

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (COMMERCIAL COURT)
MR JUSTICE WALKER

Royal Courts of Justice
Strand, London, WC2A 2LL
18/06/2009

Before:

LORD JUSTICE WARD
LORD COLLINS OF MAPESBURY
LORD JUSTICE TOULSON
and

Between:

UBS AG and UBS SECURITIES LLC

Appellants/Claimants

- and -

HSB NORDBANK AG

Respondents/Defendants

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

Mr David Railton QC and Ms Sonia Tolaney (instructed by Simmons & Simmons) for the
Appellants
Mr Jonathan Sumption QC, Ms S Prevezer QC and Mr Andrew Henshaw (instructed by Quinn
Emanuel) for the Respondents
Hearing dates : April 1 and 2, 2009

HTML VERSION OF JUDGMENT

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Lord Collins of Mapesbury:

I Introduction

1. This appeal turns on the construction of a jurisdiction clause. This is yet another case in which an action for a negative declaration has been used as a means of seeking to have a dispute litigated in what is perceived as a favourable forum: see e.g. *The Volvox Hollandia* [1988] 2 Lloyd's Rep 361, 371; *Hatzl v XL Insurance* [2009] EWCA 223, [2009] 1 Lloyd's Rep 555, at [27]. The principal issue is whether the English jurisdiction clause in one of the documents recording the complex transaction between the parties (a 1 page document among 500 pages of other documents

constituting the overall deal) applies to the claims in the action in England for the negative declaration.

2. This case concerns derivatives in relation to the property market, or Collateralised Debt Obligations ("CDOs"). The contractual documentation in this matter consists of more than 500 pages and its size and complexity, which is no doubt duplicated in many other transactions, make it easier to understand, if not to excuse, why senior banking figures (but not necessarily in this case) had little understanding of this market and of the risks their institutions were undertaking.
3. HSH Nordbank AG ("HSH") is a commercial bank incorporated in Germany with dual headquarters in Hamburg and Kiel in Germany. It was established in June 2003 as the result of a merger between two regional German banks, Landesbank Schleswig-Holstein Girozentrale ("LB Kiel") and Hamburgische Landesbank. The first claimant, UBS AG, is an investment bank created in July 1998 by the merger between Union Bank of Switzerland and Swiss Bank Corporation. UBS AG is incorporated in Switzerland, where it has its head office, and has substantial offices worldwide, including New York and London. The second claimant, UBS Securities LLC ("UBS LLC"), is an affiliate of UBS incorporated in the United States with its principal place of business in the United States. It will not normally be necessary to distinguish between them, and I will generally refer to either or both of them as UBS.
4. The transactions which are the subject matter of the actions took place in 2002/2003 between UBS and LB Kiel. HSH has assumed all material assets, rights and obligations of LB Kiel, and it is in that capacity that HSH has sued UBS in New York, and is being sued by UBS in England. HSH is domiciled in Germany for the purposes of Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels I Regulation").
5. The action for seeking negative declaratory relief against HSH was instituted on February 25, 2008, in anticipation of proceedings which were going to be instituted by HSH against UBS in New York. The New York proceedings were commenced later the same day in the New York state court. HSH alleged mis-selling and mismanagement of the securities which were the subject of the complex arrangements between the parties. The complaint relied on these causes of action: breach of contract; fraud; negligent misrepresentation; breach of fiduciary duty; breach of an implied covenant of good faith and fair dealing; unjust enrichment; constructive trust.
6. The only possible basis for the jurisdiction of the English court is the jurisdiction clause in one of the agreements in the CDO transaction. HSH applied in the English proceedings for an order that the English court had no jurisdiction to try UBS's claim in the English proceedings. In the alternative HSH asked the court to decline to exercise jurisdiction on forum non conveniens grounds. Walker J decided that the English court did not have jurisdiction in respect of the claims made in the English proceedings, and that it was unnecessary to decide on the alternative application for a stay.
7. A distinctive feature of this case is that the only point of the English proceedings is to pre-empt any decision of the New York court in the proceedings brought there by the defendants in the English proceedings. It is accepted that if the relevant claims (for fraudulent and negligent misrepresentation) in the New York proceedings do not stand, there will be no point in the English proceedings. UBS filed a motion in New York for an order dismissing the New York complaint on substantive grounds, alternatively dismissing or staying the action on jurisdictional grounds.
8. After Walker J's judgment, the New York judge acceded in part to UBS's motion to dismiss, but HSH has revived some of the relevant claims in an amended complaint, which is itself the subject of a further motion to dismiss by UBS on the ground that they are precluded by the res judicata effect of the New York court's judgment. That motion has been heard but not yet decided.

II Collateralised Debt Obligations

9. The background to the claim is that LB Kiel wished to invest in real estate related credit and asset backed securities which, at the time of the transaction in March 2002, were seen in the market as having outperformed similarly rated corporate securities. As a consequence, LB Kiel invested in a multiple tranche synthetic CDO.

10. A CDO is a financial structure at the centre of which a special purpose vehicle ("SPV") issues tranches of debt securities, the performance of which is linked to a portfolio of assets. The SPV may either hold the underlying assets (a "cash CDO") or take exposure to assets such as corporate bonds or asset-backed securities via a credit default swap with a financial counterparty (a "synthetic CDO"). The performance of CDOs is linked or "referenced" to the pool of underlying bonds or securities, the "Reference Pool".
11. In the case of a synthetic CDO the issuer may (as in the present case) invest the proceeds of issue of the CDOs in a portfolio of high quality, typically AAA-rated assets ("collateral"); those collateral assets are used to generate income to make coupon (interest) payments on the CDOs and, in the case of a default of any of the Reference Pool to which the SPV is exposed, to pay the financial counterparty the loss due under the credit default swap. On each occasion on which one of the assets in the Reference Pool defaults or is subject to some other "credit event" (such as a downgrading of its credit rating), then a payment becomes due from the SPV to the financial institution under the credit default swap. At the same time, the principal and interest due from the SPV to the CDO noteholder is correspondingly reduced. The usual practice is for CDO notes to be issued in different classes, whereby the losses are allocated sequentially commencing with the most "junior" tranche of notes until the original principal amount of such class of notes are written down to zero, and then losses are allocated to the next "higher" tranche of notes, until the entire capital structure is exhausted or the maturity date of the CDO notes occurs. As a consequence junior notes suffer as a result of earlier Reference Pool defaults/other credit events and the less risky "senior" tranches suffer loss only after the underlying classes of CDO notes have been reduced to zero principal value.
12. A common feature of actively managed CDOs is that one of the parties to the transaction has the right to alter the composition of the Reference Pool. Such a right potentially increases the risk for the holder of the CDO note, particularly if the party with the right to alter the composition of the Reference Pool has an economic interest in the transaction, as in the present case.

