Neutral Citation Number: [2013] EWCA Civ 328

Case No: A3/2012/1463 + 1474

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEENS BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE BURTON
[2012] EWHC 1278 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2013

Before :

LORD JUSTICE MAURICE KAY
LORD JUSTICE TOULSON
and
LORD JUSTICE AIKENS

- -

Between :

The Royal Bank of Scotland Plc	**Appellant**
- and -	
(1) Highland Financial Partners LP	**Respondents**
(2) HFP CDO Construction Corp.	
(3) Highland CDO Opportunity Master Fund LP	
(4) Highland Capital Management Europe, Limited	
(5) Scott Law Group LLC	

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Mr John Nicholls QC & Ms. Louise Hutton (instructed by **Linklaters LLP**) for the **Appellant**
Mr Stephen Auld QC, Mr Benjamin Strong & Mr Laurence Emmett (instructed by **Cooke, Young & Keidan LLP**) for the **Respondents (1) to (3)**
Mr Graham Dunning QC and Mr Jeremy Brier (instructed by **DaySparkes)** for the **Respondents (5)**

Hearing dates : 27th-29th of November 2012

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

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Lord Justice Aikens :

I. Brief History of how the litigation arises

1. Sometimes an attempt to alleviate problems has unexpected consequences. This case is a tale of the consequences of actions taken by officers of the Royal Bank of Scotland ("RBS") who used a change in the International Accounting Standards IAS/39 to augment the value of RBS' banking book during the dark days of the bank's crisis in the financial maelstrom that followed the collapse of Lehman Brothers in September 2008. The result has been extensive litigation in the English courts between RBS and the Highland group of companies, resulting in three judgments of Burton J in January 2010, December 2010 and May 2012, which are, respectively, 52, 78 and 196 paragraphs long and all of which have to be considered on this appeal. The third of Burton J's judgments results from Highland's attempt to bring further proceedings in Texas. Inevitably, there is a lot of ground to cover in this judgment.

2. In form this is an appeal by RBS from the third of Burton J's judgments ("the May 2012 judgment") and the order of Burton J dated 25 May 2012 whereby he refused to grant RBS final anti-suit injunctions to prevent the present respondents from continuing with proceedings against RBS and two of its employees in Texas, USA, in breach of a jurisdiction clause. The first to fourth respondents cross-appeal Burton J's dismissal in the same judgment of their claim to set aside Burton J's first judgment in the series ("the Liability judgment") which Burton J had made in favour of RBS against the first to third respondents in January 2010, following an application by RBS for summary judgment on liability only.

3. **The parties:** Between 2006 to 2008 the "investment bank" part of RBS was heavily involved in funding projects concerning financial derivatives such as Collateralised Debt Obligations or "CDOs". The Highland Capital Management Group of companies, with which the first to fourth respondents are associated, engaged then and now in investment management and the provision of investment advisory services. The group (which I will refer to collectively as "Highland") is based in the USA. The First Respondent ("HFP") is a limited partnership registered in Delaware. The Second Respondent ("HCC") is a corporation registered in the Cayman Islands. The Third Respondent ("CDO Fund") is a Bermuda exempted limited partnership. Each of these three respondents has its head office in Dallas, Texas. The Fourth Respondent (called in the documentation "the Servicer" or "the Interim Servicer") is an English registered company. It has taken no active part in the English proceedings. The Fifth Respondent ("Scott Law") is a Texan entity. It is the assignee of claims that the First, Third and Fourth Respondents say that they have against RBS.

4. **The CDO and the contractual documentation:** In 2006 the Highland group of companies planned to launch a CDO, called "Highlander V", with an "anticipated aggregate issuance size" of €500 million. As is usual with a CDO, this was to be issued by a Special Purpose Vehicle ("SPV") which was named as Highlander Euro CDO V BV which, as usual, was called "The Issuer". The plan was that the Issuer would acquire an investment portfolio, which would be managed by the Interim Servicer. This portfolio would consist principally of European Senior Secured Loans. These are called "the Acquired Loans" in the contracts concerning the transaction and I will use that term in this judgment. RBS was engaged as "Advisor" to the CDO transaction and it would finance the purchase of the Acquired Loans. The Acquired

Loans were to be maintained in a portfolio "warehouse facility" (called "the Warehouse Facility") by an entity known as the "Warehouse Provider". These loans would provide the security for the Notes (and other securities) that were to be issued by the Issuer pursuant to the CDO. The Notes would be marketed and offered by RBS. The Notes and other securities were to be issued on a "Closing Date". The sale of the Notes and other securities issued would, eventually, provide the funds to reimburse RBS for its finance used to purchase the Acquired Loans.

5. All these arrangements were set out in a series of documents. The first was a Mandate Letter, dated 18 December 2006, between the fourth respondent and RBS. In the letter they are called respectively "the Servicer" and the "Advisor". Clause 6 of the Mandate Letter stipulated specific circumstances in which it would terminate, but it also provided that either party could terminate RBS' engagement under it at any time upon written notice to the other party without any continuing liability except as provided for in that clause. I have set out the full terms of Clause 6(a) and (b) in Appendix One to this judgment. The Mandate Letter is stated to be governed by English law.

6. Further agreements were concluded on 5 April 2007. The first was a €400 million Variable Funding Note Purchase Agreement ("VFNPA") between the Issuer and RBS, by which RBS advanced funds to the Issuer, to be repaid by the proceeds of the sale of the Notes and other securities. Secondly, there was an Interim Servicing Deed ("ISD") between the Issuer, RBS, the Interim Servicer, HCC and CDO Fund. The ISD set out various definitions of terms, the most important of which for present purposes are the "Termination Date" and the "Final Realisation Date". Those definitions are reproduced in Appendix One. Broadly, the Termination Date is the earliest of a number of possible dates on which the project would come to an end, one of which is the termination of the Mandate Letter. I explain the term "Final Realisation Date" further below.

7. Clause 3.1 of the ISD provided that the Interim Servicer, on behalf of the Issuer, would select and acquire the Acquired Loans for the Loan Portfolio to be held in the Warehouse Facility. Under the same clause RBS agreed to make an Advance to fund these acquisitions. The Acquired Loans were to be transferred to the Issuer (clause 3.6) and could be the subject of security. That security was given, in fact, by clause 3 of a Debenture dated 5 April 2007 between the Issuer and RBS ("the Debenture"). By that clause of the Debenture the Issuer assigned (by way of security) all its rights in the Acquired Loans to RBS. Effectively, therefore, in relation to the Acquired Loans, RBS was in the position of being a mortgagee.

8. Clause 4.2 of the ISD is fundamental to this litigation. It provided that if, by the time of the Termination Date, the Closing Date (ie. the issue of the Notes etc) had not occurred, then the Acquired Loans had to be sold in accordance with the terms of that clause, in particular in accordance with the terms of clause 4.2(a). I have set out the full terms of both Clause 4.2 and 5.6 of the ISD in Appendix One. In broad terms Clause 4.2(a) stipulates that if there has been no Closing Date prior to the Termination Date then the Interim Servicer has the first right to purchase all the Acquired Loans from the Issuer. If the Interim Servicer does not purchase some or all of the Acquired Loans within 3 days of the Termination Date, then RBS has the option to direct the Issuer to sell one or more of the Acquired Loans that remain in the portfolio in the Warehouse Facility in accordance with sub-paragraphs (i), (ii) and (iii) of clause

4.2(a) and also as RBS "shall determine in a commercially reasonable manner". That manner can include a sale of any of the Acquired Loans to RBS itself or to the Interim Servicer "at a price equal to the sum of the market values for such Acquired Loans".

9. The "Final Realisation Date" is defined in the ISD as the date by which all amounts realisable in respect of the Acquired Loans have been paid into an identified account. Under clause 5.6 of the ISD, if the Closing Date has not occurred prior to the Termination Date, then on the Final Realisation Date all amounts standing to the credit of each of various Accounts will be applied to pay all amounts due and payable according to the terms of the VFNPA. This would include amounts due to RBS as the financier of the Acquired Loans.

10. Also under clause 5.6 of the ISD, in the event that all amounts due and payable under the VFNPA (including interest) are not paid in full on the Final Realisation Date, then HCC and the CDO Fund will, upon the demand of RBS (as Variable Funding Noteholder), pay to RBS their share of what is due to RBS under the VFNPA. However, the obligations of HCC and the CDO Fund to RBS under this clause were also subject to the provisions of Schedule 7 of the ISD. The only provision of Schedule 7 possibly relevant to the cross-appeal is clause 2(h) and I have also set out that clause in Appendix One. (On my view of the case it is not relevant.) Clause 2(h) provides, essentially, that HCC and the CDO Fund are not released from their obligations by any other "act, omission or circumstance, matter or thing" which might, but for that clause, operate to release or exonerate HCC/CDO Fund from their obligations.

11. **The chronology:** It was anticipated that the CDO would be issued before the end of September 2007, which was the date stipulated in the Mandate Letter for its termination. A total of 88 loans had been acquired for the "Warehouse Facility" but the optimistic economic mood of late 2006 was turning increasingly sombre. There had been no Closing Date by September 2007 so the term of the Mandate Letter was extended with a longstop date for the issue of 28 February 2008.

12. On 31 October 2007, RBS, the Interim Servicer, HFP, HCC and the CDO Fund all entered into the First Loss Deposit Facility Deed, which has been called in this litigation the "First Loss Deed" or "FLD". It is governed by English law (clause 12). This deed brought HFP into the transactional web for the first time. By clause 6 of the FLD, HFP guaranteed the liability of HCC to RBS under clause 5.6 of the ISD. In addition, under the FLD, both HFP and HCC agreed to make "collateral advances" to RBS, on which RBS would be entitled to draw down in circumstances stipulated in the FLD. For present purposes the most important clause in the FLD is clause 13, which states the parties will resolve disputes in the English court. RBS relied on this jurisdiction clause in its attempt to prevent the Respondents bringing proceedings against it in Texas in circumstances that I shall explain below. I have set out the full terms of clause 13 of the FLD in Appendix One.

13. Unfortunately the economic situation got no better and the parties agreed to extend the longstop date to 31 January 2009. An Amended and Restated Mandate Letter was issued. There was also a Second Loss Deed, which increased the amount of collateral given by HFP and HCC to RBS.

14. Then, on 15 September 2008, Lehman Brothers collapsed. There was never a Closing Date and no Notes were ever issued pursuant to the CDO. RBS itself got into grave financial difficulty. On 13 October 2008 HM Government announced that it would buy £5 billion of preference shares in RBS and also underwrite a share sale to raise a further £15 billion for the bank.

15. RBS gave written notice to the Interim Servicer on 30 October 2008 to terminate the Mandate Letter thus bringing it to an end save for the obligations that were kept alive by clause 6. RBS also terminated the ISD, as it was entitled to do.

16. RBS went about recovering the sums that it had advanced to the Interim Servicer to finance the purchase of the portfolio of loans that comprised the Acquired Loans in the Warehouse Facility. The precise way this was done is at the heart of this litigation and I will have to describe in some detail what Burton J has found as fact. There were (for the purposes of these appeals) two people at RBS centrally involved in the process of dealing with the Acquired Loans so that RBS could recoup the sums it had lent. The first was Mr Sam Griffiths, ("SG"), who in October 2008 was aged 27 and was a "distressed credit trader" in RBS' Special Situations Group. The second person was Mr Stewart Hall, ("Mr Hall"), who in October 2008 was an in-house lawyer in the Global Banking and Markets Division ("GBM") of RBS. He was primarily responsible for providing legal support to the Credit and Risk Transformation Team.

17. Both SG and Mr Hall were centrally involved in events between October 2008 and the end of March 2009, which I must now outline. On 30 October 2008 RBS wrote to the Interim Servicer terminating the Mandate Letter and inviting it to notify RBS by 5 November 2008 which (if any) of the Acquired Loans the Interim Servicer had purchased or had agreed to purchase from the Issuer pursuant to clause 4.2(a) of the ISD. Not having received any notification from the Interim Servicer, on 6 November 2008, Mr Hall on behalf of RBS sent an email to the Interim Servicer. I will have to refer again to the details of this email, but as it is central to this appeal, I will set it out now. The email was sent to Philip Braner and Nina Tripathy of the Interim Servicer. It said:

"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 [ISD],[1] 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.

[1] This provided that the Interim Servicer had the right to purchase all Acquired Loans from the Issuer at no less price within 3 working days of the Termination Date, which in this case was 31 October, so the fourth respondent would have had until close of business on 5 November to exercise that right.

> 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 illiquidity of the loan in question and market conditions."

18. On 12 November the Issuer granted to RBS a power of attorney to act on the Issuer's behalf in relation to the sale of the Acquired Loans in order to facilitate their liquidation. Subsequently RBS "purchased" all of the Acquired Loans.

19. By 16 March 2009 RBS claimed that all amounts that could be realised under the terms of the CDO agreements to recoup its loans had been made and there was still a shortfall of about €30.5 million, in respect of which (under the FLD) HCC was liable as to 92.5%, which liability was guaranteed by HFP, and CDO Fund was liable as to 7.5%. RBS demanded payment of this shortfall from the Highland companies but they refused to pay. RBS sent a letter before action. In an email of 26 March 2009, in response to an enquiry from Mr Braner of Highland, Mr Hall stated that in coming to the prices that RBS had identified for the purposes of calculating the shortfall, RBS had "…followed the process set out in my email of 6 November 2008". Mr Hall stated that in respect of loans for which there had been no third party bids and no price available from a "Price Source", then "…the RBS mark was used as the traded price".

II. The Litigation between RBS and Highland: the 2009 claim leading to the Liability judgment and the Quantum judgment

20. **Steps leading to the Liability judgment:** RBS issued proceedings for the shortfall in 2009, ("the 2009 Action"), saying that the First to Third Respondents were liable to reimburse RBS under the terms of clause 5.6 of the ISD and clause 6 of the FLD. RBS instructed Herbert Smith (HS), whose in-house counsel, Mr Johnson, led RBS' legal team in the litigation. Pleadings were served. In the Particulars of Claim RBS set out the relevant terms of the various agreements and described, in broad terms, the effect of clauses 4.2(a) and 5.6 of the ISD. Paragraph 11 of the Particulars of Claim referred to the terms of clause 5.6 of the ISD, whereby, in the event that all amounts due and payable to RBS under the VFNPA were not paid in full by the Issuer on the Final Realisation Date, HCC and CDO Fund each undertook to RBS "…unconditionally and promptly on demand [to] pay to [RBS] their [respective shares] of [the shortfall]…". The pleading then recited the termination of the Mandate Letter and the ISD.

21. Paragraphs 20 and 21 of the Particulars of Claim stated:

> "20. In its letter of 30 October 2008, the Claimant invited HCM Europe to notify it, by 5 November 2008, which (if any) Loans acquired by or on behalf of the Issuer, HCM Europe had purchased or had agreed to purchase from the Issuer pursuant to clause 4.2(a) of the Interim Servicing Deed.
>
> 21. Not having received notification from HCM Europe that it had purchased or agreed to purchase any of the Loans:
>
> 21.1 On 6 November 2008, the Claimant notified HCM Europe in writing, by email, of the liquidation procedure the Claimant intended to follow, which process it considered to be commercially reasonable;
>
> 21.2 On 12 November 2008, the Issuer granted the Claimant a power of attorney to act on the Issuer's behalf in relation to the sale of the Loans to facilitate their liquidation in accordance with the provisions of the Interim Servicing Deed.
>
> 21.3 In accordance with its entitlement pursuant to clause 4.2(a) of the Interim Servicing Deed the Claimant purchased all of the Loans."

22. The remaining paragraphs of the Particulars of Claim set out the calculations of the outstanding sums said to be due to RBS, which totalled about €30.5 million plus interest. The "statement of truth" at the foot of the Particulars was signed by Mr Hall on behalf of RBS.

23. HCC and CDO Fund (the Second and Third Respondents) pleaded a defence and also counterclaimed that RBS should return to them the €42.5 million collateral paid by them to RBS under the FLD and the Second Loss Deed. Paragraph 41 of the Defence referred to the email of 6 November 2008. The defendants pleaded that they required RBS to prove its allegations in paragraph 21 of the Particulars of Claim and the defendants specifically denied paragraph 21.3.

24. HS wrote a letter dated 19 October 2009 to Highland's lawyers requesting clarification of Highland's case. HS explained its position thus:

> "Our client's requests 1-3 are directed at ascertaining your client's case on the commercial reasonableness of the procedure used to determine the market value of the Loans. Your clients have already had ample time to consider their position in this regard – they have been in possession of the information necessary to assess the valuation procedure for over 7 months. We refer again to our client's emails of 6 November 2008, 26 March 2009 and 31 March 2009. If your clients required further information regarding the method employed by [RBS] to value the Loans they failed to request it despite invitations to do so from [RBS]…"

The letter then set out the process again, ending by saying:

> "For some loans – less than 7% of the portfolio by notional – neither bids nor Third Party Market Maker quotes were available. In such cases the RBS mark was used to value the Loans". The letter continued: "Requests 1-3 are straightforward. In essence does [Highland] allege that this procedure was commercially unreasonable or not. If so, why?"

25. RBS and HS decided to apply for summary judgment on liability in respect of the shortfall claim and so on 28 October 2009 an application was issued under ***CPR Pt 24.*** The draft order sought summary judgment on "all issues of liability raised by the claim". The Application Notice (as repeated in the accompanying draft order) continued with the following:

> "1….Issues of liability shall exclude, for the avoidance of doubt, any disputed issue relating to the commercial reasonableness of [RBS'] valuation for the purposes of clause 4.2(a) of the [ISD] and/or any disputed issue relating to the quantum of the Defendants' liability."
>
> ….
>
> 3. A hearing be listed to determine any disputed issue relating to the commercial reasonableness of [RBS'] valuation for the purposes of clause 4.2(a) of the [ISD] and/or relating to the quantum of the Defendants' liability…

26. The application was supported by the first witness statement of SG, who was by then Head of High Yield Credit Trading at RBS. Paragraph 6 of his witness statement said:

> "For the reasons I shall explain below, I do not believe that the Defendants have any real prospect of successfully defending RBS' claims on issues of liability or that the Second and Third Defendants have any reasonable prospect of success on their counterclaim. Further, I do not know of any other reason why the issues of liability arising upon RBS' claim or the counterclaim should be resolved at a trial."

