7 March 2016. This statement explains that, at the relevant times, swaps other than the Disputed Swaps were in place. So far as T1 is concerned, Mr McClure says that, aside from the Disputed Swaps, there were two swaps hedging a total notional amount of €151.8 million. As regards T2, Mr McClure identifies three swaps hedging a total notional amount of about €119.8 million. Mr McClure concludes that, at the dates of the reports which Barclays says demonstrate that the thresholds were exceeded, "there were swaps in place in respect of more than 86% of the total notional amount of fixed rate securities (excluding those with a maturity of more than 10 years) in each case". Mr Zacaroli accepted that he was not yet in a position to show that the swaps to which Mr McClure refers were Form-Approved Interest Rate Hedges or had received Rating Agency Confirmation and Class A1 Noteholders' Consent, but he submitted that it could not be right to assume otherwise for summary judgment purposes. He argued that the onus is on Barclays to show that there is no real prospect of a defence and that it had not previously queried the swaps to which Mr McClure refers despite having them for years.

35. Mr Wolfson unsurprisingly relied on the absence of evidence that the relevant swaps were Form-Approved Interest Rate Hedges or had the requisite endorsement from the Rating Agencies and Class A1 Noteholder. It is incumbent on the Present Collateral Manager, Mr Wolfson submitted, to adduce sufficient evidence to make good its position and it has not done so.

36. There is undoubtedly force in Mr Wolfson's points. None the less, I have concluded that, as matters currently stand, I should not proceed on the basis that the swaps

mentioned in Mr McClure's witness statement did not satisfy the requirements of clause 22(c). There is a realistic prospect of further materials becoming available and supporting this aspect of the Present Collateral Manager's case.

37. Nor do I consider that I would be justified in dismissing the Present Collateral Manager's arguments at this stage on the strength of the other points raised by Mr Wolfson in written submissions of 3 March 2016. They, too, seem to me to call for further investigation, evidence and legal argument.

38. I must, accordingly, assume for present purposes that the Disputed Swaps are governed by clause 22(a) and (b) of the Collateral Management Agreements, not clause 22(c).

Class A1 Noteholders' Consent

39. The upshot of the conclusions I have arrived at so far is, I think, that Barclays cannot succeed on the applications before me unless it can establish that the Disputed Swaps neither received Rating Agency Confirmation nor were Form-Approved Interest Rate Hedges. Since clause 22(a) and (b) of the Collateral Management Agreements do not speak of it, I do not need to consider whether Class A1 Noteholders' Consent was or may have been obtained.

Rating Agency Confirmation

40. That brings me to the question of whether Rating Agency Confirmation was or may have been received as regards the Disputed Swaps.

The T1 Disputed Swap

41. In the light of the definitions set out earlier in this judgment, Rating Agency Confirmation for T1 involves "with respect to any specified action or determination, receipt by the Issuer and the Trustee of written confirmation by each Rating Agency [i.e. Fitch, S&P and Moody's] … that such specified action or determination will not result in the reduction, qualification or withdrawal of any of the ratings currently assigned to the Rated Notes by such Rating Agency".

42. On 10 May 2007, a Mr Andrew Bellis of Merrill Lynch[1] sent the Former Collateral Manager an email in which he said:

> "We have all 3 rating signoffs on Metrovacesa (have attached these below)."

43. The attachments to the email comprised email correspondence of April/May 2007 between Mr Bellis and, respectively, a Mr James Brennan of Moody's and a Mr Lapo Guadagnuolo of S&P and a letter dated 26 April 2007 from Fitch.

44. The letter from Fitch was addressed to Taberna I and BNY. After identifying the T1 Notes, the letter explained that it was provided in response to a request for ratings confirmation and then stated:

[1] In the remainder of this judgment, I shall refer to Merrill Lynch entities simply as "Merrill Lynch".

> "Fitch hereby confirms that, based on the information provided to Fitch, the proposed Adjustment will not result in a suspension, qualification, withdrawal or downgrade on the ratings assigned by Fitch to the above-mentioned notes."

45. Barclays accepts that this letter appears to amount to confirmation by Fitch that the Disputed Swap entered into in connection with T1 would not result in the reduction, qualification or withdrawal of its rating for the T1 Notes. Had there, therefore, been similar letters from Moody's and S&P, there could have been no issue (for summary judgment purposes at least) as to whether Rating Agency Confirmation was obtained for the T1 Disputed Swap. In the absence, however, of such letters, Barclays maintains that the documentation relating to Moody's and S&P does not satisfy the requirements of Rating Agency Confirmation.

46. Taking Moody's first, the correspondence with Mr Brennan that Mr Bellis sent to the Former Collateral Manager on 10 May 2007 began with an email of 17 April 2007 in which Mr Bellis said:

> "One of the companies in Taberna I wants to restructure its loan to a structured coupon. There would then be a swap from ML to Taberna (as per a standard IRS) that would enable Taberna to still receive 3mo Euribor plus 125bps …. Other than the fact that the coupon is structured in terms of interest rate, the normal form approved document will be used.
>
> A termsheet is attached below. We technically need your approval on this as it would not fall under the definition of form approved.
>
> Can you let me know your thoughts as this is fairly urgent."