III The facts

13. In this case the SPV was set up by UBS, which was the financial institution under the credit default swap, and LB Kiel was the original holder of the CDO Notes issued by the SPV. The SPV used for the issue of the credit linked notes was a Cayman Islands company set up by UBS called North Street Referenced Linked Notes, 2002-4 Ltd ("NS4").
14. NS4 issued notes which were denominated in United States dollars classified in three categories. The first category comprised \$500 million of floating rate notes of classes A to D ("the NS4 Notes"). They were issued to and purchased by UBS so that UBS could sell them to LB Kiel as part of the transaction. The second and third categories comprised \$25 million floating rate notes of class E ("the Class E NS4 Notes") and \$49 million fixed rate income notes ("the NS4 Income Notes"). They also were issued to UBS but were not involved in the transaction.
15. LB Kiel received the NS4 Notes which provided credit protection to UBS against certain credit risks in relation to the Reference Pool, which was a pool of international assets with an emphasis on U.S. commercial and residential real estate backed bonds and other asset-backed securities, selected by UBS.
16. The credit default swap with NS4 gave UBS the right to alter the Reference Pool within certain parameters. If UBS chose asset-backed securities of high quality and stability, LB Kiel would receive a steady stream of income based on performance of assets in the Reference Pool. In return UBS was to receive "credit protection payments" upon the happening of certain "credit events" to cover losses in the Reference Pool. The effect was that LB Kiel provided credit protection to UBS in the event of defaults which would result in reductions in the principal amounts of the NS4 Notes.
17. UBS was the manager responsible for the allocation and substitution of assets in the Reference Pool, as well as the direct recipient of any payments from the SPV due to credit events in respect of securities in the Reference Pool. Accordingly, in order to protect LB Kiel the "Reference Pool Side Agreement" ("RPSA") was entered into between LB Kiel and UBS as a condition of the purchase of the CDO Notes. The RPSA created obligations for UBS in connection with UBS's management, selection, and substitution of securities in the Reference Pool.

18. In return, LB Kiel issued to UBS \$500 million of puttable (i.e. redeemable on certain conditions) medium term notes (the "Kiel MTN Notes") under LB Kiel's existing medium term note programme.

The Kiel MTN Notes

19. There had for some years been in existence a programme which had been agreed between LB Kiel and its Dutch subsidiary LB Schleswig-Holstein Finance BV ("LB Finance") and a group of banks ("the Dealers"), which included UBS. On September 11, 2001 the parties signed an amended and restated programme agreement ("the Programme Agreement"). The Programme Agreement set out terms and conditions which would apply if either LB Kiel or LB Finance agreed with any Dealer for the issue and purchase of notes.
20. The normal practice would then be for the Dealer to sell the Notes in the secondary market. An information memorandum also dated September 11, 2001 ("the Information Memorandum") set out terms and conditions of Euro Notes. The Kiel MTN Notes, despite their denomination in dollars, fall within this category.
21. By clause 21(1) the Programme Agreement and every agreement for the issue and purchase of Notes was to be governed by English law, and by clause 21(2):

"Each of the Bank and Finance hereby irrevocably agrees for the exclusive benefit of the Dealers that the courts of England are to have jurisdiction to settle any disputes which may arise out of or in connection with this Agreement and that accordingly any suit, action or proceedings arising out of or in connection with this Agreement (together referred to as 'Proceedings') may be brought in such courts.

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

22. The Information Memorandum of the same date indicated that the Notes would be issued on the conditions set out in the document, as modified and supplemented by the applicable Pricing Supplement. Condition 19(a) provided that the Notes would be governed by English law and by clause 19(b) there was a jurisdiction clause in these terms:

"The Issuer agrees, for the exclusive benefit of the Agents, the Noteholders, the Receipholders and the Couponholders that the courts of England are to have jurisdiction to settle any disputes which may arise out of or in connection with the Agency Agreement, the Notes, the Receipts and/or the Coupons and that accordingly any suit, action or proceedings arising out of or in connection with the Agency Agreement, the Notes, the Receipts and the Coupons (together referred to as 'Proceedings') may be brought in such courts.

The Issuer hereby irrevocably waives any objection which it may have now or hereafter to the laying of the venue of any such Proceedings in the courts of England and any claim that any Proceedings have been brought in an inconvenient forum and hereby further irrevocably agrees that a judgment in any Proceedings brought in the English courts shall be conclusive and binding upon it and may be enforced in the courts of any other jurisdiction. Nothing contained in this Condition shall limit any right to take Proceedings against the Issuer in any other court of competent jurisdiction, nor shall the taking of Proceedings in one or more jurisdictions preclude the taking of Proceedings in any other jurisdiction, whether concurrently or not."

The Transaction

Letter Agreement: governed by New York law/no jurisdiction agreement

23. On January 23, 2002 UBS and LB Kiel signed a letter agreement ("the Letter Agreement") confirming the purchase by LB Kiel of what became the NS4 Notes subject to acceptable documentation. Clause 1 recorded a mutual expectation that the structure of the transaction would be substantially as described in a Term Sheet dated January 2002. It also recorded that the final structure would be as described in the final offering memorandum relating to the securities. Under clause 6 the Letter Agreement was governed by New York law. The Letter Agreement contained no jurisdiction clause. It was common ground that the sale which took place on March 5, 2002 should be treated as having taken place pursuant to the Letter Agreement. Consequently the sale was subject to New York law but did not involve any express term as to jurisdiction.