Paragraphs 31 and 32 of SG's witness statement said:

> "31. The procedure for liquidating warehoused Loans was set out in clause 4 of the Interim Servicing Deed. In outline: by clause 4.2(a), HCM Europe (as Interim Servicer) was entitled to purchase the Loans from the Issuer subject to terms about calculating the purchase price. If any of the Loans were not sold or agreed to be sold to HCM Europe within 3 business days of the Termination Date of the Interim Servicing Deed,

> RBS was entitled, acting in a commercially reasonable manner, to determine how the Loans were to be liquidated and to direct the Issuer accordingly. This expressly included a sale of Loans to RBS at market value.
>
> 32. By Clause 4.2(b), if RBS acquired a Loan from the Issuer as part of the process of liquidating the warehouse, it was to pay the purchase price into the Issuer's Sale Proceeds Account. Clause 4.2(b) was subject to clause 4.3 which gave RBS an express right to "*set off any amounts owed by it under this clause 4 against any amounts payable to it in respect of the* [VFNPA]."

Paragraphs 61 and 62 of SG's witness statement provided:

> "61. As I have explained at paragraph 30 above, termination of the Mandate Letter triggered the termination of the Interim Servicing Deed and the clause 4.2 procedure for the liquidation of the Loans. I was directly involved in this liquidation process.
>
> 62. In accordance with clause 4.2 of the Interim Servicing Deed, RBS invited HCM Europe to identify which Loans, if any, it wished to buy from the Issuer (I refer again to RBS' letter of 30 October 2008 at pages 182-183 of SG1). No response was received. As RBS was entitled to do in the circumstances, it purchased all of the Loans itself."

27. However RBS' application was challenged and there was what has become known as the "Liability Hearing" before Burton J on 21 and 22 January 2010. At the hearing, Mr Johnson, on behalf of RBS, submitted that RBS had valued the loans independently and properly in accordance with clause 4.2(a) of the ISD.[2] The judge handed down a reserved judgment on 10 February 2010, ie. the Liability judgment, in which he considered and dismissed each of five arguments raised by leading counsel for Highland (Mr Raymond Cox QC) against RBS' claim for summary judgment. At [1] of the Liability judgment, Burton J noted that "…Issues of quantum are left over". At [7] he said: "After exercising, on [RBS'] case, its rights pursuant to clauses 4.2 and 4.3 of the ISD to realise the value of the Loans…..[RBS] claims against [Highland] the shortfall…various issues do or may arise as to quantum, with which…I am not concerned". At [30] Burton J said: "[Highland] do not accept that [RBS] has complied with the provisions of clause 4.2 of the ISD…" and at [32] "…Although [Highland] reserve their rights to argue matters as to quantum, for the purposes of resistance to liability, they rely on only two contentions [about sub-participation and set-off]".

28. Burton J ordered that judgment be entered for RBS pursuant to ***CPR Pt 24*** "on all issues of liability arising on its claims" and he dismissed Highland's counterclaims.

[2] The phraseology was Burton J's in a question he put to Mr Johnson, who answered "yes": transcript of 21 January 2010 pages 81-2. There is no suggestion by Highland that Mr Johnson himself misled the court in this submission. RBS had not informed HS of the full history of events by the Liability hearing.

The order set out a timetable leading to a trial on issues of Quantum and provided that the parties could adduce expert evidence "in relation to the market for collateralised debt obligations".

29. Highland subsequently appealed the summary judgment decision but the appeal was dismissed on 14 July 2010.[3]

30. **The steps to the Quantum judgment:** In the Quantum litigation there was no dispute about the total of the advances made to the Highland group by RBS. The dispute was about what sum should be credited in Highland's favour as a result of the disposal exercise undertaken by RBS under clause 4.2(a) of the ISD in October/November 2008 after RBS had terminated the Mandate Letter on 30 October 2008. In order to understand how these arguments are relevant to the present appeal, I must set out some of the key facts, which are not now in dispute between the parties as a result of the findings made by Burton J in his Quantum judgment and his judgment of May 2012.

31. On 13 October 2008, an amendment to International Accounting Standard 39 ("amended IAS/39"), published by the International Accounting Standards Board, came into effect. This permitted banks to transfer, on a one off basis, certain assets on their trading book to their banking book. The effect of this was (in accounting terms) that assets that were marked in the trading book on a mark to market basis could instead be accounted for on an accruals basis in their banking book. Under amended IAS/39 assets could be moved to the banking book as at their 30 June 2008 mark to market value. But any such transfer had to be made on or before 31 October 2008 and it had to be intended to hold the assets transferred on a long term basis.

32. RBS quickly realised the significance of this amendment with regard to some of the loans that had been acquired and deposited in the "Highland Warehouse", bearing in mind RBS' parlous financial state at that time. Thus, even prior to RBS giving notice to terminate the Mandate Letter on 30 October 2008, it had decided it would buy 36 of the 88 Acquired Loans ("the 36 Loans") that were part of the "Warehouse" of loans bought for the CDO transaction. Mr Simon Lowe, Global Controller of Credit Markets in RBS indicated in an email of 15 October 2008 that these loans would be kept by RBS on a "long term basis". On 31 October 2008 the 36 Loans were transferred from RBSs' trading book, where they had been held although owned by the Issuer, to their banking book. The 36 Loans had been selected by SG from amongst the 88 loans in the Warehouse because they were regarded by SG's team as being either "bullet proof, money good at par" or "money good at the transfer price". As a result of this re-classification of the leveraged finance loans, including the 36 Loans to RBS' banking book, the total income of RBS for the 3 months to 30 September 2008 was £1,442 million higher and in the Annual Accounts for the year ended 31 December 2008 there was an increase in the profit and loss account of some £1.7 billion.

33. It will be recalled that the notice served by RBS of 30 October 2008 terminating the Mandate Letter and the ISD had given Highland until close of business on 5 November to state which, if any, of the Acquired Loans were to be sold to them, allegedly in accordance with the first part of clause 4.2 of the ISD. By 5 November

[3] ***[2010] EWCA Civ 809***

Highland had given no response. On that day SG sent an internal email memo to colleagues in his department in RBS, setting out his proposal for the "liquidation procedure" for the Highland warehouse assets. He invited comments and feedback. The proposed procedure set out in his email was: (1) RBS would obtain "bid side quotes" for all the Highland loans as at 6 November 2008; (2) RBS would notify Highland on 6 November of this procedure to give them a "head start" if they would like to bid for any of the assets in the liquidation procedure; (3) On 7 November RBS would send out to the market a list of assets in the portfolio requesting bids; (4) Highland would be invited to bid for assets "as part of the auction"; (5) RBS would submit its own bids in the auction; (6) the auction deadline would be 2pm on 11 November.

34. Mr Hall requested that the email be shown to the Issuer before it was sent out, but said he was otherwise content with it. He made some minor amendments to its terms. On 6 November, Mr Hall himself sent the email to the Interim Servicer. I have already quoted the email, so I need not repeat it here. For convenience it is set out in Appendix Two to this judgment.

35. This type of process of inviting bids and thereby ascertaining market values was called a "BWIC" or "Bids Wanted In Competition". This particular process is called "the BWIC" in both the Quantum judgment and in the May 2012 judgment.

36. The evidence at the Quantum trial, which took place over 5 days in September and October 2010, concentrated on the details of what RBS did in late October and early November 2008 and, in particular, when and for what reason 36 of the Acquired Loans ("the 36 Loans") were transferred onto the banking book of RBS and then, subsequently, formally into its ownership. SG, who was heavily involved in that exercise, was the only witness of fact called by RBS to give oral evidence. RBS also relied on a written statement of Mr Lowe. RBS and Highland called two expert witnesses each, one as to valuation and the workings of the syndicated loan market and one as to the accounting treatment.

37. RBS asserted that all 88 Acquired Loans, including the 36 Loans, had been transferred to RBS on about 11 November 2008 in a manner which accorded with RBS' duties under clause 4.2(a) of the ISD. Highland's key argument was that RBS, under the direction of SG and without telling Highland, had transferred the 36 loans from its trading book to its banking book on 31 October 2008 in order that it could take advantage of amended IAS/39 and so boost RBS' flagging capital value. Highland alleged that, under SG's direction, RBS had then set up a sham "auction" of the 88 loans in early November 2008 and RBS (through SG) had deceived Highland about what it was doing.

38. Highland alleged that RBS had therefore incorrectly operated the terms of clause 4.2(a) of the ISD in breach of contract. Highland also alleged that RBS had equitable duties towards Highland because, as it had held a security interest in the Acquired Loans under the terms of clause 3 of the Debenture, RBS was in the position of being a mortgagee.[4] Highland argued that RBS was in breach of its equitable duty by

[4] See: ***Cuckmere Brick Co Ltd v Mutual Finance Co Ltd [1971] 1 Ch 949.*** As Salmon LJ said at *966C* **"**In addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it".

virtue of the way that it dealt with the Acquired Loans. Highland claimed that, because of RBS' breach of contractual duty under clause 4.2(a) of the ISD and its duties as a mortgagee, RBS must give credit to Highland for the value of the 36 Loans on RBS' banking book, viz. the 30 June 2008 mark to market figure. With regard to the remaining 52 Acquired Loans, Highland said that if RBS had acted as it should have done under clause 4.2(a) then RBS would have sold them for a sum considerably higher than it did. Overall, Highland claimed €87 million credit, which would mean that there was no shortfall under clause 5.6 of the ISD; instead, RBS would owe Highland money.

III. The Quantum judgment

39. Burton J gave judgment on the Quantum issues on 7 December 2010: ("the Quantum judgment").[5] It is not necessary to review the judge's careful findings of fact in detail because he was obliged to reconsider them in his May 2012 judgment in the light of additional discovery and evidence and the further arguments made to him at the 2012 trial. So I will only set out the principal conclusions that the judge reached.

40. These were, broadly, as follows: (1) as at 30 October 2009, given RBS' pressing financial problems, the bank's priority was to determine the CDO so that RBS could control the Acquired Loans and thus safely transfer the 36 Loans to RBS' banking book to take advantage of the amended IAS/39. The imperative requirement that the Mandate Letter and CDO be terminated by 31 October in order that RBS could take advantage of the amended IAS/39 in respect of the Highland loans was not revealed at the time of the summary judgment application.[6] (2) The 36 Loans were identified for transfer to the banking book, most of them being "Category A" loans, viz. "bullet proof, money good at par".[7] (3) RBS transferred the 36 Loans to its banking book on 31 October 2008. They were not available to be purchased by other parties who bid in the BWIC.[8] (4) However, RBS needed to determine what the market value of the 36 Loans was for the purpose of calculating what credit to give to Highland for the loans' value for the purposes of clause 5.6 of the ISD.[9] To do so RBS used the mechanism of a price-fixing sham auction – the BWIC.[10] RBS did not intend to bid in this "auction" and so add competitive value, nor, in fact, would the "highest bidder" be purchasing the 36 Loans.[11] That was contrary to paragraph 5 of the email of 6 November 2008, which had said that each Acquired Loan would be sold to the "highest bidder". (5) Although RBS had decided by 31 October 2008 that it would buy the 36 Loans, the actual "sale" of the 36 Loans to RBS took place after the sham auction at the price so fixed.[12] (6) RBS did not disclose to Highland what it was doing at the time (in particular in the email of 6 November 2008) nor subsequently. SG's explanations of its actions in evidence were not credible.[13] (7) Moreover, SG's anxiety to hide the true nature of the BWIC exercise led to deception, difficulty and

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[5] ***[2010] EWHC 3119 (Comm)***
[6] [19] – [23] of the Quantum judgment – "QJ".
[7] [26] QJ. The rest were "Category B" which meant "money good at the transfer price" ie. the value at 30 June 2008.
[8] [30] QJ.
[9] [30] QJ
[10] [30] QJ
[11] [37] QJ.
[12] [54] QJ.
[13] [30] QJ.

deliberately misleading statements being made by SG to RBS's own sales force used in the BWIC exercise, who themselves, unknowingly, put forward those misleading statements to potential buyers. (8) This exercise was not a sales process that was "commercially reasonable" in accordance with clause 4.2(a) of the ISD, as SG admitted in evidence.[14] (9) RBS should have disclosed to Highland before the BWIC procedure was carried out that it intended to acquire the 36 Loans so that only the remaining 52 loans would actually be available for sale. In failing to do so, RBS failed to operate clause 4.2(a)(iii) of the ISD in accordance with its terms and failed in its duty as mortgagee.[15] (10) The decision by SG not to inform Highland was deliberate.[16] (11) RBS' failure to disclose the true nature of the BWIC exercise continued thereafter, up to and including SG's "incorrect or disingenuous witness statement" which he affirmed on oath in the witness box. This was a breach of the equitable duty of RBS as mortgagee.[17] (12) If RBS had disclosed to Highland what was going on, RBS would have been forced to explain why it wished to retain the 36 Loans. Had there been full disclosure with regard to the 36 Loans there would have been agreement of a market value of the 36 Loans at one point above the 15 October 2008 RBS mark for each loan.[18] (13) As for the remaining 52 loans, the "unsupportable nature" of the BWIC was such that there could be no confidence that the prices indicated in that exercise for those loans were the true market values. (14) In the light of the evidence heard, these 52 loans would have been regarded as reasonable bets in the long term and so the value should be midway between the RBS 15 October mark and the Highland 11 November 2008 mark, less an allowance, called the WAD.[19]

41. In consequence, in Burton J's order of 7 December 2010, it was ordered that HCC (and HFP as HCC's guarantor) together with the CDO Fund pay to RBS their respective proportions of a total of the equivalent of €21 million. Highland subsequently obtained permission to appeal.[20] RBS have made a cross-appeal, although it has not attempted to appeal Burton J's finding of the "sham nature of the BWIC".[21] The appeal and cross-appeal await the outcome of the present appeal. Meanwhile the Highland entities have not paid any of the €21 million to RBS.

42. In his judgment on costs following the Quantum trial, Burton J reiterated his conclusion in the Quantum judgment that RBS ought to have disclosed matters concerning the 36 Loans "at the outset contractually and in equity" but they continued thereafter to litigate without revealing the full position until April/May/June of 2010. He emphasised the fact that SG's witness statement was never corrected, but, instead, he went into the witness box to confirm it was accurate when it was not. Burton J concluded that RBS had misconducted itself both in relation to the original claim and

[14] [30] and [46] QJ.
[15] [30] and [45]- [46]QJ.
[16] [46] QJ.
[17] [46] QJ.
[18] [61] QJ.
[19] [77] QJ.
[20] Initially from Sir Richard Buxton only in respect of the 36 Loans, but subsequently from Ward LJ (on 16 March 2011) in respect of the remaining 52 loans as well: see ***[2011] EWCA Civ 475.***
[21] See [23]of the May 2012 judgment.

also the litigation. He reflected this in making no order for costs despite the fact that RBS had obtained a judgment for €21 million.[22]

IV. The RBS Disciplinary Hearing against SG

43. In the light of Burton J's criticisms of SG and his evidence in the Quantum trial, in December 2010 SG was subject to an RBS internal investigation into his conduct "during the proceedings in the High Court which RBS brought against [Highland]".[23] A report of the investigation was prepared by Mr Jason Richardson of RBS. In this he accepted that the steps taken by SG "…with regard to misleading the client were conscious but his intention was only to preserve the credibility of the BWIC process in the eyes of the bidding participants". However, Mr Richardson also commented: "I believe that fear [that] disclosure [of the transfer of the 36 Loans] would have weakened the case is central to the issues here in this investigation".[24]

44. Mr Richardson's report led to a Group Disciplinary Hearing against SG. In his judgment of May 2012, Burton J recorded SG as stating at the disciplinary hearing that he wanted to put as many assets as possible on the banking book at 30 June 2008 prices and that this process was mandated by Mr Stewart Booth, who was employed by RBS at the time as Global Head of Credit Trading. SG said to the hearing that Mr Booth had said that as many assets as possible should be put on the banking books so long as they were good assets. SG said that he did not consider the Highland assets any differently to any other loan. He said that 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". SG also stated to the investigator that this coloured the decision to "terminate Highland".[25]

45. The result of the disciplinary process was that SG was found to have been guilty of serious misconduct in (1) directing an employee of RBS (viz. one or more of the RBS salesmen involved in the BWIC) to make a misleading statement to a client during the BWIC process, and (2) making a number of misleading statements in his witness statements for the Quantum trial and subsequently confirming those statements to be fact during the trial. He was exonerated of a further allegation about the BWIC process. He was issued with a "Final Written Warning".

V. The Texas Litigation and RBS' response to it – the 2011 claim.

46. On 14 February 2011 HCC and Scott Law (as assignees of HFP, the CDO Fund and the Fourth Respondent in the present case) began litigation against RBS, SG and Mr Hall in the District Court of Dallas County, Texas. The Plaintiffs' Original Petition, filed on 14 February 2011, contained three "counts". The first, against RBS alone, alleged that RBS fraudulently misrepresented facts to the plaintiffs, on the strength of which they agreed to extend the Termination Date of the Mandate Letter and advanced further sums to RBS. The second count, against RBS, SG and Mr Hall, alleged fraud. Paragraph 73 of the Petition asserted:

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[22] See [2], [3] and [6] of the Quantum Hearing costs judgment.
[23] Title of report of Jason Richardson dated 6 December 2010.
[24] [93] of Burton J's May 2012 judgment.
[25] See Burton J's May 2012 judgment at [24].

> "As more fully described above, [all three] 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. As described throughout the Petition, 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."

47. Paragraph 74 alleged that the plaintiffs relied on the misrepresentations and concealment of material information in deciding whether to bid for the 36 Loans, which they would have done had they had the full information, thus reducing "Plaintiffs' deficiency by approximately US$30 million". Paragraph 75 alleged that as a result of the defendants' "fraudulent conduct" the plaintiffs had suffered "considerable damage" in an amount to be proved at trial.

48. Count Three, against RBS alone, alleged that RBS had obtained "substantial and unjust benefits from its frauds on Plaintiffs". [26]

49. On 15 April 2011 RBS made an application in the context of the 2009 claim, without notice, for an anti-suit injunction against the Respondents to this appeal, alleging that the Texas proceedings were vexatious and oppressive.