Mr Brennan replied on 18 April:

> "I do not have a problem with this. Let me know the trade date."

47. So far as S&P is concerned, the correspondence started with an email comparable to the one from Mr Bellis quoted in the previous paragraph. In due course, on 30 April 2007, Mr Guadagnuolo sent Mr Bellis an email in which he said:

> "Andrew – as I said, you can go ahead with this but I want to make sure that it is clear to ML (and to the manager) that, unless it is a pure perfect assets swap, every [hedge] must be [modelled]. So for future requests we will need to see the exercise of showing the cost of terminating the swap at different years compared to keep the swap running. Please confirm this is your understanding as well. thanks
>
> Just to be clear, the presence of a rating agency confirmation to get out of the swap (although it is good) does not cover the fact that the deal will be facing a cost in any case, i.e. either

> termination costs or keep it running, which none of them was [modelled].”

Mr Bellis responded on 8 May:

> “Lapo, understood on this. We need to think about how we model this as I am not sure we have the correct set up to do it but we will work on it.
>
> I will get the lawyers to request a formal RAC letter shortly.”

The email chain concluded with an email of 8 May from Mr Guadagnuolo reading:

> “Ok thanks”

48. Mr Wolfson argued that Mr Bellis’ reference to requesting a “formal RAC letter” shows that he recognised that Rating Agency Confirmation required a letter comparable to that supplied by Fitch. The correspondence with Moody’s and S&P cannot (Mr Wolfson contended) suffice for Rating Agency Confirmation purposes since the emails from Moody’s and S&P (a) were not addressed to the Issuer or Trustee but rather to Merrill Lynch and (b) did not state that the Disputed Swaps would not result in the reduction, qualification or withdrawal of the ratings assigned to the Notes.

49. While, however, it is apparent from the definition of the term that Rating Agency Confirmation involves confirmation that a proposed step will not result in the reduction, qualification or withdrawal of an existing rating, no particular form of words is expressly prescribed. That suggests that it could be good enough that a statement would reasonably be understood in the context as confirming that there would be no reduction, qualification or withdrawal of a rating, regardless of whether that was spelt out in terms. The emails from Moody’s and S&P that I have quoted might satisfy such a test.

50. Further, I do not think I can conclude at this stage that there was no “receipt by the Issuer and Trustee” of the emails from Moody’s and S&P. It is true that the emails were not addressed to Taberna I (the Issuer) or BNY (the Trustee), but I have been persuaded by the submissions of Mr Zacaroli that there is a realistic chance that the emails were passed on to Taberna I and BNY in one way or another or, alternatively, that Taberna I and BNY were content to delegate their responsibilities in this regard to Merrill Lynch. In that connection, it is noteworthy that the letter from Fitch was emailed to Merrill Lynch despite being addressed to Taberna I and BNY.

51. In short, I consider it to be at least seriously arguable that Rating Agency Confirmation was obtained for the T1 Disputed Swap.

The T2 Disputed Swap

52. The position is rather different as regards T2. There, no documents comparable to those referred to in paragraphs 42-47 above have come to light.

53. Mr Thomas Hibbert, a partner in Reynolds Porter Chamberlain who has given evidence on behalf of the Issuers, has accepted in one of his witness statements that

"the Issuers have not seen equivalent specific written Rating Agency approval of the Taberna II Disputed Swap", but nevertheless suggested that "[i]t may be that formal Rating Agency approval was obtained for the Taberna II Disputed Swap". Mr Hibbert has also expressed the view that such approval "may have been considered unnecessary in circumstances in which the Taberna II Disputed Swap had been entered into prior to closing" or that "it may have been the case that the confirmations provided in relation to Taberna I were taken at the time to apply equally to the Taberna II Disputed Swap".

54. In the end, though, I have concluded that there is no real question of Rating Agency Confirmation having been obtained for the T2 Disputed Swap. It is perfectly possible that the Rating Agencies were aware that the T2 Disputed Swap was going to be entered into and content that it should be. The chances of Taberna II (as the Issuer) or Citicorp (as the Trustee) having received "written confirmation" to that effect from each of the Rating Agencies strike me, however, as remote. Communications relating to the approval of the T1 Disputed Swap have been found. It seems most unlikely that comparable evidence in relation to the T2 Disputed Swap would not have been discovered, had it existed. While the Former Collateral Manager may not have provided the parties with documentation that it may have, one or more of Merrill Lynch, Taberna I, Citicorp and the Present Collateral Manager would surely hold and have made available any document evidencing "written confirmation" from the Rating Agencies.

55. Mr Goldring sought to meet this point by arguing that the act of giving an initial rating to the T2 structure could amount to Rating Agency Confirmation. However, I cannot see how that can be right. The conferral of such a rating would not of itself have involved the requisite "receipt by the Issuer and/or the Trustee of written confirmation by each Rating Agency" that the swap would not adversely affect the Notes' rating.