Offering Circular and Indenture: New York law and non-exclusive New York jurisdiction

24. An offering circular dated March 1, 2002 ("the Offering Circular") described features of the NS4 Notes which came to be embodied in an Indenture dated as of March 5, 2002. The Offering Circular described how the performance of the NS4 Notes was to be linked, through a credit swap with UBS, to the performance of assets forming the US\$3 billion notional amount Reference Pool. Under the credit swap NS4 would be obliged to make credit protection payments to UBS in the event of defaults on the assets, and the Offering Circular explained that such payments would give rise to corresponding reductions in the unpaid accrued interest on the NS4 Income Notes and thereafter the principal balance of all classes of the NS4 Notes, working progressively upwards from the NS4 Income Notes through classes E, D, C, B and A. The offering circular stated:

"Governing Law

The Notes, the Indenture (including the grant by the Issuer of the security interest in the Collateral and the enforcement by the Trustee of such security interest (except to the extent that the validity or perfection of the Issuer's or the Trustee's interest in the Collateral, or remedies under the in respect thereof, may be governed by the laws of a jurisdiction other than the State of New York, in which case the laws of such jurisdiction shall apply to such extent)), the Kiel Custody Agreement, the Repurchase Agreements, the Non-Kiel Custody Agreements and the Administration Agreement will be governed by, and shall be construed in accordance with, the laws of the State of New York without regard to the principles of conflicts of laws. The Issuer will submit to the non-exclusive jurisdiction of the New York courts for all purposes in connection with the Notes, the Indenture, the Kiel Custody Agreement, the Repurchase Agreements, the Non-Kiel Custody Agreements and the Administration Agreement and will appoint UBS Warburg LLC to accept service of process on its behalf. The Repo Counterparty will submit to the non-exclusive jurisdiction of the New York courts for all purposes in connection with the Repurchase Agreements and the Non-Kiel Custody Agreements and will appoint UBS Warburg LLC to accept service of process on its behalf.

The Kiel MTN Notes will be governed by, and shall be construed in accordance with, the laws of England. The MTN Issuer will submit to the jurisdiction of the English courts in connection with the Kiel MTN Notes and has appointed its United Kingdom representative office at 50 Gresham Street, London EC2V 7AY to accept service of process on its behalf.

The Credit Swap, and all matters arising from or connected with it, will be governed by, and shall be construed in accordance with, the laws of England. The Issuer and the Swap Counterparty will submit to the jurisdiction of the English courts for all purposes in connection with the Credit Swap, and the Issuer will appoint Clifford Chance Secretaries Limited to accept service of process on its behalf."

25. The Indenture provided that the Indenture and the NS4 Notes were governed by New York law and it contained a non-exclusive New York jurisdiction clause.

Credit swap: English law and non-exclusive English jurisdiction

26. Contemporaneously with the transaction, and in accordance with the Offering Circular, UBS and

NS4 entered into a credit swap ("the Credit Swap"). Under the Credit Swap UBS purchased credit default protection from NS4 with respect to the Reference Pool. In return a total premium of \$574 million, subject to reduction in certain events, was to be paid by UBS to NS4 as periodic premium payments over the life of the swap. The Credit Swap provided for credit protection payments as described in the Offering Circular. It was governed by English law and (by virtue of the incorporation of the ISDA Master Agreement) contained a non-exclusive English jurisdiction clause.

Reference Pool Side Agreement: New York law and non-exclusive New York jurisdiction

27. The RPSA was also dated March 5, 2002, and provided LB Kiel with protections regarding UBS's management of the portfolio comprising the Reference Pool. Under Article II of the RPSA there was an obligation on UBS which required the creation of a "Commitments Committee" to monitor the credit quality of the Reference Pool. The Commitments Committee was to meet on a daily basis or as necessary. Article IV gave LB Kiel a power of veto in certain circumstances.
28. The RPSA was subject to New York law and contained a non-exclusive New York jurisdiction clause. Section 9.08 of the RPSA was entitled "Governing Law: Consent to Jurisdiction and Service of Process." It included the following governing law and jurisdiction clauses:

"(a) This agreement shall be governed by, and construed in accordance with, the laws of the State of New York, without regard to principles of conflicts of laws.

(b) ALL JUDICIAL PROCEEDINGS BROUGHT AGAINST [UBS] OR [LB KIEL] ARISING OUT OF OR RELATING TO THIS AGREEMENT MAY BE BROUGHT IN ANY STATE OR FEDERAL COURT IN THE BOROUGH OF MANHATTAN IN THE CITY OF NEW YORK AND ANY APPELLATE COURT FROM ANY SUCH COURT, AND, BY ITS EXECUTION AND DELIVERY OF THIS AGREEMENT, EACH OF [UBS] AND [LB KIEL] ACCEPTS FOR ITSELF AND IN CONNECTION WITH ITS PROPERTIES, GENERALLY AND UNCONDITIONALLY, THE NONEXCLUSIVE JURISDICTION OF THE AFORESAID COURTS AND WAIVES ANY DEFENSE OF FORUM NON CONVENIENS AND IRREVOCABLY AGREES TO BE BOUND BY ANY JUDGMENT RENDERED THEREBY IN CONNECTION WITH THIS AGREEMENT

..."

Pricing Supplement/Dealer's Confirmation: English law and exclusive English jurisdiction

29. On March 5, 2002 LB Kiel issued to UBS \$500 million of Kiel MTN Notes. They were "puttable" (i.e. redeemable) in that the principal amount of each note with accrued interest would become payable to a noteholder on any business day at the noteholder's option subject to written notice being given 5 business days in advance. These Notes were issued pursuant to a Pricing Supplement and a Dealer's Confirmation under the terms of the 2001 Programme Agreement regulating the issue of Kiel MTN Notes.
30. The Pricing Supplement was signed by LB Kiel and dated March 5, 2002. The Pricing Supplement was to be read in conjunction with the Information Memorandum. It had detailed provisions concerning, among other things, the interest rate of the Kiel MTN Notes and the put option available to holders of the Kiel MTN Notes. Clause 32 of the Pricing Supplement dealt with "other terms or special conditions". It provided that Condition 19(b) of the Information Memorandum for Euro Notes was to be modified. The modification resulted in a jurisdiction clause which read:

"(b) Subject as provided [below], the parties agree that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with the ...[Kiel MTN Notes]... and the parties accordingly submit to the exclusive jurisdiction of the English courts... nothing contained in this condition shall limit any right of the ... Noteholders... to take proceedings against [LB Kiel] in any other court of competent jurisdiction, nor shall the taking of Proceedings in one or more jurisdictions preclude the taking of Proceedings in any other jurisdiction, whether concurrently or not."
31. The other document executed on March 5, 2002 was a "Dealer's Confirmation" signed by UBS AG.