50. On the same date RBS issued new proceedings ("the 2011 claim") against the Respondents to this appeal, the Issuer and the litigation trust of which Scott Law is trustee.[27] So far as is now relevant, the claim form sought the following: (1) a declaration that HFP, HCC, CDO Fund, and the Interim Servicer were obliged, on the true construction of the jurisdiction clause of the FLD,[28] to litigate all "suits, actions, proceedings and disputes between any and all of them and the claimants arising out of or in connection with" the FLD before the English courts and in no other forum. (2) A declaration that Scott Law, as assignee of HFP and CDO Fund, was equally so bound. (3) An injunction restraining the defendants from pursuing in the Texas court or any other forum other than the English courts (or any other court of another Member State of the EU or a contracting state of the Lugano Convention) any proceedings "arising out of or in connection with" the FLD.[29] (4) An injunction requiring HCC, Scott Law and Alpha Litigation Trust (as the Plaintiffs in the Texas Proceedings) to discontinue the Texas proceedings. (5) Damages in respect of the costs and expenses that RBS had incurred in and arising out of the Texas Proceedings.

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[26] Paragraph 78 of the Petition.
[27] The last was Alpha Litigation Trust. RBS later discontinued its action against this entity.
[28] The Claim Form referred also to the jurisdiction clauses in the ISD, and the First Amendment Deed of 31 October 2007 and the Second Amendment Deed of 1 April 2008 but they are not now relevant.
[29] The other contracts are also identified but they are not relevant any more.

51. On 15 April 2011 Burton J granted *ex parte* interim anti-suit injunctions against the defendants in both the 2009 claim and the 2011 claim. On 25 May 2011 there was a hearing before David Steel J in which he ordered that the interim anti-suit injunctions be continued by consent until the trial of both the 2011 claim and the applications made in the 2009 claim. He gave directions for there to be statements of case by all parties in each action. There were further Case Management Conferences before Burton J on 29 June and 8 July 2011 for directions on disclosure, the service of witness statements and expert evidence. At the latter CMC, Highland was given permission to amend their Defence in the 2011 claim to make a counterclaim that the Liability Judgment be set aside as having been obtained by fraud.

52. The discovery ordered was unusually wide. First it was ordered on the extended "***Peruvian Guano***"[30] basis as against RBS in the light of the allegations made against it. RBS subsequently waived legal professional privilege in respect of a large number of documents. Highland was ordered to disclose certain privileged documents at the hearing of an application made by RBS on the basis of a waiver of privilege. Thus communications between RBS and HS and the Highland parties and their lawyers were disclosed. In addition a substantial quantity of further documents was disclosed by RBS, which, as Burton J recorded, the defendants in the 2011 claim "…asserted could and should have been disclosed prior to the Quantum trial".[31]

53. The Texas Proceedings were stayed pending the outcome of the trial.

VI. The trial of RBS' applications in the 2009 claim and of RBS' 2011 claim and the counterclaim by the Highland parties

54. By the time of the trial of RBS' claim for permanent anti-suit injunctions (in both the 2009 claim and in the 2011 claim) and the Highland parties' counterclaim to set aside the Liability Judgment in the 2009 claim as having been obtained by fraud, the battle lines were as follows: (1) the Highland parties and Scott Law resisted RBS' claim for anti-suit injunctions on three bases. First, the jurisdiction clauses that RBS relied on did not prevent the Highland parties and Scott Law from bringing the Texas Proceedings against RBS and/or SG and Mr Hall. Secondly, insofar as any of the jurisdiction clauses might otherwise be effective to prevent the Highland parties and Scott Law from bringing the Texas Proceedings, there were "strong reasons" why the court should not exercise its discretion to grant RBS permanent injunctive relief.[32] Thirdly, RBS was not entitled to any injunctive relief because it had offended the equitable doctrine of being required to come to court "with clean hands".[33] (2) The Highland parties alleged that the Liability judgment had been obtained by the fraud of RBS (through SG and Mr Hall) towards Highland in two respects. First, in the

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[30] ***(1885) I TLR 188***

[31] [32] of the May 2012 judgment.

[32] "Strong reasons" is the phrase used by Lord Bingham of Cornhill at [24] of his speech in ***Donohue v Armco Inc and others [2002] 1 Lloyd's Rep 425 at 433,*** where he set out in general terms the basis on which the English court would exercise its "discretion" to secure compliance with a contractual bargain of contractual parties to give a particular court exclusive jurisdiction to rule on claims between those parties. The other law lords agreed in the result, although Lords Hobhouse of Woodborough and Lord Scott of Foscote gave separate speeches.

[33] It was agreed between the parties that any question of damages for breach of any jurisdiction agreement by the Highland parties, or of equitable compensation/damages in respect of the actions of Scott Law as assignee should be adjourned: [30] of the May 2012 judgment.

manner in which RBS had misrepresented to Highland what it was doing and why, in relation to its decision to retain the 36 Loans in October/November 2008; secondly, in the way that RBS had continued to misrepresent the position up to and after its application for summary judgment on liability. Scott Law argued that the Liability judgment should be set aside for fraud as part of its defence to the claim by RBS for anti-suit injunctions.

55. The trial of the 2011 claim and counterclaim and the application in the 2009 claim for anti-suit relief was heard by Burton J over 16 days in January, February and March 2012. At this trial, SG again gave evidence on behalf of RBS. There were two other witnesses of fact for RBS: Mr Stewart Booth, who had been employed by RBS from March 2002 to February 2009 as Global Head of Credit Trading, and Mr Hall. The Highland parties and Scott Law called four witnesses of fact. Each side also called an expert in Texas law.

VI. Burton J's findings and conclusions in his May 2012 judgment on the actions of RBS (in particular SG) in relation to the Acquired Loans, from October 2008 until the Quantum Trial.

56. In the 2012 trial RBS challenged some of the findings that Burton J had made in his Quantum judgment, in particular those relating to the motivation, role and state of mind of SG concerning the 36 Loans and the BWIC. Before us, RBS did not further challenge the judge's conclusions of fact in his May 2012 judgment. Scott Law, however, did challenge certain findings relating to the role of Mr Hall in the BWIC. I will have to consider whether those challenges are relevant later in this judgment. However, in my view a close examination of Burton J's final findings of fact made in his May 2012 judgment is central to the determination of both the appeal and the cross-appeal. I therefore make no apology for analysing them in some detail.

57. The structure of Burton J's May 2012 judgment is as follows: first, he summarised the findings of fact that he had made in the Quantum judgment. Next he reviewed those findings in the light of the further evidence he had heard from SG, Mr Hall and Mr Booth, as well as that of the Highland witnesses of fact and the much greater discovery that had been given for the 2012 trial. The judge summarised and reviewed his previous findings of fact under four topic headings. These were: (1) RBS' motivation for the termination of the CDO; (2) the "sham auction" of the Acquired Loans; (3) the "Pre-Determination" of the sale of the 36 Loans to RBS despite the BWIC; and (4) non-disclosure/concealment by RBS. He held that in undertaking this review, issue estoppel was "only marginally relevant unless and until it comes to consideration of the anti-suit injunction". [34] Thirdly, Burton J summarised his conclusions of fact concerning the whole process of the transfer of the 36 Loans and the aftermath in the light of the further evidence. Fourthly, he considered Highland groups' counter-claim to set aside the Liability judgment as having been procured by fraud. Lastly, he examined RBS' claim for anti-suit injunctions and allied relief against Highland and Scott Law.

58. Burton J summarised which of his previous findings of fact were challenged by RBS. They were: (1) the findings on the motivation of the termination of the CDO; (2) the finding that the email of 6 November 2008 from RBS to Highland was misleading or

[34] [33] of the May 2012 judgment, hereafter "May".

disingenuous (although RBS accepted the finding that "the auction" itself was a sham); (3) the finding that there was no possibility of the 36 Loans being sold to a third party in the BWIC because they were needed for the transfer to RBS' banking book, under the amended IAS/39 exercise; and (4) the finding that RBS' deception of Highland had continued up to and including the "incorrect or disingenuous witness statement of [SG] which he affirmed on oath in the witness box" in the Quantum trial.

59. Burton J dealt summarily with a further matter at [37], which was whether the "pre-determination" was a sale of the 36 Loans. Highland asserted that such a sale occurred as between the RBS Trading Book and its Banking Book when the 36 Loans were transferred on 31 October 2008. Having considered the additional disclosure that had been given since the Quantum judgment, the judge confirmed his view that a transfer between the two different books of RBS was not a sale. He held that the sale took place "…by the Issuer (on activation by RBS of its Power of Attorney) to RBS and that took place after the BWIC". Burton J reiterated that 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* by RBS that it would purchase the 36 Loans from the Issuer *after* the BWIC. (My emphasis).

60. **Motivation of Termination:** Burton J concluded that SG and his superior Mr Booth both knew and intended that the Highland Loans would be included in the amended IAS/39 re-classification.[35] He held that SG's statement in his Disciplinary Hearing that RBS's ability to take the gain made available by amended IAS/39 "*coloured"* the decision to terminate the CDO.[36] However, Burton J drew back from his conclusion at [23] in the Quantum Judgment that "*the motivation*" for termination on 31 October was the need to make the transfer from Trading Book to Banking Book by that date, saying hta tthis conclusion was not a fundamental or necessary part of the Quantum Judgment such as to constitute an issue estoppel. Nevertheless, the judge was persuaded that the Highland facility/Warehouse would in any event have been terminated at or about the time it was, "albeit that the deadline of 31 October for [amended] IAS/39 dictated the actual timing".[37] I am not convinced that there is any significant difference between the two findings. The motivation for determining the CDO *before 31 October* (my emphasis) was the need to ensure that amended IAS/39 could be utilised for the 36 Loans.

61. **Sham auction:** Burton J concluded that the new evidence confirmed his earlier conclusions. He specifically found, first, that SG's fifth statement (for use in the Quantum trial) about the sequence of events around late October/early November, was incorrect and that his explanation for this in his seventh statement for the 2012 trial was unconvincing.[38] Secondly, the new disclosure (which included transcripts of telephone conversations between SG and others in RBS and customers) demonstrated that SG wanted the BWIC to look authentic, although the 36 Loans (and many of the others in the 88) were not actually for sale.[39] This meant making

[35] [43] May.
[36] [44] May.
[37] [45] May.
[38] See [49] May. The judge specifically rejected SG's explanation in his 7th witness statement that SG was not aware until 6 November 2008 "which, if any of the 36 [loans] had been accepted" because, as SG knew full well, he was fully involved in their transfer – what the judge dubbed "Phase 1".
[39] See [50]-[54] May.

dishonest statements to potential buyers.[40] Further, although SG continued to assert in his seventh witness statement, prepared for and confirmed as true in the May 2012 trial, that the 36 Loans might have been sold through the BWIC, that was "difficult to reconcile" or "even more implausible" in the light of the new documents.[41] Thirdly, the new argument advanced by RBS, that after the BWIC exercise, RBS would have a "last look" at the bids before deciding whether to acquire one or more of the 36 Loans, was wholly inconsistent with the evidence that the 36 Loans had already been transferred to the banking book.[42]

62. **Pre-determination:** Both SG and Mr Booth of RBS attempted to suggest in their evidence in the 2012 trial that there was a small chance that the 36 Loans might be sold if there had been a very high bid in the BWIC. Burton J described SG's evidence as an "attempt to deny the inevitable".[43] He characterised Mr Booth's suggestion as "purely an afterthought" which did not support SG, "…since [SG] himself did not understand what Mr Booth had in mind – as do not I".[44] The judge concluded that no one in RBS, "least of all [SG] and [his superior, Mr Gulliver] had in mind the sale to any third party of any of the 36 Loans" or (alternatively) of any particularly attractive bid from a third party.[45] That the sale was pre-ordained was also demonstrated by documents showing that SG believed that the transfer of the 36 Loans to RBS' banking book would, by itself, result in a "windfall profit" and that the profit should be credited to his department or desk.[46] There was "every reason" to confirm his previous conclusion that the 36 Loans were never for sale in the BWIC.[47]

63. **Non-disclosure/Concealment:** Burton J made detailed findings on the way RBS, and SG in particular, approached the litigation to recover from Highland what RBS regarded as the shortfall on the loans made to finance the CDO Highland V. In summary the judge found: first, both SG and RBS' solicitors HS approached the early stages of the litigation on the basis that Highland should be given as little information as was consistent with the duty of RBS and HS. So a deliberate decision was made not to address any "quantum related issues" because they might "muddy the waters" on the liability application. That was also SG's preference.[48] Secondly, SG gave a witness statement for the purposes of the ***Part 24*** application in which he stated that he did not believe that the defendants had any real prospect of successfully defending RBS' claims on issues of liability and that he did not know of "any other reason why the issues of liability arising on RBS' claim or the counterclaim should be resolved at a trial".[49]

64. Thirdly, on 15 December 2009 there was a conference between SG, Mr Hall and the solicitor advocate of HS, Mr Johnson, together with other HS personnel, in which HS learnt about amended IAS/39 for the first time, the "windfall profit" from the

[40] See the example of a conversation between SG and a representative of Morgan Stanley given at [51] (vi) and the judge's statement at [69].
[41] [54] and [56] May.
[42] [57]-[59] May.
[43] [66] May.
[44] [67] May.
[45] [69] May.
[46] [70] May.
[47] [71] May.
[48] [72] May.
[49] [73] May.

transfer of the 36 Loans under amended IAS/39 and RBS' motivation to terminate the Mandate Letter. Mr Johnson noted: "…they say we need to look at quantum to look at liability…no further evidence needed to be introduced; more evidence dangerous – convince court matter of construction". But there was no express reference at that conference to 31 October 2008, which was an integral part of the amended IAS/39 process.[50] There was further discussion of amended IAS/39 and the issue of the quantum by reference to the 30 June 2008 price of the 36 Loans at a meeting between SG and HS on 29 March 2010, that is after RBS had obtained judgment on liability. A note recorded that SG stated that he did not want the waters "muddied" by reference to the IAS/39 procedure and SG is also noted as saying that Highland might argue that the real price was the 30 June price, not the 11 November price. The note stated that HS advised that this was likely to be Highland's argument anyway and the only way to neutralise this would be to explain that all this had been "done correctly".[51]

65. Fourthly, the judge records that in conferences on 29/30 March 2010, SG effectively instructed HS that there had been no transfer despite the deadline of the amended IAS/39. HS wrote to Highland's solicitors on 15 April 2010 stating that the amended IAS/39 and "accounting" issues were not relevant to valuation. However, in cross-examination in the 2012 trial, SG admitted that if he had told HS that the loans had been transferred to the banking book before the BWIC, HS would not have written as they had done.[52] SG gave instructions to HS on 21 April 2010 that RBS had "…sold approximately 30% [of the loans] to RBS' banking book. Those loans going into the banking book stayed with the Warehouse for the time being and then [were] re-designated to the banking book in late 2008/early 2009. Some loans [could] go onto banking book with IAS/39 marking". That assertion was repeated in SG's fourth witness statement, which was prepared for use in the Quantum trial. In cross-examination in the 2012 trial, SG admitted that the transfer happened on 31 October 2008 but said "…I don't know whether my knowledge at that time was that I had appreciated that date" [sic].[53] Later (13 May 2010) SG told HS in email discussion that the profit was probably booked shortly after 11 November 2008. Yet he also accepted, in a further email that morning, that there was a "very good correlation between those loans that were accepted into IAS/39 and those that were put onto the banking book". He asked: "how does this tally with my witness statement thus far?".[54] HS sent a letter to Highland's solicitors on 14 May 2010 and referred to SG's fourth witness statement and said that the Warehouse loans were either sold to third parties on 11 November 2008 or were later transferred to the banking book of RBS.[55]

66. Fifthly, SG plainly saw the significance of amended IAS/39 because he wrote to his superior Mr Gulliver on 21 May 2010 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 30 June levels we should have given them some credit for that. It's a nonsense argument of course but one that we need to deal with". Yet in cross-examination in the 2012 trial, SG said that he "did not know/ had not realised" that

[50] [74] May.
[51] [75] May.
[52] [80] May.
[53] [81] May.
[54] [84] May.
[55] [85] May.

assets had gone into the banking book prior to the BWIC and that he did not recall "when my eyes were opened, my knowledge changed". He thought it might have been when the expert reports set out the process.[56]

67. Sixthly, on 19 July 2010, after the expert reports had been exchanged, HS prepared an important draft litigation memorandum which was shown to SG and to Mr Hopper of RBS' legal department, who was by then involved in the RBS/Highland litigation. Mr Hopper asked two very pertinent questions about the draft memorandum. First, he asked if RBS had reclassified the 36 Loans by the time of the BWIC "and [so] were unable to sell them even if we wanted". Secondly, in relation to paragraph 25(i) of the memo, which dealt with the Highland allegation that RBS offered loans for sale in the BWIC that it had no intention of selling, he asked: "is this true or simply alleged? Any regulatory issue if we offered loans for sale when they were not".

68. Burton J commented that if SG (who would by now have seen the expert reports) was then alive to the issue, it "appears surprising" that he did not react with concern to Mr Hopper's questions, particularly as SG himself had been asked to comment on the draft memo. No comment was made, the judge concluded, because it remained SG's position that there was no decision to acquire the 36 Loans until after the BWIC. Thus, paragraph 25(i) of the final draft of the memo said "there is nothing wrong (RBS will contend) with using the BWIC to ascertain the market value of those loans it wished to acquire itself". However, two days prior to the Quantum trial SG emailed himself a question: "What about the timing? IAS list finalised 31 Oct, liquidation carried out on 11 Nov – real sale? What if Highland had wanted to buy assets? (Defer to accountant)".[57]

69. Lastly, the judge recalled that the heading of paragraph 54 of SG's fourth witness statement, used in the Quantum trial, had referred to "Post-acquisition by RBS" of the 36 Loans. This heading was incorrect, yet it remained unaltered at the Quantum trial. In the 2012 trial SG stated in evidence that he had "forgotten" that the 36 Loans had been transferred to the banking book prior to the BWIC, therefore he was not deliberately giving false information to HS. Burton J set out, at [92] of the May 2012 judgment the detailed argument of Highland at the 2012 trial on why SG's assertion that he had "forgotten" was "wholly unlikely". At [99] the judge held that SG had not forgotten, for all the reasons advanced by Highland, as summarised at [92]. He held that SG "simply did not want to reveal" what the judge characterised as "The Suppressed Fact", knowing or fearing its materiality.