Form-Approved Interest Rate Hedges

56. Specific Rating Agency Confirmation will or may not have been required in respect of the T2 Disputed Swap if it was a Form-Approved Interest Rate Hedge. Since I have concluded that it is at least seriously arguable that Rating Agency Confirmation was obtained for the T1 Disputed Swap, it does not matter whether that swap was or could have been a Form-Approved Interest Rate Hedge.

57. The definition of "Form-Approved Interest Rate Hedge" is to be found in paragraph 12(ii) above.

58. Mr Goldring fairly accepted – as he had to – that the Issuers and Present Collateral Manager have not succeeded in identifying a relevant form that had been presented to the Rating Agencies. He relied, however, on the email from Mr Bellis that I have quoted in paragraph 46 above. This said of the T1 Disputed Swap that, "[o]ther than the fact that the coupon is structured in terms of interest rate", "the normal form approved document will be used". This indicates, Mr Goldring submitted, that a "form-approved document" existed. Mr Goldring also referred to a 2013 email in which MLI told Barclays that it understood that the Disputed Swaps:

> "were documented in the form of Form Approved Interest Rate Hedges, the only difference being the pricing economics (including the option) which, according to the definition of 'Form Approved Interest Rate Hedge', may deviate from the approved form".

59. On the other hand, the email from Mr Bellis itself said of the T1 Disputed Swap that Rating Agency approval was needed as the swap "would not fall under the definition of form approved". In any case, there is no comparable email for the T2 Disputed Swap. That is the more significant since the fact that a form might have received the approval of the Rating Agencies and Class A1 Noteholders in the context of T1 cannot of itself render it an approved form for the purpose of T2. As Mr Wolfson emphasised, T1 and T2 were distinct note issues. For the T2 Disputed Swap to be a Form-Approved Interest Rate Hedge, its documentation and structure must have conformed sufficiently to a form approved *in the context of T2* (albeit, as was common ground, that the requisite approvals could have been given before the "Closing Date", i.e. 13 September 2007).

60. Mr Zacaroli submitted that, before the Closing Date, a form could be "approved" (within the meaning of the proviso to the definition of "Form-Approved Interest Rate Hedge) with less formality. Since the Notes will not yet have been constituted, that may be correct. Mr Zacaroli may possibly be right, too, that the reference to Class A1 Noteholders has to be interpreted purposefully since there will have been no actual Notes or noteholders in advance of the Closing Date. The fact remains, however, that there is, as I see it, a complete dearth of contemporary evidence of any relevant form having been approved by the Rating Agencies or any "Class A1 Noteholder" in relation to T2.

61. It was suggested by Mr Goldring and Mr Zacaroli that additional evidence bearing on this aspect of the case might become available. Since, however, T2 was arranged by Merrill Lynch, it could be expected to hold any material documentation and to have provided it already. Further, Mr Goldring accepted during submissions that it is difficult to infer that the Rating Agencies may have given specific confirmations that have not yet come to light. Mr Goldring suggested that, if the Rating Agencies knew that the Disputed Swap was to be entered into (as, he said, they will have done), the act of giving an initial rating to the T2 structure will have amounted to Rating Agency Confirmation for the relevant form. For my part, however, I cannot see how the mere fact (if it is one) that a Rating Agency gave the structure ratings in the knowledge that it was contemplated that a swap would be entered into subsequently can imply that any form had been approved by the Rating Agency.

62. In all the circumstances, the prospects of the Issuers/Present Collateral Manager defeating Barclays' claim in respect of T2 on the basis that the relevant Disputed Swap was a Form-Approved Interest Rate Hedge strike me as no more than fanciful.

Is any breach continuing?

63. That brings me to the last issue I need to address: whether, if I am right in thinking that there is no real question of Rating Agency Confirmation having been obtained for the T2 Disputed Swap or of its having been a Form-Approved Interest Rate Hedge, there may none the less be no continuing breach of obligation on the part of the Issuer

that could validly be the subject of a notice under clause 10(a)(v) of the Conditions (quoted in paragraph 6 above).

64. Mr Zacaroli developed an argument to the effect that, even if Class A1 Noteholders' Consent was not given when the Disputed Swaps were entered into, the requirement for it may have been waived later on. In the event, however, I have not found it necessary to consider whether or not there was Class A1 Noteholders' Consent (see paragraph 39 above) but have concluded that the T2 Disputed Swap was neither a Form-Approved Interest Rate Hedge nor the subject of Rating Agency Confirmation. Since Mr Zacaroli's submission did not relate to these latter requirements, it cannot avail the Present Collateral Manager or Taberna II.

Conclusion

65. I have not been persuaded that I should accede to Barclays' application in respect of T1 (i.e. that made in claim FL-2015-000005). In contrast, it seems to me that Taberna II and the Present Collateral Manager have no real prospect of successfully resisting Barclays' claim in the proceedings relating to T2 (i.e. claim FL-2015-000007). I shall therefore grant summary judgment on that claim.