It has also been referred to in this case as "the Kiel Notes Initial Purchase Agreement" or IPA. The Dealer's Confirmation recorded that clause 21 of the Programme Agreement was deemed to have been deleted and replaced. The replacement was a jurisdiction clause which read:

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

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

..."

32. Immediately upon issue by LB Kiel to UBS the Kiel MTN Notes were transferred by UBS to NS4 in exchange for the issue by NS4 to UBS of the NS4 Notes. This transfer was envisaged by the Offering Circular, which explained that payments of principal under the NS4 Notes, along with Credit Protection Payments affecting those notes, would be funded by NS4 exercising its option to redeem the Kiel MTN Notes.

IV The dispute and the New York proceedings

33. Since March 5, 2002 regular payments on the NS4 Notes have been made by NS4 to LB Kiel and subsequently by NS4 to HSH. In recent times there have been defaults on assets in the Reference Pool. These defaults have not yet reached the top 4 tranches of the obligations to make credit protection payments. HSH says that it is nevertheless concerned at what may happen in future, and that those concerns have led it to review the circumstances in which LB Kiel entered into the transaction and the way in which the transaction has been put into effect. Following that review a dispute has arisen between HSH and UBS.

A The original New York complaint

34. As I have said, the New York proceedings were commenced on February 25, 2008 shortly after, on the same date, UBS had issued its proceedings for negative declaratory relief in England. The essence of the New York complaint in its original form concerned the alleged initial mis-selling and subsequent mismanagement of the Reference Pool underlying the NS4 Notes in that (a) UBS in selling the NS4 Notes to LB Kiel made various misrepresentations to LB Kiel, fraudulently or negligently; (b) UBS was in breach of the contract for the sale of the NS4 Notes to LB Kiel, by failing to deliver notes with the characteristics promised; (c) UBS breached the RPSA.
35. In paragraph 29 the complaint referred to LB Kiel as making "a \$500 million cash investment" in return for the NS4 Notes, and in paragraph 30 the complaint said that NS4 used what it received from LB Kiel in order to invest in the Kiel MTN Notes. HSH acknowledged that this was inaccurate. The true position was that LB Kiel bought the NS4 Notes by issuing the Kiel MTN Notes to UBS, and UBS transferred them to NS4 which retained them as collateral.
36. The first cause of action was for breach by UBS of contractual obligations found in the agreement for the purchase of the NS4 Notes by LB Kiel from UBS and in the RPSA. In consequence it was claimed that HSH should be awarded rescission of its contracts with UBS, or, in the alternative, damages.

37. The second and third causes of action were for fraud and negligent misrepresentation respectively. Each gave an account of allegedly untrue representations, along with failures to disclose, which were said to have induced LB Kiel to have purchased the NS4 Notes. In relation to both these causes of action it was said that HSH should be awarded rescission of its contracts with UBS, or, in the alternative, damages.
38. The fourth cause of action was for breach of fiduciary duty. It asserted that UBS had utilised LB Kiel's investment as an opportunity to take default risk off its own balance sheet and profit by taking short positions against the Reference Obligations it selected for inclusion in the Reference Pool. As a result HSH said that it had been damaged in an amount to be determined at trial, and was also entitled to punitive damages.
39. The fifth cause of action was for breach of an implied covenant of good faith and fair dealing. It asserted that UBS knowingly, intentionally, in bad faith, and in secret, selected Reference Entities that fundamentally compromised the NS4 Notes, charged an excessively high price for those Notes, and set an excessively low yield to be paid on them. It also asserted that UBS had made multiple adverse substitutions of collateral in the Reference Pool for its own benefit. The remedy claimed was rescission of the NS4 transaction, or, in the alternative, damages in an amount to be determined at trial.
40. The sixth cause of action was for unjust enrichment and breach of constructive trust, on the basis that UBS had received a monetary benefit to which it was not entitled, and which it had unjustly retained, and that in consequence the parties should be returned to their original position prior to UBS's misconduct, and UBS's ill-gotten gains should be held on constructive trust for HSH.
41. The seventh cause of action sought an injunction requiring UBS to establish a Commitments Committee conforming with the requirements of the RPSA or in some other way to manage its conflicts of interest.
42. The eighth cause of action was for conversion, on this basis: HSH had entrusted funds, through its investment in the NS4 Notes, to UBS for specific and limited purposes; UBS had wrongfully converted those funds; as a result of the conversion HSH had been damaged in an amount to be proved at trial.

B The Motion to Dismiss

43. On March 28, 2008, UBS filed a motion to dismiss the New York proceedings as not disclosing a cause of action. UBS also argued (as an alternative submission) that the New York court should stay its proceedings on forum non conveniens grounds. A few days after Walker J's judgment on July 4, 2008, UBS withdrew its forum non conveniens challenge, on the basis that in the light of Walker J's decision and pending the present appeal it was moot.
44. In his decision dated October 21, 2008, Justice Richard B Lowe III dismissed six out of the eight causes of action advanced in the New York complaint, namely the second to fourth and sixth to eighth causes of action, i.e., the causes of action for (alleged) fraudulent and negligent misrepresentation, breach of fiduciary duty, unjust enrichment and constructive trust, request for an injunction and conversion.
45. The fraud claims were dismissed on the ground that because HSH's claims of fraud were merely repetition of its claims for breach of contract, with the addition of allegations that UBS never intended to act in HSH's interests, and the many ways in which UBS did not honour the agreements, HSH had failed to allege fraud in the inducement, and that the many disclaimers and disclosures in the documents also barred the claim. The claim for negligent misrepresentation was barred because there was no special relationship of trust or confidence.
46. Consequently, the only causes of action which Justice Lowe was prepared to allow HSH to continue to advance in the New York proceedings against UBS were the first and fifth causes of action set out in the New York complaint, for: (a) breach of contract, in connection with which Justice Lowe described HSH's "overarching claim" as being the allegation that "UBS failed to maintain the promised high quality of the notes in the Reference Pool, by failing to ensure that the Commitments Committee keep an eye on the condition of the investments" (i.e., a claim for breach

of the RPSA); and (b) breach of the implied covenant of good faith and fair dealing, which is implied in all New York contracts, and which was treated in essence as an allegation in respect of the RPSA.