70. At the end of his review of the four topics, the judge encapsulated what he called "The Suppressed Fact" as being what had not been disclosed by RBS to Highland. This was the fact that:

> "…as a result of [amended] IAS/39, the 36 Loans had been transferred by RBS from its trading book to 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

[56] [87] May.
[57] [88]-[89] May.

> BWIC. This was not revealed until at or about the opening of the Quantum trial".[58]

VII. Burton J's analysis of the consequences of "The Suppressed Fact": Highland's claim to set aside the Liability Judgment and RBS' claim for anti-suit injunctions.

71. Under the heading of "The Suppressed Fact" Burton J made some further findings relevant to the claim and cross-claim in the 2011 action. I have slightly re-ordered the judge's conclusions, which are as follows: first, as regards SG: (a) he was (subject to Mr Gulliver's oversight) fully involved with and knowledgeable as to the reclassification, the transfer of the 36 Loans to the banking book and the recognition of the "profit";[59] (b) he was in charge of the litigation and the instructions to HS;[60] (c) he had not (by the time HS were instructed or thereafter) forgotten that the 36 Loans had been transferred to the banking book before the BWIC, contrary to the explanation given in evidence in the 2012 hearing;[61] thus SG had lied in saying he had "forgotten" the "Suppressed Fact";[62] and (d) "…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…he did indeed suppress it for as long as he could in the hope that it would remain undiscovered".[63] The judge explained that SG had an "anxiety not to disclose the "Suppressed Fact" to HS or to Highland because he appreciated that if he did, "there was an inevitability" that Highland would argue that the 30 June price/value should be taken as the market value of the 36 Loans for the purposes of clause 4.2 of the ISD.[64] SG had hoped, indeed anticipated, that the case would settle before the Quantum hearing.[65]

72. In relation to Mr Hall's role in relation to the email of 6 November, Burton J concluded: (a) he could and should have done a better job in drafting its terms; (b) he knew about amended IAS/39, but the judge was "not satisfied" that Mr Hall knew about its effects or consequences in any detail, or that the 36 Loans had been transferred to the RBS banking book by 31 October; (c) nor did Mr Hall appreciate that RBS was bound to buy at least 36 of the Acquired Loans as opposed to simply contemplating their purchase; (d) in the redraft of the 5 November memo/6 November email, he should have made it clear that RBS was to have the opportunity of purchasing any of the loans by matching the highest third party bidder. However, Burton J concluded that he was not satisfied that Mr Hall knew that RBS was in fact going to acquire all the 36 Loans "willy-nilly", or that he knew that the BWIC was thus "a flawed or sham exercise in relation to the 36 or 52 [loans]". The judge was "not satisfied" that Mr Hall had lied in evidence in the 2012 hearing.[66]

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[58] [94] May. The judge's underlining of "before".
[59] [104]
[60] [104]
[61] [98]-[99] May.
[62] [104] May.
[63] [104] May.
[64] [96] May.
[65] [96] May.
[66] [101]

73. **Burton J's conclusions on setting aside the Liability judgment:** The judge stated that four issues had to be determined in Highland's favour before the Liability judgment could be set aside. First, this was a case of "alleged dishonest concealment" of facts by SG, not one of a deliberate misstatement. The judge held that Highland must therefore show that SG did not have an honest belief "that he did not need to make the disclosure or [an honest belief] that by concealing the facts he was thereby deliberately putting forward a false case". The parties were agreed that, based on the House of Lords' decision in ***The Ampthill Peerage Case [1977] QC 547,*** the test was whether the relevant fraud (viz. concealment of "The Suppressed Fact") was the result of "conscious and deliberate dishonesty".[67]

74. Secondly, the judge held that Highland must show "causation". The judge considered many of the cases on the test for "causation" where one party has sought to set aside a judgment on the ground that it was obtained by the fraud of the other party. As I read his judgment Burton J concluded that in this case Highland had to prove that the fraud, viz. the concealment of "The Suppressed Fact", had been an operative cause of the court's decision to give the Liability judgment in favour of RBS. Or, to put it the other way, Highland had to show that the fresh evidence that established that there was a concealment of "The Suppressed Fact" fundamentally changed or undermined the way in which the court approached and came to its conclusions in the Liability judgment.[68]

75. There were two further issues before the judge, neither of which are relevant now. They were, first, whether Highland knew of "The Suppressed Fact" at the operative time, which he held to be when RBS obtained the Liability judgment. He held they did not[69] and that conclusion is not appealed. The last issue was whether there had been an election by Highland against setting aside the Liability judgment so as to preclude them from doing so in the 2011 claim. Burton J held that Highland did not have the knowledge necessary to make a valid election until at least the outset of the Quantum Hearing and that there had been no election by Highland thereafter.[70] That issue is also not appealed.

76. On the question of whether there had been fraud by RBS as a result of what the judge had found to be SG's deliberate concealment of "The Suppressed Fact" right up until the start of the Quantum Trial, Burton J held, at [115 (ii)]:

> "Although I have found that [SG] deliberately concealed The Suppressed Fact and did so right up to the start of the Quantum trial, it seems to me clear that [SG] believed that the evidence related to quantum, to the value of the loans. [HS] plainly were advising (see paras 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, [SG's] failure to disclose the Suppressed Fact was deliberate and dishonest."

[67] [106] May.
[68] [107]-[112] and [125]-[126]May
[69] [113] May.
[70] [114] May.

So, Burton J found that SG had *deliberately* concealed "The Suppressed Fact". Subsequently, at [129], the judge held:

> "….I am not persuaded to the relevant standard of proof that [SG], 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. "

77. In short, the judge held that, in relation to the concealment of "The Suppressed Fact" up to and including the time that RBS obtained the judgment sought to be impugned, viz. the Liability judgment, SG had not been guilty of "conscious and deliberate dishonesty".

78. Having reached this conclusion on the first issue, the judge did not need to decide the issue of causation, but he made findings nonetheless. The argument of Highland was that the failure of SG to reveal "The Suppressed Fact" prior to the Liability judgment meant that they were not able to advance three arguments which, based on "The Suppressed Fact", would, either individually or collectively, have resulted in the dismissal of the claim for summary judgment.

79. The three arguments were: (1) in taking the course it actually did in relation to the 36 Loans, RBS was in "repudiatory breach" of clause 4.2 of the ISD or the ISD as a whole, which breach Highland either accepted at the time by objecting to the procedure, or it did so by the 2011 claim.[71] (2) Because the 36 Loans were not available for sale, no Final Realisation Date, as defined by the ISD,[72] had occurred, so that no obligation under clause 5.6 of the ISD to make good the shortfall had yet arisen. (3) Because Highland would have been able to point to RBS' failure properly to operate clause 4.2 of the ISD, there would have been an argument that Highland should have been credited with the value of the 36 Loans as at 30 June 2008 (ie. the value at which they were noted in RBS' banking book) so that it would have been arguable that there was no sum due to RBS at all under clause 5.6 of the ISD. Therefore, Highland could have argued that there should be no judgment on liability or, alternatively, it could have argued that summary judgment under ***Part 24*** should not be given because there was some "other compelling reason why the case or issue should be disposed of at a trial".[73]

80. Burton J concluded that all three of these points were unarguable. But even if they were, he held it would still have to be shown that this would avail Highland and Scott Law in the present circumstances. He concluded that this case was unlike most cases where a judgment has been obtained by fraud, where it is difficult or impossible to tell what the decision might have been if it had been re-tried with honest evidence. In the present case it *had been* (my emphasis) retried in the Quantum hearing and in the 2012 trial with all the evidence, including "The Suppressed Fact". Thus the judge held that he was able to conclude that "despite the fraudulent concealment the outcome would not have changed" because there had been a decision in the Quantum

[71] This point was never formally pleaded by Highland. RBS do not take a technical pleading point before us but ask this court to note the fact.
[72] "The Final Realisation Date" means "the date on which all amounts realisable in respect of the Charged Assets have been realised and paid into the applicable Account".
[73] See ***Part 24.2(b)*** and ***cf Miles v Bull [1969] 1 QB 258*** decided under the provisions of ***RSC Order 14.***

judgment on honest evidence which demonstrated that about €21 million was due to RBS from the Highland parties.[74]

81. The judge concluded that it would be pointless to set aside the Liability judgment, because he was satisfied that, with the full facts now before him, "the result in the Quantum judgment is correct and reflects the true position". Thus the Liability judgment should not be set aside and "…if it were, judgment to the same effect would be given".[75]

82. Highland and Scott Law challenge the judge's conclusions on both the "dishonesty" and "causation" issues.

83. **Burton J's conclusions on RBS' claim for anti-suit injunctions:** Burton J identified eight issues to be decided. The first three were on whether there was a clause in any of the contractual documents that provided for exclusive jurisdiction of the English courts for any claim by Highland entities against RBS and if so, did it bind not only RBS, HCC, HFP and CDO Fund but also Scott Law as assignees of the latter two entities. Burton J held that clause 13.1 of the FLD constituted an exclusive jurisdiction provision, which bound RBS, HCC, HFP and CDO Fund and Scott Law as assignee.[76]

84. The fourth issue was whether the scope of the exclusive jurisdiction clause was sufficiently broad to encompass the claims made in the Texas proceedings. Burton J held that all the contractual documents concerning the CDO had to be read and construed together. He also held that, on the true construction of clause 13.1 of the FLD, it encompassed claims in tort "in connection with" both the extension of the CDO and its termination, which claims were based on alleged fraudulent misrepresentations and/or fraudulent concealment of information by SG and/or Mr Hall on behalf of RBS.[77]

85. The fifth issue was whether RBS was entitled to rely upon clause 13.1 of the FLD to restrain the Texas proceedings against SG and Mr Hall as well as against itself. The judge pointed out that the Highland parties and Scott Law alleged that SG and Mr Hall made fraudulent misrepresentations and omissions solely on behalf of RBS, not independently. Having extensively reviewed the authorities, the judge concluded that RBS had a sufficient interest to give it the right to claim injunctive relief to prevent the Highland parties and Scott Law from continuing the Texas proceedings against SG and Mr Hall in respect of fraudulent misrepresentations or omissions as employees of RBS.[78]

86. The sixth issue was whether the English court should, as a matter of comity, leave it to the Texas court to decide whether to restrain the proceedings. The judge held that, given the applicability of the exclusive jurisdiction clause, "questions of comity do not in my judgment arise".[79]

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[74] [125]-[127] May
[75] [128]-[129] May.
[76] [138] and [141] May.
[77] [142]-[146] May.
[78] [147]-[153] May.
[79] [158] May.

87. The seventh issue was whether, as RBS alleged, the Texas proceedings were vexatious or an abuse because they were an attempt to re-litigate or repeat the English proceedings in the Texan courts, with the addition of SG and Mr Hall as parties. The judge concluded that he had to examine this issue in connection with the eighth and last issue.[80]

88. The last issue the judge considered was whether there were "strong reasons" not to grant the injunction or whether RBS did not come to the court seeking equitable relief with "clean hands". Burton J said, at [173], that having concluded that there was an exclusive jurisdiction clause of which the Highland defendants were in breach and by which Scott Law was bound as assignee and that matters of comity did not arise, then "strong reasons" were required if the English court was not to grant an anti-suit injunction.[81] The judge recognised that there was a distinction between "strong reasons" and the equitable doctrine, or rather defence, of "unclean hands". However, he said that it was clear from submissions of leading counsel for RBS in closing (and other counsel had agreed) that, on the facts of this case, if he found sufficient "unclean hands", he would also find "strong reasons" not to grant an anti-suit injunction. So he began with that issue.

89. The judge analysed the authorities, which he considered were, ultimately, not very helpful. He concluded, at [179], that it was best to adopt the test in the well known text book ***Meagher, Gummow and Lehane's Equity: Doctrines and Remedies (4th Ed)*** at 3-130, where the authors state: "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*'".[82] To the ***Meagher*** definition could be added the elaboration in ***Spry: Principles of Equitable Remedies (8th Ed)*** at page 247 that "immediate and necessary relation" meant that the claimant "…seeks to derive advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief". It depended on the facts of the case, but the court could take account, first, whether the claimant's misconduct has continued or the claimant has, since the misconduct, "washed his hands" and, secondly, matters other than the gravity of the misconduct, such as hardship to the parties.

90. Burton J concluded that SG's deliberate concealment of "The Suppressed Fact" until at or immediately before the Quantum trial:

> "…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

[80] [172] May.
[81] Referring to the phrase of Lord Bingham of Cornhill in ***Donohue v Armco (supra) at [24].***
[82] The statement in quotes in italics within the quotation from the text book were used by Lord Chief Baron Eyre in ***Dering v Earl of Winchelsea (1787) 1 Cox 318 at 319,*** when stating, in relation to the proposition that a party's ill conduct could 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".*

> 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,…"

91. The judge noted that the suppression of facts and of disclosure thereafter ceased, although, as he himself remarked, there had been additional disclosure for the 2012 hearing which should have been disclosed at the Quantum hearing. But the judge went on to note that, at the 2012 hearing SG had not only lied in his witness statement and in oral evidence, but had persisted in his argument about when and how the decision to transfer the 36 Loans had been made. Moreover, SG "was untruthful in giving his explanation that he had forgotten The Suppressed Fact and had only remembered it at some later stage".[83]

92. The judge concluded that there had "not been any relevant washing of hands" insofar as they were and remained "relevantly grimy". Thus "there had been up to and including this last hearing improper conduct of RBS through [SG] and it was serious".[84] He then asked himself the question: did this misconduct have "an immediate and necessary relation to the equity sued for". It did not relate directly to the jurisdiction clause relied on by RBS. But, it had been essential for RBS to put SG forward as a witness of truth in order to resist the claim to set aside the Liability judgment for fraud and to respond to the Highland/Scott Law argument that the anti-suit injunction should be refused because of SG's "unclean hands".

93. The judge then examined the issue of whether a refusal to grant RBS an anti-suit injunction would cause it hardship. He noted, first, that the Highland/Scott Law parties were prepared to undertake not to pursue claims for multiple or punitive damages in the Texas proceedings, if that would be the deciding factor in whether or not to grant an injunction. Secondly, the judge reconsidered the argument of RBS that the Texas Proceedings were an attempt by Highland/Scott Law to relitigate issues decided by Burton J in the Liability judgment (as upheld by the Court of Appeal) and the Quantum judgment. Earlier in the May 2012 judgment[85] Burton J had concluded that, in respect of all three counts in the Texas Petition, RBS had a strong argument that this was a case of relitigation by Highland/Scott Law. However, Burton J decided that, if he refused RBS an anti-suit injunction, that would not prevent it from arguing the "relitigation point" before the Texas court and the evidence of the Texas law experts was that the court could deal with the issue.[86]

94. The judge's overall conclusion on the anti-suit injunction claim therefore rested on the "unclean hands" issue. He said:

> "…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."[87]

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[83] [185] May.
[84] [186] and [188] May 2012.
[85] [162]-[169] May.
[86] [194] May.
[87] [195] May.

VIII. The arguments of the parties on RBS' appeal and Highland's cross-appeal.

95. Although the hearing before us started with RBS' appeal on the anti-suit injunction issue, it seems to me more logical to deal first with the question of whether the Liability judgment should be set aside and then to consider the anti-suit injunction issues. So I will summarise the arguments and then examine them in that order.

96. **Setting aside the Liability Judgment. Highland's arguments:** The arguments of Highland on the cross-appeal relating to the Liability judgment were presented by Mr Benjamin Strong. He submitted: (1) the judge was wrong to characterise SG's actions as simply a failure to disclose The Suppressed Fact.[88] SG had made a deliberate and positive misstatement to Highland in the email of 6 November 2008 which was re-iterated in the misleading email of 26 March 2009 and was never corrected. The misleading position was repeated by the solicitor correspondence before the Liability hearing, in SG's witness statement in support of summary judgment and in submissions made during it.[89] (2) At all times SG knew the statement in the 6 November email and the statements that the sale of the 36 Loans and the BWIC had been carried out in accordance with clause 4.2(a) of the ISD were false. That was "conscious and deliberate dishonesty". (3) Even if it be correct to characterise SG's actions as only a failure to disclose, it was conscious and deliberate. SG and RBS were in breach of a duty to disclose to Highland at all times, in particular in the ***Part 24*** procedure. (4) On causation, if RBS had not presented the case as it did, but had made Highland aware (at any time before the Liability hearing) of the transfer of the 36 Loans on 31 October, before the "sham auction", RBS would not have attempted to obtain summary judgment or could not have done so. (5) Further, the judge should have asked whether the evidence about what RBS had actually done in relation to the 36 Loans and RBS' misstatements/non-disclosure to Highland would have had an impact on the original Liability judgment.[90] It plainly would have done, because the judge proceeded on the basis that, apart from the "technical" point raised by Mr Cox QC for Highland at the liability hearing, there had otherwise been a "proper realisation of the loans".[91] (6) Additionally, if the true position had been known to Highland at the time of the summary judgment application, it could have advanced three arguments against granting summary judgment, viz. (a) repudiation of the ISD; (b) no final realisation date; and (c) the facts disclosed a compelling reason for a trial. The judge had been wrong to reject these as unarguable. (8) The fact that the Quantum trial was conducted on the correct basis cannot prevent the Liability judgment from being set aside if that was procured by fraud.

97. **Scott Law's arguments:** Mr Graham Dunning QC, for Scott Law, supported Mr Strong's submissions, arguing that if the Liability judgment was impeachable for fraud, then that constituted "strong reasons" why RBS would not be entitled to an anti-suit injunction against both Highland and Scott Law. Scott Law also contended

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[88] See, eg [115 (ii)] May.
[89] Mr Strong accepted, of course, that HS was never a party to any misleading act or statement.
[90] Reliance was placed on the judgment of David Steel J in ***Kuwait Airways Corporation v Iraqi Airways Corporation (Perjury II) [2005] EWHC 2524 (Comm) at [198]-[199].***
[91] [39] of the Liability judgment.

that Burton J should have found that Mr Hall was party to the fraudulent misstatement of RBS in sending out the 6 November 2008 email and the email of 26 March 2009 on behalf of RBS.