C The Amended New York Complaint

47. During the course of argument before Walker J, the judge in effect indicated that HSH's position might be stronger if in the New York claim HSH were not seeking rescission or alleging conversion of the Kiel MTN Notes. Consequently HSH confirmed that it was withdrawing its request that the NS4 transaction be unwound, and that it would amend the complaint to omit the request for rescission. HSH says that, although the request for rescission never concerned the Kiel MTN Notes issued by HSH, which were no longer even held by UBS, the amendment would make clear that the Kiel MTN Notes were not at issue in the dispute before the New York court.
48. On December 10, 2008, HSH filed an Amended Complaint in the New York proceedings. HSH re-introduced its claims that UBS made fraudulent and negligent misrepresentations and non-disclosures in respect of the transaction, and thereby induced HSH to invest in it. There are now four causes of action in the New York complaint: (1) breach of the contract; (2) fraudulent misrepresentation; (3) negligent misrepresentation; (4) breach of the implied covenant of good faith and fair dealing. The essence of the claims for misrepresentation is that HSH was induced "to purchase debt securities in [NS4]" in reliance on those representations, and "HSH would not have purchased the debt securities" in the absence of those representations (paras 97-98 and 107-108).
49. On January 16, 2009, UBS filed a motion to dismiss the misrepresentation claims in the Amended Complaint on the basis that these claims were barred by reason of *res judicata*, following the decision of Justice Lowe dated October 21, 2008; or alternatively should be dismissed on the substantive grounds identified by Justice Lowe. The motion was heard in April 2009 and judgment is expected in the autumn.

V Jurisdiction under the Brussels I Regulation, Article 23

50. It is common ground that HSH is domiciled in Germany for the purposes of the Brussels I Regulation, and that the only possible basis for jurisdiction in the English action is the jurisdiction clauses in the Dealer's Confirmation and the Kiel MTN Notes (via the Pricing Supplement). But nothing turns on the jurisdiction clause in the Kiel MTN Notes, since they passed immediately to NS4. It is therefore the Dealer's Confirmation which was the focus of the judge's decision and of this appeal. The question on this issue is whether the claims in the draft particulars of claim fall within the Dealer's Confirmation jurisdiction clause, with the consequence that the English court has jurisdiction under Article 23 of the Brussels I Regulation, which provides that where the agreement complies with the formal requirements (as to which there is no issue):

"1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. ..."

A The judge's decision

51. The judge said that the fundamental question was the meaning of the English jurisdiction clause in the Dealer's Confirmation jurisdiction clause rather than the Kiel MTN Notes jurisdiction clause, because UBS held the Kiel MTN Notes for no more than an instant. The judge accepted that had the contracts in which those clauses were found stood on their own, they should be given a wide construction. But this was a case where the parties had entered into different agreements for different aspects of an overall relationship, with different terms as to jurisdiction.
52. As a matter of general principle the court must seek to identify the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract: *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896, 912-913. The relevant background knowledge in the present case would include knowledge of

other contracts forming part of the transaction.

53. When considering the jurisdiction clauses found in the RPSA, the Kiel MTN Notes, and the Dealer's Confirmation, a person having that background knowledge would at once see that there was scope for the clauses to clash. In order to limit that scope, and to ensure that the clauses had meaning, such a person would be driven to the conclusion that each such clause focused upon matters directly relating to the contract in which it was found. It was manifestly incompatible with a non-exclusive New York jurisdiction clause for a matter falling within it also to be the subject of an exclusive English jurisdiction clause.
54. The question in each case was to which contract the dispute in question was properly to be allocated; and the court then applied whatever jurisdiction provisions, if any, that contract might contain: *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 Lloyd's Rep 767. The English jurisdiction clauses were insufficiently wide to cover the dispute set out in the New York complaint. All matters relating to the NS4 Notes, including the Indenture, the Letter Agreement and the RPSA, were subject to the laws of New York. All those agreements contained submissions to the jurisdiction of the New York courts, except for the Letter Agreement which was silent as to jurisdiction and hence effectively agreed that action could be brought in any court of competent jurisdiction. The Letter Agreement would not entitle UBS to sue HSH, a German domiciled company, in England.
55. The focus must be on the cause of action rather than the remedy flowing from that cause of action. Thus a claim to rescission, or for damages based upon the risk of exercise of the put option, was not to be regarded as so directly linked to the Kiel MTN Notes or the Dealer's Confirmation as to fall within the English jurisdiction clauses. The result was that the English court did not have jurisdiction under Article 23 of the Brussels I Regulation.

B The appeal

UBS's arguments

56. UBS's arguments are essentially these. It accepts that a claim for post-inception breaches of the RPSA would be outside the scope of the Dealer's Confirmation jurisdiction clause. That would include the first and fourth causes of action in the amended New York complaint.
57. But HSH's claim for misrepresentation is a claim concerning the representations which caused it to issue and transfer the Kiel MTN Notes. The Dealer's Confirmation was the agreement by which HSH invested in the transaction. Accordingly a dispute as to whether or not HSH was misled into agreeing to invest would clearly fall within the Dealer's Confirmation jurisdiction clause. So would any dispute as to whether damages should be paid for any loss caused by entering into the Dealer's Confirmation, or for any breach of the Dealer's Confirmation.
58. The New York complaint clearly indicates from the start that the action relates to HSH's investment in NS4, i.e. by its sale of the Kiel MTN Notes to UBS, so that it could fit into the NS4 structure described in the Offering Circular. Section B of the complaint is headed "UBS induces HSH to invest \$500 million in North Street 4" (i.e. the investment of the Kiel MTN Notes pursuant to the Dealer's Confirmation). The fraud and misrepresentation allegations made by the second and third causes of action are that HSH was induced to "purchase the debt securities" (Paras 72 and 82) (i.e. invest in NS4) in reliance on the truth of UBS's statements.
59. The Kiel MTN Notes were central to the transaction. Without them there would have been no issue and purchase of NS4 Notes. In addition to being the consideration provided by HSH for the NS4 Notes, the Kiel MTN Notes also serve as collateral for any credit protection payments relating to the NS4 Notes due to UBS under the credit swap. Should a credit protection payment need to be made in respect of the NS4 Notes, it is effected by redemption of the appropriate amount of Kiel MTN Notes.
60. The proper approach to the construction of clauses agreeing jurisdiction is to construe them widely and generously, and the words "arising out of" or "in connection with" apply to claims arising from pre-inception matters such as misrepresentation.

61. The Dealer's Confirmation jurisdiction clause had been specially renegotiated to provide expressly for the exclusive jurisdiction of the English court. If the parties had intended to give it a narrower scope, they would have done so. They must have envisaged the risk of a clash, and could have avoided it. The meaning of the clause is to be determined as at the time it was entered into and not by reference to the events which have happened.
62. The judge wrongly proceeded on the basis that the Dealer's Confirmation jurisdiction clause had to be construed narrowly (because of the existence of non-exclusive jurisdiction clauses in other agreements comprising the transaction), and thus wrongly construed the Dealer's Confirmation jurisdiction clause as applying only to matters "directly relating to" (Judgment, para 92) or "directly linked to" (para 94) the Dealer's Confirmation. The judge wrongly approached the matter not by asking whether or not a particular cause of action directly related to the Dealer's Confirmation, but whether it was more directly related to some other agreement.
63. The only question for the judge was whether on a true construction of the Dealer's Confirmation jurisdiction clause, Article 23 was engaged in relation to any of the claims made by HSH. It was irrelevant to this question whether or not the disputes, or some of them, also fell within a jurisdiction clause in any other contract. Nothing in the language of the Dealer's Confirmation jurisdiction clause indicates that certain disputes which otherwise fall within the scope of the clause are to be *excluded* from the English court's jurisdiction, whether by reason of the other jurisdiction clauses or otherwise.
64. The judge's assumption that the different jurisdiction clauses had to be interpreted so that they did not "overlap", and therefore that a dispute had to be "allocated" to only one agreement within the transaction, was erroneous. Claims in relation to the transaction may well involve more than one agreement. The fact that the different agreements comprise a single transaction makes it all the more likely that *certain* claims might fall within more than one jurisdiction clause in those agreements. This does not however mean that on an ordinary interpretation of the Dealer's Confirmation jurisdiction clause, the jurisdiction clauses in the RPSA, the Kiel MTN Notes and the Dealer's Confirmation will "clash", or that the Dealer's Confirmation jurisdiction clause properly interpreted would render the other (non-exclusive) jurisdiction clauses otiose.
65. If contrary to UBS's principal submission, the judge's approach that only one jurisdiction clause can be engaged at any one time was correct, then he should have given particular weight to the fact that the Dealer's Confirmation jurisdiction clause, in favour of the English courts, was an exclusive jurisdiction clause. The other jurisdiction clauses in the other contracts comprising the transaction were each non-exclusive New York clauses. In so far as the parties are to be taken to have been addressing the question of how any overlap between different jurisdiction clauses was to be resolved, this is the clearest indication that they envisaged that if a matter fell within the wording they had agreed in the Dealer's Confirmation jurisdiction clause, then it would take precedence over any other clause which might also apply.

HSH's arguments

66. HSH's arguments are these. The terms of the sale of the NS4 Notes were contained in the Letter Agreement and the RPSA. The only purpose of the Dealer's Confirmation was to set out the conditions on which the Kiel MTN Notes were to be issued. HSH used the Kiel MTN Notes (rather than cash) to pay for the NS4 Notes. There is no dispute about the issue, sale or performance of the Kiel MTN Notes. The dispute revolves entirely around the contracts by which the CDOs, i.e. the NS4 Notes, were acquired and managed. The Kiel MTN Notes are at best collaterally involved and which UBS held them for a mere *scintilla temporis*.
67. The dispute relates wholly to the NS4 Notes and not the Kiel MTN Notes, which are no more than part of the mechanics by which the NS4 Notes were acquired and collateralised. Not merely the centre of gravity but the entirety of the dispute is focused on the sale of the CDO Note and its subsequent management. The sale of the Kiel MTN Notes is only more distantly or collaterally involved, if involved at all.
68. The misrepresentation claims were made about the Reference Pool, not about the Kiel MTN Notes. The same allegations would be made if Kiel LB had paid for its investment in cash instead of Notes. The Kiel MTN Notes were no more than the consideration for the NS4 Notes. The

jurisdiction clause contained in the Dealer's Confirmation (i.e. the method of payment for the investment) cannot govern the dispute relating to inducement of making such investment.

69. HSH's claims against UBS are in essence that UBS wrongfully sold and managed the CDOs (the NS4 Notes) issued by NS4. In particular, the New York complaint alleges that UBS (1) induced HSH to purchase the NS4 Notes by misrepresentations concerning, among other things, the credit quality of the Reference Pool to which payments under the NS4 Notes were linked; (2) failed to deliver to HSH CDOs with the characteristics which it had agreed to provide; and (3) breached the RPSA, which was intended to provide HSH with important protections regarding the contents, and UBS's management, of the Reference Pool.
70. The Claim Form does not mention the Dealer's Confirmation. The draft Particulars of Claim underline the point that the dispute revolves around the represented and actual qualities of the NS4 Notes and their subsequent management. The draft places extensive reliance on provisions of the Letter Agreement, the Offering Circular, the Indenture and the RPSA, none of which contains an English jurisdiction agreement. The draft discloses no dispute in relation to the Kiel MTN Notes and no other connection with England. HSH's claims arise from or in connection with two written agreements only: the RPSA and the Letter Agreement.
71. In determining which contract a dispute arises from or in connection with, in a multi-contract situation, a degree of common sense is appropriate: *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 Lloyd's Rep 767 (Rix J). The parties entered into different agreements for different aspects of an overall relationship, with different terms as to jurisdiction. All matters relating to the CDO Note, including the Note itself (as set out in the Indenture), the Letter Agreement and the RPSA, are subject to the laws of New York. All those agreements contain submissions to the jurisdiction of the courts of New York, except for the Letter Agreement, which is silent as to jurisdiction and would not entitle UBS to sue HSH in England. The existence of the other contracts, with their own provisions as to jurisdiction, indicates that the parties intended that disputes arising out of them were *not* to be regarded as arising out of some other, at best collaterally involved, contract such as the Dealer's Confirmation.