98. **RBS' arguments:** Mr John Nicholls QC, who appeared for RBS, made the following submissions on the Liability judgment issues: (1) the relevant time to consider whether there was any conscious and deliberate dishonesty by virtue of a fraudulent misstatement or a fraudulent concealment was the Liability hearing. At that time neither RBS nor SG was trying to make any case as to the manner of the sale of the 36 Loans or the valuations of them. Highland's position at the time of the Liability hearing was that RBS was in breach of clause 4.2 of the ISD, but it accepted that was to be resolved at a later stage. That was common ground at the Liability hearing, as Burton J fully understood. [92] (2) Burton J was correct to characterise the wrongdoing of SG as one of fraudulent concealment of "The Suppressed Fact" as opposed to a deliberate positive misstatement. (3) Burton J was also correct to conclude that SG was not dishonest in failing to disclose "The Suppressed Fact" in the context of the application for summary judgment, as SG was advised and reasonably believed that information relating to quantum did not need to be disclosed at that stage. (4) On causation, the test is whether any of Highland's proposed arguments (repudiation/breach of clause 4.2/no final realisation date) would have led to any different result on the issue of liability. For the reasons the judge gave they would not. In particular, in relation to the "repudiation" and "breach of clause 4.2" points, the terms of clause 2.1 of Schedule 7 of the ISD[93] provide a complete answer. (5) Once the court had decided that the proposed defences of Highland would have had no realistic prospect of success (which arguments had to assume that there had been no dishonest misstatement and no concealment), there was no other compelling reason for a trial on liability, as opposed to quantum. (6) When Burton J stated (at [126] and [128] of the May 2012 judgment) that the case had been fully tried with all the evidence in the Quantum hearing and in the 2012 trial, so that it would be pointless to set aside the Liability judgment, he was testing the proposition that there was, in January 2010, no compelling reason to have had a liability trial. That was a legitimate approach. (7) Even if the Liability judgment (and order on appeal) were to be set aside, it does not follow that the Quantum judgment must be so. That was not procured by fraud.

99. **The Anti-suit injunction. RBS' arguments:** Mr Nicholls' argument concentrated on the sole reason that the judge refused to grant the anti-suit injunction, viz. that RBS came to court with "unclean hands". He submitted: (1) the judge identified the correct test, viz. a party's "misconduct" must have an "immediate and necessary relationship to the equity sued for" but he misapplied that test. (2) There was an insufficient relationship between the misconduct of SG and the claim for an anti-suit injunction based upon the exclusive jurisdiction clause in the FLD. (3) The fact that RBS attempted, in the 2012 trial, to establish that the facts that had been found by the judge in the Quantum judgment as to SG's dishonesty were incorrect does not provide the "immediate and necessary" relationship needed and the judge gave no cogent reasons for finding that there was such a relationship. (4) There was no

[92] Mr Nicholls pointed out that, by the time that the Liability judgment was before the Court of Appeal, Highland had pleaded its Quantum case making allegations of wrongdoing against RBS, but Highland did not attempt to introduce those into the argument on the Liability judgment appeal.
[93] As reproduced in Appendix One below.

connection whatever between the misconduct of SG and the jurisdiction clause in the FLD. (5) The judge misunderstood the role of SG in the 2012 trial and was wrong to attribute SG's misconduct to RBS for the purposes of deciding whether RBS had "clean hands" or not. SG gave evidence in the 2012 trial as to his, personal, state of mind. His evidence and any misconduct by SG in the 2012 trial was not to be attributed to RBS as RBS' state of mind.

100. **The anti-suit injunction. Highland's arguments:** Mr Stephen Auld QC presented the arguments for Highland. He submitted: (1) the actions and statements of SG were at the centre of the litigation between RBS and Highland and SG's evidence was central at all three trials. The judge found (at [188] of the May 2012 judgment) that RBS, through SG, had been guilty of "improper conduct" that was "serious" up to and including the last hearing. That finding could not be impugned. (2) For there to be "unclean hands" the improper conduct does not have to be directly related to the jurisdiction clause itself. But there was sufficient of a relationship between SG's conduct and the claim for an anti-suit injunction to entitle the judge to refuse the relief sought. (3) On "attribution", the judge's findings at [104] cannot be faulted. The judge was correct to find, at [191] that RBS needed to call SG in the 2012 trial to rebut the case put forward by Highland and Scott Law that RBS had "unclean hands".

101. Mr Auld tentatively advanced the argument that the anti-suit injunction should also be refused because there were matters that could be investigated in the Texas proceedings which were not investigated properly in the English proceedings because of the suppression of facts by SG. This argument did not feature before the judge and, in my view, cannot now be raised. It would need evidence and fact findings by the judge, which we do not have. So I will not refer further to that argument.

102. **Anti-suit injunction. Scott Law's arguments:** Mr Graham Dunning QC, for Scott Law, submitted: (1) the test is whether there is a sufficiently close connection between the unconscionable conduct and the relief claimed, not between the unconscionable conduct and the relevant contractual right. The judge's approach at [179]-[180] was correct. (2) It is accepted (assuming that the jurisdiction clause in the FLD applies) that proceeding in the Texas court will be a breach of contract by Highland and Scott Law (as assignee) would be bound by the clause. But the anti-suit injunction can still be refused if there is misconduct in the way in which relief is sought, such as misleading the court: ***Armstrong v Sheppard & Short Ltd;***[94] ***Gee on Commercial Injunctions.***[95] (3) The object of SG's 7th witness statement (used in the 2012 trial) was to persuade the court not to make findings of misconduct as alleged against RBS in Scott Law's defence, para 122. Therefore, SG's evidence in the 2012 trial was in support of RBS' applications in both the 2009 and 2011 actions. (4) As for clause 13 of the FLD: (a) it was not an exclusive jurisdiction clause; (b) in any event it did not prevent Highland/Scott Law from suing SG and Mr Hall in Texas;[96] (c) it was insufficiently broad in scope to cover the allegations made in Counts 2 and 3 of the Texas Petition; (d) it covered matters "in connection with" the FLD but not "in connection" with breaches concerning clauses in the ISD. (5) The

[94] ***[1959] 2 QB 384 at 397, per Lord Evershed MR.***
[95] (2004) at 64-65.
[96] Mr Dunning relied particularly on the judgment of Rix J in ***Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd [1999] 1 Lloyd's Rep 767 at 777 (RHS).***

judge should have found that Mr Hall was also guilty of misconduct and that was another reason for refusing the injunction.

IX. The issues to be decided.

103. I agree with the judge that Highland's claim to set aside the Liability judgment for fraud must be dealt with first. If there is no Liability judgment because of RBS' fraud, that could be a major factor in deciding whether there should be an anti-suit injunction at two points. First, it would undermine the RBS argument that Highland is trying to re-litigate issues decided in the English court. Secondly, it might be relevant to an argument that there is a "strong reason" why an injunction should not be given, quite apart from any additional force such a finding might give to the "unclean hands" argument of Highland.

104. On the claim to set aside the Liability judgment, I think the following issues have to be decided: (1) what is the correct characterisation of "The Suppressed Fact": was it a fraudulent misstatement by SG or was it a fraudulent concealment? (2) Was the judge correct to conclude that SG's failure to disclose "The Suppressed Fact" at the time of the Liability hearing was not dishonest? (3) Was the judge correct to conclude that, even if SG's actions had been deliberate and dishonest, there was no causative link between his actions and the Liability judgment in favour of RBS? (4) What is the effect of the judge's conclusion that it would be pointless to set aside the Liability judgment because, if the case were retried, the same result would follow in relation to both liability and quantum?[97]

105. On the claim for an anti-suit injunction, the following issues arise: (1) Did the judge err in concluding that there was a sufficient "immediate and necessary" relation between the misconduct of SG and the claim of RBS for equitable relief in the form of the anti-suit injunction so that RBS was to be denied it under the "unclean hands" doctrine? (2) If the judge did err in that respect, then ought RBS to be denied the relief sought on the grounds that (a) clause 13 of the FLD did not extend to Counts 2 and 3 in the Texas Proceedings, or (b) was not an exclusive jurisdiction clause or did not protect SG and Mr Hall in their personal capacities? Alternatively, even if the judge was correct on (a) and (b), did the judge err in finding Mr Hall was not guilty of misconduct and so did fail to take that misconduct into account?

X. Should the Liability judgment be set aside for fraud?

106. **The legal framework:** There was no dispute between counsel before us on the legal principles to be applied if one party alleges that a judgment must be set aside because it was obtained by the fraud of another party. The principles are, briefly: first, there has to be a "conscious and deliberate dishonesty" in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned.[98] Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be "material". "Material" means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant

[97] [128] May.
[98] ***Ampthill Peerage case [19771] AC 547*** at ***571B*** per Lord Wilberforce; to the same effect, at ***591B*** per Lord Simon of Glaisdale. This case did not involve a judgment but a declaration of legitimacy under the Legitimacy Declarations Act 1858 but the principle is the same.

evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did.[99] Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision.[100] Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence.[101]

107. **What is the correct characterisation of "The Suppressed Fact"?** In considering this issue I am fully conscious of the fact that Highland is making an allegation of fraud against SG (and Scott Law is also making one against Mr Hall). There is one civil standard of proof and that is the balance of probabilities. If, on that standard, a court finds that an event and state of mind of someone is proved, then that is the case. This is what Lord Hoffmann called a "binary system": the fact is either proved or it is not. But the inherent probabilities may be taken into account where relevant in deciding whether a fact or state of mind is proved.[102]

108. I also appreciate that the judge's conclusions, both in relation to the characterisation of "The Suppressed Fact" and whether SG was dishonest in concealing "The Suppressed Fact" at the time of the Liability hearing, are conclusions based on a mass of documentary and oral evidence which the judge considered in detail over two extended trials in which SG was extensively cross-examined by leading counsel. Although the Court of Appeal has the power to draw any inference of fact which it considers is justified on the evidence,[103] many cases in this court have emphasised that this court will not interfere with findings of primary fact based on the oral evidence of witnesses unless the appellant establishes that the trial judge was plainly wrong in his assessment and his findings. Where the challenge is not to findings of primary fact but to a judge's overall assessment of the effect of those findings, this court has also stated in a number of cases that although it has greater latitude to reconsider the judge's evaluation, it must still take particular care before deciding that it can safely interfere with the judge's assessment. I have approached all the issues in the appeal and cross-appeal that concern evidence and the judge's conclusions on the facts with these constraints very much in mind.

109. It is clear from the judge's findings of fact in both the Quantum judgment (summarised at [40] above) and the May 2012 judgment (summarised at [57]-[69] above) that SG always knew: (i) the principal reason for determining the Mandate Letter and the ISD *on 30 October 2008* (my emphasis)[104] was to enable RBS to take

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[99] ***Tuvyuhu v Swigi (QB. unrep. 26 October 1998)*** per Laws J at page 5 of the transcript.
[100] ***Sphere Drake Insurance Plc v The Orion Insurance Co Plc (Com Ct. unrep 11 February 1999)*** at [119] per Langley J.
[101] ***Kuwait Airways Corporation v Iraqi Airways Corporation ("Perjury II") [2005] EWHC 2524 (Comm)*** at [198]-[199] per David Steel J.
[102] See: ***In re B(Children) (Care Proceedings: standard of proof) [2009] AC 11*** at [2]-[3] per Lord Hoffmann and at [70] per Baroness Hale of Richmond, with whom the other law lords agreed.
[103] ***CPR Pt 52.11(4).***
[104] This reflects Burton J's conclusion at [45] May where he accepted that "*the motivation"* for the termination, by which he must have meant the *sole* motivation, was not the transfer, but he also concluded that the deadline of 31 October for amended IAS/39 "*dictated"* (the judge's word) the actual timing of the termination.

advantage of amended IAS/39 to transfer the 36 Loans (at least) from its trading book to its banking book and claim the "profit"; (ii) the 36 Loans were transferred to RBS' banking book on 31 October for that purpose; (iii) the 36 Loans were never available for sale to third parties in the BWIC, which was a "sham-auction" so that (iv) the email to Highland of 6 November 2008 was false and deliberately misleading, in particular paragraph 5 of it which had said that each Acquired Loan would be sold "to the highest bidder".[105] SG had drafted the 5 November Memo and knew the true position at all times because he had not "forgotten".[106] The judge also found, at [30] and [45]-[46] of the Quantum judgment that RBS should have disclosed to Highland what RBS wished to do with the 36 Loans in order to make the sale procedure "commercially reasonable" and to accord with RBS' duties as a mortgagee. He further found that RBS *knew* (my emphasis) at the time and thereafter that it should have disclosed these matters to Highland.[107] The judge expressly found that this concealment by RBS of what had happened to the 36 Loans (and so the failure to afford Highland the opportunity to attempt a mutual agreement on the process for arriving at a market value) was deliberate.[108]

110. Based on these findings, to my mind, RBS, through SG, did more than suppress facts. I start with the email of 6 November 2008. By deliberately suppressing the true facts, this email was positively misleading to Highland about the process being adopted by RBS. It was deliberately misleading, as the judge found in his Quantum judgment and at [115(ii)] of the May 2012 judgment. Mr Richardson also appeared to acknowledge this in his report of investigation for RBS prior to SG's disciplinary hearing, (see [43] above), because SG did not want Highland to know what RBS was doing and why. This analysis is further supported by the judge's finding, at [96] of the May 2012 judgment, that SG had an anxiety not to disclose "The Suppressed Fact" either to HS 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…".[109] Thus a positive but misleading impression had deliberately to be given. The nature of the deliberate positive misstatement is also borne out by what SG said to Mr Watkins in the telephone conversation at 09.34 on 6 November 2008 (the so-called "Shakespearean conversation") viz. "…the BWIC *has to look authentic* but it is effectively a pricing exercise…".[110]

111. SG was acting for RBS at the time of the 6 November email and at all times up to the conclusion of the Liability hearing. The judge found that his acts and his knowledge must be imputed to RBS at that stage and, for the purposes of this part of the case, there is no appeal from that finding.

112. If, as I would hold on the judge's findings, the 6 November email was a deliberate misstatement by SG (and so RBS) to Highland, then the next question is: what is the

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[105] See: [59], [62], [67], [69], [70] May.
[106] [92] and [99] May.
[107] See in particular Burton J's conclusion at [46(v)(d)] QJ.
[108] [46](iii) QJ.
[109] Although the judge also found, at [61] that had "there been compliance with RBS' obligation and a full disclosure with regard to the 36 [Loans]" there would have been a compromise on the market price to be attributed to them at one point over the 15 October 2008 RBS mark". Effectively, there would not have been any litigation over them, nor, presumably, the remaining 52.
[110] [51(i)] May. My emphasis.

characterisation of the actions or inactions of SG thereafter and up to the time of the Liability judgment? First, neither SG nor anyone else at RBS ever corrected the deliberately misleading statement made in the 6 November 2008 email. The deliberate misstatement was re-iterated in the email of 26 March 2009, which gave no hint of what had actually happened with regards to the 36 Loans. Secondly, in paragraphs 20 and 21 of the Particulars of Claim of 11 May 2009, served on behalf of RBS, the false position set out in the 6 November email was not corrected.

113. Thirdly, as the judge noted, after the summary judgment application had been issued on 28 October 2009, HS gave advice in a telephone conference to RBS on 18 November 2009 to which SG was a party. This conference took place after Highland's lawyers had sent HS a letter dated 12 November 2009 indicating that Highland intended to attack the process by which, Highland's lawyers said, "…the Loans were not sold to anyone – they were simply appropriated by [RBS]". The 12 November letter sought disclosure by RBS of all correspondence and documents relating to the whole process concerning the disposal/appropriation of the Loans. Category (g) sought "all documents showing how [RBS] reached its own internal marks for the Loans…".

114. There are two attendance notes of this telephone conference. In one SG is recorded as asking "what have we learnt from the letter?" It is in this context that Mr Johnson of HS, then in ignorance of amended IAS/39 and what RBS had done with the 36 Loans on 31 October 2008 or the true nature of the BWIC, or that RBS had deliberately misled Highland in the 6 November email, advised that this letter indicated that Highland's line of attack would be on the reasonableness of the valuation method. As the judge records, HS advised that if quantum matters were addressed at that stage they might "muddy the waters" and affect the timing of the summary judgment application.[111] That was a prescient comment. In the second of the two HS attendance notes SG is recorded as stating that he was insistent that he did not want to "open up debate on internal processes; issue of confidentiality". It also records that SG "…doesn't want to get into protracted discussion of quantum". SG is recorded as commenting that the disclosure in category (g) would not be voluminous. But SG did not say what, in fact, that disclosure would reveal, viz. that the 36 Loans had deliberately been reallocated to RBS' banking book on 31 October 2008 at 30 June market values.

115. There is no suggestion in the findings of the judge that those attendance notes are unreliable and I take them to be an accurate reflection of SG's views and statements at the time. They strongly support the judge's finding that SG was anxious not to disclose "The Suppressed Fact". At [46(v)(d)] of the Quantum judgment, Burton J went further. He spoke of "the continued deception" of Highland by RBS "…which continued in correspondence and right through to the incorrect and disingenuous witness statement of [SG]…". I therefore think that, given these conclusions of the judge, the attendance note entries are very important in ascertaining SG's state of mind at that stage, an issue which I consider below.

116. Fourthly, the judge found that around 22-24 November 2009, SG sent to HS copies of many further emails concerning the disposal of the Loans, but stated, in a covering email of 24 November 2009 to HS that "…there is quite a lot of evidence

[111] [72] May.

that the portfolio disposal process was real and carried out properly…".[112] Given the judge's findings on SG's conscious and deliberate failure to disclose to Highland what was going on in October/November 2008,[113] his finding at [46(v)(d)] of the Quantum judgment on "continuing deception" and his further finding (at [99] of the May 2012 judgment) that SG did not forget that the 36 Loans had been transferred to RBS' banking book on 31 October 2008, the failure of SG to tell HS the full story on 18 November and in the email of 24 November 2008 must, in my view, be seen as deliberate decisions by SG to keep HS in ignorance of the true position and mislead HS. In both the Quantum and the May 2012 judgments the judge effectively found that SG knew that the disposal process of the 36 Loans was neither "real" nor "carried out properly".