VI Conclusions

72. The question on this part of the appeal is whether the claims in the English action fall within the jurisdiction agreement in the Dealer's Confirmation. That question turns on whether, in the light of the complex documentation as a whole, the parties should be taken objectively to have intended by the jurisdiction clause in the Dealer's Confirmation that, when a dispute arose as to whether the transaction as a whole was induced by fraudulent or negligent misrepresentation, the issue whether the issue and transfer of the Kiel MTN Notes was so induced should be subject to the exclusive jurisdiction of the English courts, while the question whether the conclusion of the other agreements was induced by the same alleged misrepresentations should be subject to the non-exclusive jurisdiction of the New York courts.
73. The claim form in the English proceedings makes no mention of the Dealer's Confirmation. It specifies only (1) the credit default swap dated March 3, 2002, which is an agreement between NS4 and UBS, to which HSH is not a party and under which it has made no claim; (2) HSH's subscription for the NS4 Notes, the terms of which contain a non-exclusive New York jurisdiction clause; (3) a subscription by NS4 for the Kiel MTN Notes issued by HSH, in relation to which no dispute exists; and (4) the RPSA, an agreement under which HSH makes claims in the New York court, and which contains a New York non-exclusive jurisdiction clause.
74. The draft particulars of claim have not been produced in a revised form following the dismissal of the misrepresentation claims in New York. This does not matter for present purposes. As I have said, the essence of the claims for misrepresentation is that HSH was induced "to purchase debt securities in [NS4]" in reliance on those representations, and "HSH would not have purchased the debt securities" in the absence of those representations (paras 97-98 and 107-108 of the Amended Complaint). Those pleas are in the same terms as the original complaint (paras 72-73 and 82-83).
75. According to the draft particulars of claim (para 2): "These proceedings concern the Defendant's investment in a multiple tranche synthetic Collateralised Debt Obligation ('the Transaction') which is the subject of these proceedings." It is important to note the wide definition of "the

Transaction."

76. Section B of the draft particulars of claim is headed "Events leading to the Transaction." Paragraph 6.2 pleads:

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

77. Paragraph 8 pleads:

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

78. Then after referring to several passages in the Offering Circular, paragraph 13 pleads:

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

79. Paragraphs 15 to 17 record that the Kiel MTN Notes were the mechanism by which Kiel made its \$500 million investment in the Transaction, and described the Dealer's Confirmation, the Pricing Supplement, the role of the notes as collateral for Credit Protection Payments, and the NS4 Kiel margin.
80. Paragraph 31 summarises HSH's claim as being that it is entitled to rescind the Transaction (a claim now dropped) and/or to damages on the grounds that UBS acted fraudulently and/or in breach of duty and/or wrongfully in relation to the Transaction and, in particular, in relation to the selection and substitution of assets comprising the Reference Pool. It then goes on to summarise the allegations in the original New York complaint.
81. Section E sets out the declarations of non-liability which are sought. The draft particulars of claim defined "the Principal Agreements" to include all of the documents involved in the transaction, including the Dealer's Confirmation, and defined "Related Documents" as "all other written agreements and/or written notifications and/or documents entered into and/or executed by the parties pursuant to or related to or in connection with the Transaction". As I have said, "Transaction" was defined as HSH's "investment in a multiple tranche synthetic Collateralised Debt Obligation". The declarations which were sought were:
- i) that the Principal Agreements and the terms contained therein, as well as all other written agreements and/or written notifications and/or documents entered into and/or executed by the parties pursuant to or related to or in connection with the Transaction (the "Related Documents") were and had been at all material times valid, binding and enforceable;
 - ii) that HSH was not entitled to rescind any of the Principal Agreements or any of the Related Documents (which is no longer relevant since the claim for rescission has been dropped);
 - iii) that HSH was not induced to enter into the Transaction by the alleged misrepresentations and/or non-disclosures;
 - iv) that the obligations of the parties in relation to the Transaction were (and had at all material times been) governed by, and are limited to, the terms of the Principal Agreements and/or the Related Documents and, save as expressly set out in those Agreements and/or the Related

Documents, UBS had assumed no obligation, duty or other responsibility, whether of a fiduciary or other nature, to HSH;

v) alternatively, that any such duty, obligation or responsibility undertaken by UBS had been lawfully performed and discharged;

vi) that UBS had not been unjustly enriched as alleged and/or had not converted any of HSH's funds and/or HSH's investment as alleged;

vii) that UBS had materially complied with and/or discharged each and all of its relevant obligations arising out of or in connection with the Principal Agreements and the Related Documents and accordingly UBS had not caused and/or was not liable to HSH in respect of any loss or damage arising out of or in connection with those Agreements and the Related Documents (whether in contract, tort, statute or otherwise) which may have been suffered or incurred by HSH in connection with the Transaction.

82. Are these claims within the Dealer's Confirmation jurisdiction clause? I accept UBS's submission that the proper approach to the construction of clauses agreeing jurisdiction is to construe them widely and generously: *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 Lloyd's Rep 425 at [14]. I also accept that in the usual case the words "arising out of" or "in connection with" apply to claims arising from pre-inception matters such as misrepresentation: *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20, [2007] 2 Lloyd's Rep 267 (affd sub nom *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40, [2007] 4 All ER 951); *Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc* [2008] EWCA Civ 1091, [2008] 2 Lloyd's Rep 619; *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] QB 488.
83. But the essential task is to construe the jurisdiction agreement in the light of the transaction as a whole. As I suggested in *Satyam Computer Services Ltd v Upaid Systems Ltd* [2008] EWCA Civ 487, [2008] 2 All ER (Comm) 465, at [93], whether a dispute falls within one or more related agreements depends on the intention of the parties as revealed by the agreements.
84. Plainly the parties did not actually contemplate at the time of the conclusion of the contracts that there would be litigation in two countries involving allegations of misrepresentation in the inception and performance of the agreements. But in my judgment sensible business people would not have intended that a dispute of this kind would have been within the scope of two inconsistent jurisdiction agreements. The agreements were all connected and part of one package, and it seems to me plain that the result for which UBS contends would be a wholly uncommercial result and one that sensible business people cannot have intended.
85. It is fanciful to suppose (as UBS contends) that the Dealer's Confirmation jurisdiction clause had been specially renegotiated to provide expressly for the exclusive jurisdiction of the English court to deal with disputes of this kind, or that the parties must have envisaged the risk of a clash.
86. The Dealer's Confirmation is expressed to be issued pursuant to LB Kiel's US\$20 billion Global Medium Term Note Programme and simply confirms the issue of the US\$500 Kiel MTN Notes to UBS as one of the dealers on HSH's bond programme. UBS immediately transferred them to NS4. NS4 kept the Kiel MTN Notes as an investment or "collateral" to create income in order to fund payments under the NS4 Notes.
87. I accept HSH's argument that the Kiel MTN Notes are simple AAA-rated bonds that HSH issued pursuant to a pre-existing bond programme. HSH used these Notes (rather than cash) to pay for the NS4 Notes. This dispute has nothing to do with the Kiel MTN Notes, which were no more than the consideration for the NS4 Notes. The parties cannot be taken objectively to have intended that the jurisdiction clause contained in the Dealer's Confirmation (i.e. the method of payment for the investment) would govern every dispute relating to inducement of making such investment.
88. There is no dispute about the issue, sale or performance of the Kiel MTN Notes. Their holder, NS4, is not a party to any of the proceedings. None of the parties to the proceedings advances any claim under the Kiel MTN Notes against any other party. None of the parties suggests there has been any breach of the Kiel MTN Notes, or any misrepresentation in relation to them. The Kiel MTN Notes are supported by a German state guarantee and are virtually equivalent to cash. The