117. Fifthly, on 9 December 2009, Highland served on HS the first witness statement of Mr Philip Braner in opposition to the application for summary judgment on liability. Mr Braner was a Chief Operating Officer of HFP and is a director of Highland Capital Management. Under the heading "the windfall benefit which could accrue to [RBS] by virtue of its actions" (ie. in terminating the Mandate Letter and the ISD), Mr Braner described the process for the sale of the Loans as "murky" and said that it seemed that RBS had "appropriated the Loans…and retained practically all of the Loans on its own books ever since".[114] Mr Braner also made the point (at paragraph 67) that:

> "…RBS would have appreciated, when it purported to terminate the Mandate Letter and appropriated the Loans (without paying the Issuer for them) that if they held onto the Loans they were a lot more valuable than any bids [RBS] could solicit at the time…"

This shows that Highland were on to the point that there might be something irregular about the clause 4.2 procedure, but it did not know what. Moreover, Highland had not got the discovery that they had sought by their 12 November letter.

118. Sixthly, the judge records, at [74] of the May 2012 judgment, that at a conference between Mr Johnson of HS and SG and Mr Hall on 15 December, HS was told, for the first time, about amended IAS/39, the use of the 30 June 2008 mark and the use of the word "windfall" by RBS to describe the benefit to RBS of the reassignment of the 36 Loans, but there was no mention of what had occurred on 31 October 2008. An attendance note recorded Mr Johnson as advising: "no further evidence needed to be introduced; more evidence dangerous – convince court matter of construction".[115] It is after this conference that HS sent a long letter dated 15 December in response to Highland's lawyers' letter of 12 November and rejected the allegation that clause 4.2 had not been properly followed.

119. SG then served a second witness statement in support of the Part 24 application on 23 December 2009. This dealt with Highland's lawyers' letter of 12 November and HS' 15 December response. Paragraph 23 said:

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[112] [73] May.
[113] [46] QJ *passim.*
[114] Para 64.
[115] [74] May.

> "Shortly stated, it is inaccurate to talk about RBS realising a "*windfall*". First, the acquisition of Loans by RBS in a liquidation of the warehouse is expressly envisaged by clause 4.2 of the [ISD]. Where RBS acquired Loans under clause 4.2 it assumed the potential for gain and the risk of loss just as third party purchasers of the Loans did and just as anyone does when they acquire an asset of this type. Second, RBS was entitled to buy Loans in the liquidation *and to* recover against HCC and CDO Fund under clause 5.6 for any shortfall – they are not alternatives. If RBS acquires Loans under clause 4.2 at market value and recovers against HCC and CDO Fund for the shortfall under clause 5.6 as it is entitled to do, it is not realising a "*windfall"* or acting improperly – it is exercising its contractual entitlement."[116]

There is a statement of truth at the end of the witness statement.

120. Recalling the judge's findings of RBS' "continuing deception" and that SG had not forgotten what had happened in relation to the 36 Loans, I must characterise that paragraph as thoroughly misleading. It does not refer to amended IAS/39 or the reason for the transfer of the 36 Loans. It dismisses the notion of a "windfall" although that is the phrase that had been used in conference with HS. In my judgment this paragraph can only be described as a conscious and deliberate misstatement by SG of what had happened in relation to the 36 Loans. It was doubtless drafted for SG by HS, but they were still ignorant of the full picture at that stage. The paragraph must have misled both Highland and the court at the Liability hearing as to what had gone on.

121. As Lord Simon of Glaisdale said in ***The Ampthill Peerage case,*** "no doubt suppression of the truth may sometimes amount to suggestion of the false".[117] That, in my judgment, is precisely what happened here. The court, and indeed HS, were put under the impression, as reflected in paragraph 21 of RBS' Particulars of Claim and by the evidence of SG in his witness statements, that the 36 Loans had been part of the BWIC and that it had been operated within the context of clause 4.2 of the ISD, even if there were to be arguments on quantum as to whether what RBS had done, in operating clause 4.2, was "commercially reasonable". What was not contemplated at that time, but what is now known is the fact that RBS had not operated clause 4.2 at all in relation to the 36 Loans; the transfer to RBS' banking book on 31 October with the result that the 36 Loans were never available for sale in the BWIC to Highland or any third party was quite outside the terms of clause 4.2.

122. Accordingly, in my view, there was more than simple concealment of "The Suppressed Fact". The evidence and the findings of the judge overall lead to the inevitable conclusion that, at the time of the Liability hearing and judgment SG was continuing positively to mislead both Highland and the court as to what had happened in relation to the 36 Loans and was doing so consciously and deliberately. For these

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[116] Emphasis as in the original.
[117] ***[1977] 1 AC 547 at 577***

purposes, there can be no argument that the acts of SG must be attributed to RBS, so there was a positive misstatement by RBS of the true position.[118]

123. **Was the judge correct to conclude that SG's failure to disclose "The Suppressed Fact" at the time of the Liability hearing was not dishonest?**

It will be recalled that the judge dealt with this issue at two points in the May 2012 judgment. The first is at [115 (ii)]. I have found the second half of this paragraph somewhat difficult to follow. The judge first states, at line 8 of that paragraph that "*I have found"*[119] that SG had deliberately concealed "The Suppressed Fact". Then in lines 13-15 the judge says that, because HS had advised that evidence relating to quantum did not need to be disclosed to Highland and that SG believed that "The Suppressed Fact" related to quantum, therefore the test for the judge was whether it was proved that SG's "*failure to disclose The Suppressed Fact"* was (both) deliberate and dishonest. There can be no doubt, given the judge's earlier finding, that the failure to disclose was deliberate. So I think the judge meant to say that he needed to be satisfied, in addition, that this deliberate concealment was, in the circumstances, *dishonest.*

124. The second passage where the judge deals with the point is at [129]. There the judge concluded that he was not persuaded that Highland had demonstrated that there was *dishonest* concealment by SG of "The Suppressed Fact" which he knew ought to have been revealed. This was, the judge found, because SG was advised by HS and SG "knew or believed" that information relating to quantum did not need to be disclosed. The judge does not elaborate on the basis for this finding of fact at that point but I assume that it is based on his findings about the conferences with HS. The judge therefore finds that, although SG should have told HS the true position and left them to decide what to disclose, "…I do not conclude that [SG] was deliberately and dishonestly concealing the information at <u>that</u> stage…". This conclusion is apparently at odds with that in [115(ii)] where the judge had concluded that SG *had deliberately* concealed "The Suppressed Fact" (my emphasis). Presumably the judge meant to say in [129] that, although he was satisfied that SG had *deliberately* concealed "The Suppressed Fact", he was not satisfied that SG had also done so *dishonestly.*

125. It is implicit in the way the judge phrased [115(ii)] and [129] of the May 2012 judgment that if he had found that the deliberate concealment of "The Suppressed Fact" at the time of the Liability hearing constituted a positive misstatement by SG (and so RBS) then he would have found that the misstatement was dishonest. From all the other findings that the judge made in both the Quantum judgment and the May 2012 judgment, it is clear that the judge had concluded that SG knew the true facts at all times and he lied (at both the Quantum trial and the 2012 trial) when asserting he did not. If "The Suppressed Fact" constituted a continuing misstatement to both Highland and the Court at the time of the Liability hearing, it must have been both deliberate and dishonest, because, on the judge's findings, SG could not at any time have had "an honest belief in the truth of the statement at the time he first made it" [120]

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[118] Cf the judge's finding at [104] May that SG was RBS' "mouthpiece".
[119] My emphasis.
[120] ***Clerk & Lindsell on Torts (20th Ed) at 18-21 to 18-24.***

(6 November 2008) or thereafter in various emails to HS or witness statements to the court.

126. But, if I am wrong about that characterisation and the deliberately concealed "Suppressed Fact" did not amount to a continuing positive misstatement, the question is whether SG acted dishonestly in deliberately concealing "The Suppressed Fact". To my mind it would be odd to conclude that the deliberate concealment of "The Suppressed Fact" was an honest act by SG simply because he was advised that quantum issues need not be disclosed, in circumstances where he knew the truth so he must have known that the impression given by the story told in paragraphs 21 and 22 of the Particulars of Claim and the story told in paragraph 23 of SG's second witness statement quoted above was a false one.

127. The only reason the judge found that the concealment by SG was not dishonest was because SG "knew or believed and had been advised" in general terms that "information relating to quantum" did not need to be disclosed. However, HS' advice about what needed to be disclosed could only be based on what they had been told by SG and others in RBS. At no time before the Liability hearing had HS been told the full facts; they had been deliberately concealed by SG who knew the full facts. But I have reluctantly decided that all the evidence points to the conclusion that HS' advice on disclosure, based on incomplete facts, was a convenient excuse for SG to delay telling the full story. In my judgment the evidence and the findings of the judge all leads to the inevitable conclusion that SG dishonestly allowed the misrepresented position to be understood as the true position. At the least, he deliberately and dishonestly concealed "The Suppressed Fact" from HS and the court at the time of the Liability hearing because he knew it would open up the whole question of how and why the 36 Loans had been transferred; would lead Highland to demand it be credited with the 30 June 2008 value for the 36 Loans and would completely scupper any chance of settling the case on reasonable terms.

128. I arrive at this conclusion from the following facts: first, the judge found that SG and so RBS deliberately misled Highland as to the true position by the 6 November email.[121] Secondly, it is clear from the attendance notes of the telephone conference of 18 November that it was SG who did not want to "open up debates on internal processes". Thirdly, the judge found that RBS (which must include SG) knew it should have disclosed to Highland[122] the true position, which SG had never forgotten.[123] SG "had an anxiety not to disclose" "The Suppressed Fact" because he knew Highland would argue that the 30 June prices/values should be taken as the *market* value of the 36 Loans for the purposes of clause 4.2 of the ISD.[124] Fourthly, the judge concluded that at all times *after* the Liability hearing and up to the Quantum trial, SG deliberately *and dishonestly* concealed "The Suppressed Fact".[125] But SG's reason for doing so then was the same as before the Liability hearing: fear that it would give Highland more arguments to defeat or reduce RBS' claim to recover a shortfall. Fifthly, the judge found, both in the Quantum judgment and in the May 2012 judgment, that SG had lied in two trials (under oath) about what he knew and

[121] [59], [62], [66], [67], [69], [70] May.
[122] [46] QJ
[123] [92] and [99] May.
[124] [96] May.
[125] [129] May.

what his motives were in relation to the 36 Loans. Therefore, in my judgment, no weight can be placed on any statement of SG[126] that he did not disclose "The Suppressed Fact" (even to HS) because he was advised that matters going to quantum did not need to be disclosed. He deliberately kept HS in the dark about the true facts and, indeed, was anxious not to get into any "quantum" issues.

129. Mr Nicholls emphasised, first, that the judge had seen SG being cross-examined in the witness box for 3 days and had been immersed in all the disclosure (including privileged material) at the 2012 trial, but he had still concluded that SG was not dishonest in concealing "The Suppressed Fact", which he knew ought to have been revealed. That is true, but the judge was damning about SG's evidence otherwise and he found that he had lied both at the Quantum trial and in the May 2012 trial, particularly about his state of knowledge concerning the fate of the 36 Loans.

130. Mr Nicholls also pointed out that SG was not cross-examined on his evidence about paragraph 6 of his first witness statement in support of the summary judgment application.[127] That does not go very far. SG said in his seventh witness statement[128] that the paragraph was drafted by HS and he did not recall considering the paragraph "in any great detail". If he did not, then there would be no point in cross-examining SG on the basis of what he might have thought if he had carefully considered the paragraph. The fact is that the paragraph was drafted by HS in ignorance of "The Suppressed Fact". It is obvious that HS would not have drafted it as they did had they known the true position.

131. Mr Nicholls further submitted that no suggestion was put to RBS' witnesses in the 2012 trial that if "The Suppressed Fact" had been revealed then RBS would not have applied for summary judgment. There would have been no point in putting the question. SG and Mr Hall would doubtless have said they would have followed HS' advice. RBS did not call any HS witnesses in the 2012 trial. If they had been called and if they had been asked whether HS would have advised making a summary judgment application if RBS had told HS the full story including "The Suppressed Fact", the answer, to my mind, is obvious. HS would have advised either not to make it at all or that if an application was made then there would have to be full disclosure of what had actually happened to the 36 Loans and the fact that the BWIC was not an authentic auction as SG had by then admitted. In either case, in my judgment, there would have been no summary judgment on liability. I elaborate on this below under the heading of "Causation".

132. Mr Strong submitted that when a summary judgment application is made under ***Part 24,*** the integrity of the procedure depends upon the truth of the statement of an applicant that he (or it) "knows of no other reason why the disposal of the claim or issue [to which the application relates] should await trial": see the practice direction at ***CPR Pt 24 PD2(3).*** It was therefore important, as a matter of policy, to ensure that this requirement is fully and correctly observed, otherwise there may be miscarriages of justice. I agree with that proposition, but it does not advance the argument. Either there was a deliberate and dishonest misstatement or concealment or there was

[126] Eg para 204 of his 7th witness statement.
[127] Viz. that he believed that Highland did not have any real prospect of defending RBS' claim on liability and there was no other reason to have a trial on liability.
[128] [204], for use in the 2012 trial.

not. If there was, the breach of the obligation under ***CPR Pt 24 PD 2(3)*** adds nothing. If there was not, then there was no breach of that practice direction.

133. **Causation: is it demonstrated that the deliberate and conscious misstatement/concealment was an operative cause of the court's decision to give summary judgment to RBS? Alternatively, is it shown that the fresh evidence would have entirely changed the way in which the first court would have approached and come to its decision?**

Highland relied again before us on the two specific "defences" of repudiation and "no Final Realisation Date" which, Mr Strong argued, could successfully have been advanced by Highland to defeat the summary judgment application. I am inclined to agree with the judge that those two defences would not, in themselves, have succeeded in defeating the summary judgment application, on the assumption that "The Suppressed Fact" had been fully revealed by then.

134. In my view, there is no need to analyse those points in any detail because there are stronger reasons for considering that the deliberate, and conscious and dishonest misstatement/concealment by SG was an operative cause of the court's decision to give summary judgment to RBS. If RBS had revealed that, contrary to the impression given in the 6 November 2008 email, before the BWIC the 36 Loans had been transferred from its trading book to its banking book at 30 June prices and a "profit" crystallised in order to take advantage of amended IAS/39, so that the 36 Loans were not for sale at all, I conclude that RBS would not have applied for summary judgment on liability at all.

135. I base this conclusion on three points. First, the judge made findings at [59] to [77] of his Quantum judgment as to what would have been likely to have happened had "The Suppressed Fact" been revealed when the Mandate Letter and ISD were terminated. In short, there would have been a compromise.

136. Secondly, if the dishonest misstatement had been persisted in at that stage, but then revealed after the litigation had been started, the judge has found, effectively, that Highland would inevitably have argued that the 30 June value should have been taken as the market value of the 36 Loans for the purposes of clause 4.2 of the ISD.[129] I suspect that Highland would have gone further and alleged that there had been a deliberate and dishonest positive misstatement by RBS in the email of 6 November, which had been continued by the email of 26 March 2009, so that RBS was acting in breach of its contractual duty under clause 4.2 and its equitable duty as a mortgagee, as the judge found at [46(v)(d)] of the Quantum judgment.

137. It must be assumed for these purposes that, soon after the litigation started, HS would have been aware of the full story. I find it impossible to believe that, in those circumstances, HS could have advised RBS to make an application for summary judgment on liability in the form that was actually advanced, ie. leaving aside any disputed issues relating to the commercial reasonableness of RBS' valuation for the purposes of clause 4.2(a) and/or any disputed issues as to the quantum of Highland's liability. It would have been obvious to HS that issues concerning the deliberate concealment of "The Suppressed Fact" in November 2008 and March 2009 would

[129] [96] May.

form the centre of an attack by Highland on whether there was any liability to RBS at all. Equally, if "The Suppressed Fact" had been revealed by the time of a potential application for summary judgment, I cannot imagine that HS could have advised SG that he would be able to state truthfully in a witness statement that he believed that there was not a defence on liability and he knew of no other reason why the disposal of the claim (on liability) should await trial.

138. Thirdly, even if SG had felt able truthfully to sign such a witness statement, it would not have stopped Highland from arguing that, in respect of the 36 Loans, RBS had affected a sale to itself for the purposes of clause 4.2 of the ISD, so that RBS must account to Highland at the value at which RBS made the transfer, ie. the 30 June value. Furthermore, in relation to the 52 other loans, Highland would have argued that a value ought to be given to them such that, overall, either nothing was due from Highland to RBS or, even, that RBS had to account to Highland for sums. Those are precisely the arguments that have been said to have a reasonable prospect of success in the Quantum appeal, as is demonstrated by the fact that Sir Richard Buxton gave permission on paper to appeal the Quantum judgment in respect of the argument concerning the 36 Loans. [130] Moreover, Ward LJ gave permission to appeal in relation to the value to be attributed to the 52 loans after an oral hearing on 16 March 2011. To my mind, anticipation of those arguments together would have been likely to deter RBS from obtaining summary judgment on liability in the form sought. That would have been the right reaction. It is unlikely that a court would have granted summary judgment in that form in a case of this kind against such a murky factual background.

139. Therefore, it seems to me, there is ample material on which to conclude that, but for the deliberate, conscious and dishonest suppression of "The Suppressed Fact" up to and including the Liability hearing, the probability is that there would have been no summary judgment on Liability in favour of RBS because none would have been applied for.

140. **What is the effect of the judge's conclusion (at [128] of the May 2012 judgment) that it would be pointless to set aside the Liability judgment because, if the case were retried, the same result would follow in relation to both liability and quantum?**

Mr Nicholls submitted that Burton J was testing, with the benefit of hindsight, whether, at the time of the summary judgment hearing, there was in fact a compelling reason why the issue of liability should be disposed of at a trial and the judge rightly concluded that, given what happened subsequently, there was no other compelling reason to have had a trial. This was, in his submission, a legitimate exercise and demonstrated that, even assuming that there was a deliberate, conscious and dishonest misstatement or concealment on behalf of RBS, it did not operate on the liability judgment.

141. I cannot accept this argument. In my view it is necessary to concentrate on the only judgment that is said to be impeachable by virtue of a fraud by RBS, viz. the Liability judgment. If, as I have concluded, the revelation of RBS' misconduct in the way it dealt with the 36 Loans and conducted the sham-auction would entirely have changed

[130] 4 February 2011.

the basis on which RBS might have applied for summary judgment, then, logically, the Liability judgment has to be set aside. The fact that, subsequently, the judge was able to conduct the Quantum trial on proper (although not full) evidence and reach certain conclusions on the effect of what he subsequently called "The Suppressed Fact" in terms of the parties' respective liabilities is not to the point for three reasons. First, I agree with the analysis of Langley J in ***Sphere Drake Insurance Plc v The Orion Insurance Co Plc***[131] at page 174-175 that the materiality of the fresh evidence, or the new facts, relates to whether the original judgment is thereby impugned. It is not for the judge considering this issue to re-try the question of the liability of the parties or to see whether the fresh evidence or new facts is material to the final result in the sense of what the decision might be if the matter were to be retried with honest evidence.[132] So the fact that it "all came out in the wash" subsequently in the Quantum trial is not relevant.[133] Secondly, it seems wrong in principle to permit a party to keep the fruits of a judgment that has been found to have been obtained by fraud; it would be profiting from its own wrong. Thirdly, the judge found in the Quantum judgment that if there had been full disclosure then there would have been agreement on the market values of the 36 and 52 loans.[134] In the May 2012 judgment he found that SG had hoped, indeed anticipated that the case would settle between the Liability judgment and the Quantum hearing.[135] The inference must be that if the full facts had been apparent before the Liability hearing, the whole claim would have been compromised, probably less advantageously to RBS than the terms of the Quantum judgment. It would be unjust now to permit RBS to have the fruits of the Quantum judgment, even though obtained on the full facts, if it would not have had that advantage if the full facts had been revealed when they should have been.

142. This analysis leads to the conclusion that the Liability judgment of Burton J must be set aside as having been obtained by the fraud of RBS.

143. **What of Scott Law's arguments concerning Mr Hall's role in relation to the 6 November email to Highland?** My conclusion above makes it unnecessary to consider in detail Mr Dunning's submissions on Mr Hall. I have re-read those written submissions and my note of the oral submissions carefully and I have re-examined the materials to which we were referred on this issue. The key difference between SG and Mr Hall is that, in the case of the former, the judge found that he lied in relation to several witness statements and on oath at two trials, but, in relation to the latter, the judge found that he had not lied in evidence in the May 2012 trial. The judge concluded that Mr Hall ought to have made it plain in the 6 November email that RBS was to have the opportunity to purchase any of the Acquired Loans by matching the highest bid placed by a third party in the BWIC, but he failed to do so. But the judge believed Mr Hall's evidence in cross-examination that he did not know about any specific plans that RBS had (as at 5/6 November) to buy any particular Loans, so that the BWIC must have been a sham in relation to the 36 Loans. That conclusion is consistent with the other evidence of Mr Hall and is not inconsistent with any documentary evidence that Mr Dunning relied on. Therefore I have concluded that the judge was entitled to find that Mr Hall did not know, when he

[131] 11 February 1999 (unrep)
[132] See also the judgment of David Steel J in ***"Perjury II" at [198].***
[133] Although, even then, the judge did not have the full facts.
[134] See [59] – [77] QJ
[135] [96]. See also [184].

drafted the 6 November email, that RBS had already decided to transfer the 36 Loans "willy-nilly" and "that no third party was going to get a look in", so that the BWIC was a flawed or sham exercise in relation to the 36 Loans.[136]

144. **What is the consequence of this conclusion on the judgment of the Court of Appeal on liability and on the Quantum judgment?**

I think it must follow from my conclusions above that the Court of Appeal judgment on liability must also be set aside. It is not alleged that the Quantum judgment of Burton J can be impugned for fraud. We were told that the parties had agreed before Burton J that if the liability judgment was to be set aside then the necessary consequence was that the Quantum judgment must be so also, but that the matter had not been argued out before the judge.

145. If there is no liability judgment, it would be bizarre to retain a judgment on quantum which assumes a liability which is no longer established. The issue was only lightly touched on in argument before us. However, for the reasons I have set out in [141] above, it seems to me that, as a matter of principle, it would be wrong to permit RBS to retain the value of a Quantum judgment that has been obtained in the manner it was. Accordingly, I have concluded that the Quantum judgment must also be set aside.

XI. RBS' appeal against the refusal of the judge to grant the Anti-Suit Injunction relief to RBS.

146. If I am right in concluding that the Liability judgment must be set aside for the fraud of RBS, that fact may well have an impact on the exercise of the judgment of the court on whether to grant an anti-suit injunction. However, in case Maurice Kay and Toulson LJJ disagree with that conclusion, I am going to approach RBS' appeal on the anti-suit injunction issue on the same basis as the judge did, viz. that the Liability judgment stands.

147. Mr Nicholls advanced two arguments. The first was that there was an insufficiently "immediate and necessary" relation between the misconduct of SG, as found by the judge, and the claim by RBS for equitable relief in the form of an anti-suit injunction, so that the judge was wrong to conclude that the relief should be refused because RBS had "unclean hands." The second was that any misconduct of SG could not legally be attributed to RBS, so that RBS itself could not be said to have "unclean hands". Logically, the second argument comes first. If none of SG's misconduct is legally attributable to RBS then there is no need to consider the ambit of the "unclean hands" doctrine or its application in this case.

148. **Was the judge wrong to attribute the misconduct of SG to RBS?** At [187] of the May 2012 judgment Burton J characterised SG as RBS' main witness "on which the case has wholly depended" and that RBS had continued to assert during the 2012 trial, that he was a witness of truth. Then at [188], the judge concluded that "there has been up to and including this last hearing improper conduct by RBS through [SG], and that it was serious". That is the only place in the May 2012 judgment that the judge deals with the issue of whether SG's conduct is to be attributed to RBS and he

[136] [101] May

does not use the words "attribute" or "attribution". However, it is clear that Mr Nicholls had argued the "attribution" point before the judge.[137] The judge held that there had been no misconduct by other RBS personnel, in particular Mr Hall and Mr Booth.

149. Mr Nicholls emphasised that the judge had found that SG's previous misconduct in deliberately and dishonestly concealing "The Suppressed Fact" had ceased, at the latest by the end of the Quantum trial. He recognised that the judge had held that there had been further misconduct by SG in lying in the 2012 trial, which related specifically to the anti-suit injunction and the counter-claim to set aside the liability judgment. The judge identified SG's misconduct at the 2012 trial at [185] of his judgment and at [192] emphasised that it was SG's misconduct in relation to the 2012 trial that he concluded was relevant to the "unclean hands" allegation.

150. Mr Nicholls argument is that SG was not acting as "agent" of RBS when he gave evidence in the 2012 trial, relying on a statement of Nourse LJ in ***Re Odyssey (London) Ltd v OIC Run-Off Ltd ("Odyssey")***[138] that "a person who gives evidence on behalf of a company does not do so as its agent". Therefore, as there was nothing in the constitution of RBS that would indicate that the acts of someone in the position of SG would generally be regarded as "attributable" to RBS as a corporate legal entity, it was necessary to find some special rule of attribution that was applicable for this particular purpose so as to make SG's acts that of the company.[139] Mr Nicholls said that SG was called as a witness in the 2012 trial to deal with two issues, both raised by Highland and Scott Law, viz. the "unclean hands" allegation in relation to the anti-suit injunction and the counter-claim to set aside the liability judgment. Mr Nicholls submitted that SG was called as a witness by RBS to give evidence as to his individual state of mind at various points in time between October 2008 and the Quantum trial so as to explain his conduct at the time. That evidence could not be regarded as evidence of the state of mind of RBS at that time. He was therefore a "mere witness" whose misconduct was not to be attributed to RBS.

151. I cannot accept Mr Nicholls' analysis. In the 2011 claim by RBS for an anti-suit injunction, both Highland and Scott Law pleaded, in their defences, that RBS was not entitled to an injunction because of the misconduct of RBS, through SG (and Mr Hall) from the time of the 6 November email onwards. The whole history was put in question in their pleadings. As I understood his arguments, Mr Nicholls accepted that all that Mr Hall and SG had done up to and including the Quantum trial were to be attributed to RBS for all purposes.

152. Although RBS really had no choice but to call Mr Hall or SG as witnesses in the 2012 trial to deal with Highland's and Scott Law's allegations, the witnesses could have dealt with them in one of two ways. The witnesses could have said that they now accepted that facts had been misrepresented in the 6 November email (and eg. in the

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[137] When the parties received a draft of his judgment, counsel for RBS pointed out the fact that the judge had not elaborated his conclusion on "attribution", but the judge declined to make any alterations to his draft in this respect.

[138] Judgment dated 13 March 2000 (unrep) at page 11. This was the appeal from Langley J's decision in ***Sphere Drake Insurance Pls v The Orion Insurance Co Plc (unrep. 11 February 1999),*** explained further below at [152].

[139] Mr Nicholls referred us to the well-known passage of the speech of Lord Hoffmann in the leading case of ***Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500 at 507E-F.***

26 March 2009 email), that there had been a suppression of various facts up until the Quantum trial and that they now accepted the judge's findings in the Quantum judgment. Or they could challenge the judge's conclusions on the facts in his Quantum judgment and seek to justify what had happened up to and including the Quantum trial. Mr Hall, Mr Booth and SG took the latter course and the judge concluded that SG had lied, again.

153. In the ***Odyssey*** case there were two key issues for the Court of Appeal. The first was: had the witness Mr Leslie Sage given perjured evidence at the original trial before Hirst J in 1989 concerning an oral agreement made at a meeting at which he was present in 1975. The second was whether, if Mr Sage had given perjured evidence, that perjury (and so fraud on the court) was to be "attributed" to the insurance company Orion. Mr Sage had been the general manager and a director of Orion in 1975 but by the time he came to give evidence before Hirst J in 1989 he had long retired. He died before the subsequent litigation in which the company that had been Sphere Drake but which subsequently became Odyssey sought to set aside Hirst J's judgment as having been obtained by the fraud of Orion through Mr Sage's perjured evidence. In the subsequent litigation before Langley J, after a long trial in which he analysed a huge number of documents, including many normally subject to legal professional privilege, the judge held that Mr Sage had not committed perjury but, in any event, his evidence could not be "attributed" to Orion.

154. Nourse LJ gave the first judgment in the Court of Appeal. He concluded that, as a matter of fact, Mr Sage had perjured himself before Hirst J. Brooke LJ agreed with that conclusion, but Buxton LJ dissented on that point. Nourse LJ next stated (in agreement with Brooke LJ and also Buxton LJ on this issue) that nothing less than the fraud (or perjury) of *a party* itself is sufficient to displace the general rule that final judgments should be accorded finality.

155. Nourse LJ then considered the issue of whether the perjured evidence of Mr Sage was to be treated as that of the party Orion for the purposes of the attempt to set aside Hirst J's judgment for the fraud of Orion. Nourse LJ referred to Lord Hoffmann's speech in ***Meridian*** and recognised that the rule that a final judgment could only be set aside if it had been obtained by the fraud of a party was a substantive rule of judge-made law which applied to a company as well as an individual. Nourse LJ concluded that the question of whether the perjured evidence of an individual should be attributed to a company for the purposes of an action to set aside a judgment for fraud of a party would depend on the facts of each case. Nonetheless, Nourse LJ formulated a test to be applied to the facts of particular cases, which he derived from the judgment of Eveleigh J in ***R v Andrews-Weatherfoil Ltd.***[140] Nourse LJ's formulation, in the terms of the ***Odyssey*** case was: "for the purposes of the fraud of a party rule, did Mr Sage have the status necessary to make his evidence the evidence of Orion". Applying that test, Nourse LJ held it was satisfied in that case, for two reasons. First, because Mr Sage was the witness above all others on whose evidence the success of Orion's case had come to depend. Secondly, for six months prior to the trial before Hirst J, Mr Sage had been made a part of the team which took decisions on how Orion's case was to be presented, thus identifying Mr Sage with Orion's own interests and itself. Brooke LJ agreed with Nourse LJ's analysis. Buxton LJ dissented.

[140] ***[1972] 1 WLR 118 at 124,*** in giving the judgment of the Court of Appeal (Criminal Division).

156. In my judgment that analysis is applicable to the facts of this case. So the question is: what was SG's status in the 2012 trial? RBS had no option but to call SG as a witness to deal with the allegation of "unclean hands" and the allegation that the Liability judgment had been obtained by fraud. He was RBS' key witness on both those issues. Also, by the time of the 2012 trial, SG was a Managing Director of RBS working in the European Credit Special Situations Group. He was authorised to make his seventh witness statement, his chief witness statement in the 2012 trial, on behalf of RBS in support of the anti-suit injunction claims.[141] Although the judge did not make an express finding to this effect, I would expect that, as in the earlier litigation, SG was part of the RBS litigation team for the purposes of the 2012 trial. There was no evidence from RBS that SG's situation had changed from that at the time of the Liability hearing.[142]

157. There can be no doubt, in my view, that when SG gave his evidence in the 2012 trial, he had the status necessary to make his evidence that of RBS for the purposes of the "unclean hands" issue as well as the issue of whether the Liability judgment had been obtained by fraud – as to which Mr Nicholls did not raise the "attribution" argument. So I must reject the first of Mr Nicholls' two main submissions.

158. **Did the judge err in concluding that there was a sufficient "immediate and necessary" relation between the misconduct of SG and the claim by RBS for equitable relief in the form of an anti-suit injunction such that RBS was to be denied it under the "unclean hands" doctrine?**

There is no dispute that there exists in English law a defence to a claim for equitable relief, such as an injunction, which is based on the concept encapsulated in the equitable maxim "he who comes into equity must come with clean hands".[143] Mr Nicholls accepted that the doctrine applies to a claim for an anti-suit injunction where the claim is based on an allegation that the defendant has started proceedings in a foreign jurisdiction in breach of contract because the claimant and defendant had agreed to an exclusive jurisdiction clause in favour of the English courts. It is clear from the speech of Lord Bingham in ***Donohue v Armco Inc***[144] that this defence is distinct from that of there being "strong reason" not to grant an anti-suit injunction.

158. It was common ground that the scope of the application of the "unclean hands" doctrine is limited. To paraphrase the words of Lord Chief Baron Eyre in ***Dering v Earl of Winchelsea***[145] the misconduct or impropriety of the claimant must have "an immediate and necessary relation to the equity sued for". That limitation has been expressed in different ways over the years in cases and textbooks. Recently in ***Fiona Trust & Holding Corporation and others v Yuri Privalov and others***[146] Andrew Smith J noted that there are some authorities[147] in which the court regarded attempts to mislead it as presenting good grounds for refusing equitable relief, not only where the purpose is to create a false case but also where it is to bolster the truth with

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[141] Seventh witness statement para 2.
[142] See the finding of Burton J on that point in the May 2012 judgment at [104]
[143] ***Snell's Equity (32nd Ed 2010) at 15-15 (page 98-9).***
[144] ***[2002] 1 Lloyd's Rep 425 at [24]***
[145] ***(1787) 1 Cos 318 at 319.***
[146] ***[2008] EWHC 1748 (Comm)***
[147] ***Armstrong v Sheppard & Short Ltd [1959] 2 QB 384; J Willis Son v Willis [1986] EGLR 62; Gonthier v Orange Contract Scaffolding Ltd [2003] EWCA Civ 873***

fabricated evidence. But the cases noted by him were ones where the misconduct was by way of deception in the course of the very litigation directed to securing the equitable relief.[148] ***Spry: Principles of Equitable Remedies,***[149] suggests that it must be shown that the claimant is seeking "to derive advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief". Ultimately in each case it is a matter of assessment by the judge, who has to examine all the relevant factors in the case before him to see if the misconduct of the claimant is sufficient to warrant a refusal of the relief sought.

159. Mr Nicholls relied strongly on the House of Lords' decision in ***Grobbelaar v News Group Newspapers.***[150] The House of Lords permitted the claimant footballer to bring an action to obtain an injunction to restrain *The Sun* newspaper from printing false allegations about him *actually* throwing matches, when a jury had convicted him of *conspiring* to throw matches in return for bribes but not actually having done so. In contrast, Mr Dunning relied on ***Armstrong v Sheppard & Short Ltd***[151] in which the Court of Appeal held that the claimant's attempt to mislead the court about whether a conversation had taken place between him and a representative of the defendant, which was fundamental to the claimant's claim for an injunction, was sufficiently closely connected. In my view these cases are simply illustrations of the application of the principle and they do not assist further in defining its ambit.

160. Ultimately Mr Nicholls did not quarrel with the legal test that the judge adopted in this case, as discussed at [175] – [180] of the May 2012 judgment. Mr Nicholl's argument is that the judge misapplied the legal principles to the facts of this case. Mr Nicholls noted that the judge had accepted[152] that SG's misconduct did not relate to the existence of the relevant jurisdiction clause ie. clause 13 of the FLD, nor its construction, nor its "enforceability", by which I think the judge must have meant "validity", because "enforceability" was the very matter in issue, as the judge makes clear later in the same paragraph.

161. However, Mr Nicholls submitted that the judge erred fundamentally in finding that the misconduct of SG in relation to the 2012 trial itself was relevant at all. Mr Nicholls argued that the judge should not have taken SG's misconduct in that trial into account and, if he had left it out, then the judge would have concluded that there was no misconduct that was sufficiently closely connected to the equitable relief claimed to warrant a refusal to grant the anti-suit injunctions sought.

162. In my view it is vital to identify carefully the two elements with which we are concerned; that is "the equity sued for" and "the misconduct" said to make RBS' hands unclean. The "equity sued for" is an injunction to restrain Highland and Scott Law from continuing to be in breach of (or in Scott Law's case refusing to be bound by) the jurisdiction clause in the FLD by bringing proceedings in which it is alleged that RBS had "knowingly misrepresented material facts and withheld critical information from [Highland] as part of [RBS'] scheme to acquire the 36 Loans at

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[148] Andrew Smith J at [20]. He said that in those cases the connection between the misconduct and the claim to equitable relief was far more immediate than in the case before him.
[149] ***8th Ed 2010***
[150] ***[2002] 1 WLR 3024.***
[151] ***[1959] 2 QB 384***
[152] [189] May

severely understated values".[153] The misconduct alleged against RBS, through SG, falls into two Stages. First, there is the fact that RBS did not accept without challenge the judge's findings made in the Quantum judgment about the matters surrounding the transfer of the 36 Loans, the BWIC and the subsequent suppression of facts until the Quantum trial itself. Secondly, the fact of the lies of SG in the 2012 trial in trying to challenge the findings that the judge had made in his Quantum judgment.

163. As I read [185] – [192] of the 2012 judgment, Burton J accepted that if the misconduct of RBS (through SG) had ended with an acceptance of the conclusions made in the Quantum trial, then he would not have regarded the misconduct of RBS as being sufficiently immediate and having the necessary relation to the equity sued for to fall foul of the "unclean hands" doctrine. Thus, at the start of the 2012 trial, even though RBS might have pleaded a challenge to the various findings Burton J had made in the Quantum trial, if RBS had then accepted them, the judge would have held that RBS had not come to court with "unclean hands" because, to continue the metaphor, RBS would have "washed them". Therefore, it seems, the judge would have rejected Highland/Scott Law's "unclean hands" defence to RBS' claim for an anti-suit injunction.

164. But what tipped the balance the other way was the action of RBS in continuing to challenge four principal findings of fact made by Burton J in the Quantum trial, which I have summarised at [58] above, particularly through the evidence of SG in the 2012 trial, Burton J's reaffirmation of his Quantum judgment findings (save for the more nuanced finding in relation to motivation for termination) and his conclusion that SG had lied again. Does the fact that RBS persisted in challenging the judge's findings of fact in his Quantum judgment and its insistence that there had been no concealment of "The Suppressed Fact" constitute misconduct and, if so, does it have the necessary immediate and close relationship to the particular anti-suit injunction claimed? In my view the answer to both questions is "yes" and I shall explain why briefly.

165. First, it was RBS' decision to continue to challenge the findings of the judge in the Quantum judgment. It did so in particular through the key evidence of SG, who was put forward as a "witness of truth" as to the events that occurred in 2008-9, not as a witness who was going to explain and apologise for previous lies. Whilst I entirely accept that counsel and solicitors acting for RBS during the 2012 trial and subsequently have done so in complete good faith, the same cannot be said for SG. As the judge found, he always knew the true position and he had never forgotten it. SG's lies and his unsuccessful attempt to explain away his conduct in November 2008 at the 2012 trial were themselves grave misconduct. Bluntly, SG perjured himself again. His misconduct must be attributed to RBS for the reasons that I have already given above.

166. Secondly, that misconduct is immediately or closely related to the equity sued for because it relates, at least in part, to the very allegations being made against RBS and SG in the Texas proceedings under Count 2 of the Petition. The aim of the anti-suit injunction is to prevent Highland and Scott Law pursuing those allegations in the Texas proceedings because (it is said) they agreed that all such matters would be dealt

[153] See para 73 of the Texas Petition, which is part of Count 2 against RBS and Messrs Griffiths and Hall.

with exclusively by the English courts or (in Scott Law's case) were bound by that agreement. The judge has found that RBS, through SG, has lied about central facts on which Highland and Scott Law found the allegations that are made against RBS in the Texas proceedings. RBS, through SG, has relied on this false evidence in the course of the English proceedings whose very object is to stop the Texas action. To my mind the misconduct could not be more immediately related to the equity that is sued for.

167. Thirdly, I have not lost sight of the fact that the judge analysed the nature of the allegations being made by Highland and Scott Law in the Texas proceedings at [162] – [169] of the May 2012 judgment. He concluded that the allegations made and the measure of damages claimed in the Texas action were inconsistent with his conclusions in his Quantum judgment. He also found that, insofar as Counts 2 and 3 in the Texas Petition are based on the fraud of RBS, Highland knew all the relevant facts by the outset of the Quantum trial and so could have been pursued the allegations then.[154] The judge held that RBS had a "strong case" that, based on the English law doctrines of res judicata, issue estoppel and the principle in ***Henderson v Henderson,***[155] Highland and Scott Law should be precluded from bringing the Texas proceedings in relation to all three Counts. But he held that those "strong arguments" were not sufficient to lead to the grant of an injunction on the ground that the Texas action was vexatious or oppressive.[156] RBS has not appealed that conclusion.

168. Fourthly, the judge also took this conclusion about the nature of the claims in the Texas proceedings into account when considering the extent to which RBS would suffer hardship if he were to refuse to grant it an anti-suit injunction based on breach of the FLD exclusive jurisdiction clause. As I read his judgment, he held that the "strong argument" on res judicata and so forth was insufficiently powerful to neutralise the "unclean hands" defence. The judge held that RBS could argue that case in the Texas proceedings.[157] It may be that Highland and Scott Law's position on this issue is stronger as a result of my conclusion on the Liability judgment. However, the knock-on effect on the "unclean hands" issue of a finding that the Liability judgment should be set aside was not elaborated in argument before us and I do not need to explore it here, given the conclusions I have reached.

169. Fifthly, the judge also noted that Highland and Scott Law were prepared to give undertakings not to seek multiple or punitive damages against the defendants in the Texas proceedings "if such would be the deciding factor in my declining the grant of an anti-suit injunction".[158] He did not say whether a refusal to give such undertakings would have altered his overall conclusion, but that seems likely as the judge states that the undertaking is to be recorded in the court order. In Highland's Respondent's Notice it submits that the judge was wrong to require Highland and Scott Law to give the undertaking they did and they ought to be released from their undertaking. That point was not argued orally before us.

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[154] [168] and [169] May
[155] ***(1843) 3 Hare 100;*** confirmed by the House of Lords in ***Johnson v Gore Wood & Co [2002] 2 AC 1.***
[156] [172] and [194(ii)] May.
[157] [194(ii)] May.
[158] [194(i)]

170. However, I would not release Highland and Scott Law from those undertakings. Both Mr Auld and Mr Dunning accepted that if clause 13 of the FLD applies then Highland is in breach of contract and Scott Law is bound by it. I do not have to decide that issue finally, given my conclusion on "unclean hands". But it seems to me correct that we should proceed on the basis that there is, at least, a very good argument that Highland and Scott Law are in breach of/bound by an exclusive jurisdiction clause in favour of the English courts where the remedy of multiple and punitive damages would not be available. Therefore, at least until that issue is finally decided (and it is agreed that all issues of damages have to be adjourned),[159] Highland and Scott Law should be kept to their undertakings.

171. **Conclusion on the "unclean hands" defence.** Given all these factors, I conclude that the judge was correct to hold that the anti-suit injunction should be refused because Highland and Scott Law could successfully rely on the defence of "unclean hands".

172. **Other arguments advanced by Highland and Scott Law on the anti-suit injunction.** I do not need to decide these points and I am not going to go into them in any detail. I will just outline my views very briefly.

173. **The ambit of clause 13.1 of the FLD: does it extend to the claims made in the Texas proceedings concerning the extension of the Mandate and the ISD?** The argument is that the claims comprised in the three counts in the Texas proceedings are not disputes which "arise out of" or "in connection with" the FLD of 31 October 2007, but relate to the Mandate Letter (and its extension) the ISD of 7 April 2007. The judge was correct in holding that the contractual documents have to be read and construed together. He was also correct in holding that the phrase "in connection with" has been widely construed by English courts in the context of jurisdiction and arbitration clauses. So my view is that Burton J was correct to hold that the ambit of clause 13.1 of the FLD is wide enough to embrace the three counts in the Texas proceedings.

174. **Is clause 13.1 of the FLD an exclusive jurisdiction clause?** Mr Dunning is obviously right to argue that it would have been much clearer if the first three lines of clause 13.1 had read "…the Parties irrevocably agree that the courts of England shall have ***exclusive*** jurisdiction to hear and determine any suit action or proceedings….". However, taking the wording of clause 13.1 as a whole and bearing in mind the contrasting phraseology of clause 13.2 I think that clause 13.1 must be construed as an exclusive jurisdiction clause. The use of the words "*shall have* jurisdiction" and the requirement that the parties "*irrevocably* submit" to the jurisdiction of the English courts (my emphasis) are powerful pointers. So also is the wording of clause 13.2 which, in my view, gives RBS an option to bring proceedings in other jurisdictions, in contrast to the inability of other "Parties" to do so. I agree with the judge's conclusion on this point.

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[159] As Scott Law is only an assignee, it cannot, strictly speaking, be "in breach" of the jurisdiction clause, although Mr Dunning accepted it would be bound by it if it is otherwise effective. Accordingly, although RBS can claim damages for breach of contract against Highland, it cannot do so against Scott Law. By a proposed amendment, RBS claimed equitable compensation/damages against Scott Law. Whether RBS should have leave to amend was one of the matters that Burton J ordered be left over to a further hearing: see para 8(ii) of the Order of 25 May 2012.

175. **Does clause 13.1 extend to claims against SG and Mr Hall?** The exclusive jurisdiction agreement is between RBS and Highland and Scott Law is bound by it as assignee. Highland agreed that "any" suit, action or proceedings "in connection with" the FLD would be brought only in the English courts. The clause does not say any suit, action or proceedings against RBS. Provided that the suit, action or proceedings are "in connection with" the FLD, Highland must bring them in the English courts. If the allegations against RBS in counts 1-3 of the Texas proceedings constitute a "suit, action or proceedings" that are "in connection with" the FLD, then it seems to me that those against SG and Mr Hall must also be so as they are all the same allegations. If SG and Mr Hall made fraudulent statements then they did so in their capacity as employees of RBS.

176. I appreciate that Highland and Scott Law allege that SG and Mr Hall are independently liable as having committed fraud. I also recognise, of course, that SG and Mr Hall could not themselves enforce clause 13.1 of the FLD against Highland or Scott Law because they are not a party to that contract. But ultimately the same question of construction arises: are these claims against SG and Mr Hall ones that are "in connection with" the FLD? If they are, then Highland and its assignees have agreed with RBS that the English courts have exclusive jurisdiction to settle such disputes. The broad construction given to the phrase "in connection with" means that these allegations must fall within its scope. The facts in the present case are very different from those facing Rix J in ***Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd.***[160]

177. Assuming that this analysis were correct, Highland and Scott Law argued that RBS could not show that it had a sufficient interest to claim an injunction which prevented SG and Mr Hall from being sued independently for fraud in the Texas proceedings. I disagree. Whether that is characterised as "reputational interest" or a legitimate interest in upholding a contractual agreement does not matter.

XII. Conclusions and Disposal

178. In my view the Liability judgment was obtained by the fraud of RBS through the misstatement and concealment of facts by SG. I would therefore allow the cross-appeal of Highland from Burton J's May 2012 judgment on that issue. The Liability judgment, the Court of Appeal's judgment on Liability and the Quantum judgment must therefore all be set aside.

179. Whether or not that conclusion is correct, the judge was right to refuse to grant RBS an anti-suit injunction restraining Highland and Scott Law from pursuing the Texas proceedings on the ground that SG's misconduct in relation to the 2012 trial was sufficiently closely related to the equitable relief sought by RBS. Highland and Scott Law could therefore rely on the defence of "unclean hands" to prevent RBS obtaining the anti-suit injunction. I would therefore dismiss RBS' appeal from Burton J's May judgment on that issue.

Lord Justice Toulson:

180. I agree.

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[160] ***[1999] 1 Lloyd's Rep 767 at 777.***

Lord Justice Maurice Kay Vice President of the Court of Appeal, Civil Division:

181. I also agree.

182. This case has drawn attention to a matter which may become of more general importance with the amendments to the Civil Procedure Rules which came into force on 1 April 2013. They are the result of Lord Justice Jackson's Review of Civil Litigation Costs. Lord Justice Aikens has explained how the concealment or non-disclosure contrived by *SG* arose out of "a deliberate decision … not to address any 'quantum related issues' because they might 'muddy the waters' on the liability application": paragraph 62. In the future, there are going to be more tailor-made directions providing for disclosure on an issue-by-issue basis. This will be encouraged by the new CPR31.5(7)(c) which was introduced by the Civil Procedure (Amendment) Rules 2013. Used properly, it should result in the reduction of disclosure costs. However, practitioners and judges will have to be on their guard to ensure that issue-by-issue disclosure directions do not create a framework for injustice in which one party's perception and appraisal of a case is not handicapped by his being kept in ignorance of important material on the ground that it is only relevant to issue B but, for the moment, disclosure is only required in relation to issue A. It would not be appropriate in this judgment to give guidance as to how such potential problems should be addressed in the new context. At this stage, I merely identify the need for circumspection.

Appendix One to Judgment of Aikens LJ

Clauses from the Mandate Letter, Interim Servicing Deed ("ISD") and First Loss Deposit Facility Deed ("FLD")

Mandate Letter

6. Termination and Survival.

(a) The Advisor's engagement hereunder shall terminate automatically on September 30, 2007 (the "Expiration Date"), except that if any Securities are issued on or before the Expiration Date, then Advisor's engagement hereunder shall terminate upon the completion of the Offering; provided, that either party hereto may terminate the Advisor's engagement hereunder at any time upon written notice to the other party without any liability or continuing obligation of either party to the other except as provided in the following sentence. Not withstanding the foregoing or anything to the contrary herein this Section 6 (Termination and Survival) and Sections 4 (Marketing and Offering of Securities), 4 (Fees and Expenses), 5 (Indemnification and Contribution), 8 (Certain Matters Relating to Engagement), 10 (Governing Law, Waiver of Jury Trial and Submission to Jurisdiction) and 11 (Miscellaneous) will survive any termination of this Agreement or the termination of the Advisor's engagement hereunder (whether as a result of the completion of the Offering or otherwise).

(b) The Servicer further agrees that if (i) it terminates the Advisor's engagement hereunder or determines not to proceed with the Transaction, in either case, without cause prior to the Expiration Date, (ii) no Securities are issued and (iii) it or any of its affiliates performs the services of the Sevicer described herein or any similar services for any similar Transaction during the 3-month period following such termination or determination not to proceed, then the Advisor shall be entitled to payment by the Servicer of any out-of-pocket costs and expenses borne by the Advisor in connection with the Transaction (including, but not limited to, any such out-of-pocket costs and expenses of the Issuer borne by the Advisor).

Interim Service Deed ("ISD")

4.2 No Closing Date

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) the Interim Servicer 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 the Interim Servicer within 3 Business Days of the Termination date, the Variable Funding Noteholder 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 the Variable Funding Noteholder shall determine in a commercially reasonable manner, which (for the avoidance of doubt) may include a sale of any such Acquired Loans to the Variable Funding Noteholder or (if the Interim Servicer so agrees) the Interim Servicer at a price equal to the sum of the market values for such Acquired Loans provided;

i. if both the Variable Funding Noteholder and the Interim Servicer 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 the Variable Funding Noteholder and the Interim Servicer wish to purchase an Acquired Loan and both offer the same price thereof, then the Interim Servicer shall purchase 100 per cent. of such Acquired loan at such price;

iii. if neither the Variable Funding Noteholder nor the Interim Servicer wish to purchase an Acquired Loan, then such Acquired Loan will be sold in accordance with the procedures (i) mutually agreed between the Variable Funding Noteholder and the Interim Servicer within 5 Business days, or else (y) determined by the Variable Funding Noteholder acting in a commercially reasonable manner;

(b) the acquisition by the Interim Servicer or the Variable Funding Noteholder of any Acquired Loan pursuant to this clause 4.2 shall be effected by the relevant purchasing entity delivering immediate available funds in an amount equal to the purchase price payable into the Sales Proceeds Account of the Issuer; and

(c) if the actions specified in this clause 4.2 above are not completed to the commercially reasonable satisfaction of the Variable Funding Noteholder 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 the Variable Funding Noteholder is hereby authorised to take whatever action it determines appropriate to sell each of the Acquired Loans still held by the Issuer.

4.3 Set Off

The Variable Funding Noteholder may set off any amounts owed by it under this clause 4 against any amounts payable to it in respect of the Variable Funding Note.

5.6 Termination Date

If the Closing date does not occur prior to the Termination Date, on the Final Realisation date, all amounts standing to the credit of each of the Account shall be applied in payment of all amounts due and payable pursuant to the Variable Note Funding Purchase Agreement, including repayment of all Advances outstanding thereunder and payment of all unpaid interest accrued thereon. Following such application and subject to prior payment of all such amounts, the Issuer shall apply all

remaining Interest Proceeds, Principal Proceeds and Sale Proceeds in payment of the Highland Final Realisation Amounts.

In the event that all amounts due and payable under the Variable Funding Note Purchase 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 (such amount a "VFN Payment Amount") HCC and the CDO Fund will each unconditionally and promptly on demand pay the Variable Funding Noteholder their Highland Share of such VFN Payment Amount on the Final Realisation Date and the parties hereto agree that such payment shall operate in full and final discharge of the Issuer's obligation to pay the Variable Funding Noteholder such amounts. The obligations of HCC and the CDO Fund to the Variable Funding Noteholder pursuant hereto shall be subject to the provisions contained in Schedule 7 attached to this deed.

HCC and the CDO Fund each undertake as a direct and primary obligation to pay the Variable Funding Noteholder their Highland Share of any VFN Payment Amount.

Schedule 7 of the ISD

CLAUSE 5.6 GUARANTEE

1. CONTINUING SECURITY

The obligations of HCC and CDO Fund ("HCC/CDO") under clause 5.6 of this deed (the "HCC/CDO" Obligations"):

a. are continuing security and will extend to the ultimate balance of the HCC/CDO Obligations regardless of any intermediate payment of discharge in whole or part;

b. are to be in addition to and are not in any way prejudiced by and shall not merge with any other security which the Variable Funding Noteholder may now or in the future hold.

2. VARIABLE FUNDING NOTEHOLDER PROTECTIONS

2.1 No Discharge

The HCC/CDO Obligations shall not be discharged, diminished or in any way affected as a result of the following (whether or not known to HCC/CDO):

…….

(h) Any other act, omission, circumstance, matter or thing which, but for this provision, might operate to release or otherwise exonerate HCC/CDO from any of their obligations under the HCC/CDO Obligations.

First Loss Deposit Deed ("FLD")

12. GOVERNING LAW

This deed shall be governed by, and shall be construed in accordance with, English law.

13. JURISDICTION

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 and 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 the Variable Funding Noteholder (and shall not be construed so as to) limit the right of the Variable Funding Noteholder 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.

Appendix Two to Judgment of Aikens LJ

Email of 6 November 2008 sent by Mr Hall to Highland

> 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 line of clause 4.2(a) of the [ISD],[161] 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.

1. 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.

2. 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.

3. Bids must be submitted by 2pm on 11 November.

4. RBS shall be entitled to bid.

5. Each Acquired Loan will be sold to the highest bidder.

6. 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 illiquidity of the loan in question and market conditions.

[161] This provided that the Interim Service Provider had the right to purchase all Acquired Loans from the Issuer at market prices within 3 working days of the Termination Date, which in this case was 30 October, so the fourth respondent would have had until close of business on 5 November to exercise that right.