misrepresentation claims were made about the Reference Pool, not about the Kiel MTN Notes. The same allegations would be made if Kiel LB had paid for its investment in cash instead of Notes.

89. The New York complaint alleges (inter alia) that (a) UBS induced HSH to purchase the NS4 Notes by misrepresentations concerning, among other things, the credit quality of the Reference Pool to which payments under the NS4 Notes were linked; (b) UBS failed to operate a Commitments Committee, as required by the RPSA, so as to select Reference Pool assets with stable or improving credit profiles, carefully monitor the credit status and quality of each asset, and avoid downgrades. As Justice Lowe stated in his decision of October 21, 2008 (at p 5) (in relation to HSH's first cause of action): "HSH's overarching claim is that UBS failed to maintain the promised high quality of the notes in the Reference Pool, by failing to ensure that the Commitments Committee keep an eye on the condition of the investments."
90. In *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 Lloyd's Rep 767, MLC, a hedge fund, bought Russian bonds from the claimant, an English company, pursuant to two Purchase Agreements containing exclusive English jurisdiction clauses. MLC financed the purchase of the bonds by repurchase transactions with the claimant pursuant to a Global Master Repurchase Agreement ("GMRA"), containing a non-exclusive English jurisdiction clause. When the claimant made a margin call under the GMRA which MLC failed to pay, and the claimant sued MLC in England for the amounts due under the GMRA.
91. MLC then sued the claimant and two of its group companies in New York for securities violations. The claimant sought an anti-suit injunction relying on the exclusive English jurisdiction clauses in the Purchase Agreements. One issue was how much of the subject matter of the New York proceedings arose out of the Purchase Agreements, and was therefore in breach of the exclusive jurisdiction clauses in those agreements.
92. Rix J concluded (at 777):

"then, where the jurisdiction clauses are in conflict, I do not see why the GMRA clause should not prevail: either on the basis that, in a case of conflict on standard forms plainly drafted by CS Europe, MLC should be entitled to exercise the broader rights; or on the basis that the clause in the contract which is closer to the claim and which is more specifically invoked in the claim should prevail over the clause which is only more distantly or collaterally involved."
93. He therefore refused to grant an injunction restraining MLC's claims in New York under the GMRA, because (at 781) the claims were preferably to be viewed as arising out of or in connection with the GMRA rather than the Purchase Agreement and thus were not within the jurisdiction clause in the Purchase Agreement; but if he were wrong about that, the New York court would be in a much better position to analyse the complaint for the purpose of identifying the relevant or more relevant jurisdiction clause.
94. The essence of Rix J's first reason is that under the *contra proferentem* principle, the intention must be taken to have been that, where a dispute fell within the wording of both jurisdiction agreements, it was the GMRA which was to be taken as the agreed position. The second reason, which he must have meant as a matter of construction, was that the parties must be taken to have intended that, where a dispute fell within both sets of agreements, it should be governed by jurisdiction clause in the contract which was closer to the claim.
95. In this case it is not necessary to go so far. Whether a jurisdiction clause applies to a dispute is a question of construction. Where there are numerous jurisdiction agreements which may overlap, the parties must be presumed to be acting commercially, and not to intend that similar claims should be the subject of inconsistent jurisdiction clauses. The jurisdiction clause in the Dealer's Confirmation is a "boiler plate" bond issue jurisdiction clause, and is primarily intended to deal with technical banking disputes. Where the parties have entered into a complex transaction it is the jurisdiction clauses in the agreements which are at the commercial centre of the transaction which the parties must have intended to apply to such claims as are made in the New York complaint and reflected in the draft particulars of claim in England.
96. I return to the draft particulars of claim to emphasise that the claims raising the misrepresentation

issue refer to "the Principal Agreements," the "Related Documents," and to "the Transaction." As I have said, "the Principal Agreements" means all of the documents involved in the Transaction (including the Dealer's Confirmation), and "Related Documents" are "all other written agreements and/or written notifications and/or documents entered into and/or executed by the parties pursuant to or related to or in connection with the Transaction". "Transaction" was defined as HSH's "investment in a multiple tranche synthetic Collateralised Debt Obligation".

97. The action in England is intended to mirror the New York proceedings. I have already emphasised that the essence of the claims for misrepresentation in New York is that HSH was induced to purchase the NS4 Notes in reliance on the fraudulent and negligent misrepresentations, and would not have purchased them in the absence of those representations. No sensible commercial interpretation of the jurisdiction clause in the Dealer's Confirmation could have the result that identical misrepresentation claims would fall both within that clause and within the non-exclusive New York jurisdiction clauses, simply because the consideration for the transaction was the issue of the Kiel MTN Notes. In my judgment the standard form bond issue jurisdiction clause in the Dealer's Confirmation does not apply to claims that the transaction as a whole, and in particular the purchase of the NS4 Notes, was induced by misrepresentation. I am satisfied that the judge's decision was right.

VII Forum non conveniens

98. In the alternative, HSH sought a stay of the English proceedings on forum non conveniens grounds, which only arises if (contrary to HSH's main case) the English court has jurisdiction under Article 23. In view of his conclusion that the English court did not have jurisdiction, the judge did not deal with this application because it did not arise for decision.

99. There are a number of formidable difficulties arising from the jurisdiction agreement, which on this part of the appeal must be taken to apply to part of the dispute, in the way of HSH establishing its case for a stay. It is true that HSH would have a very good prospect of showing that there is another court with competent jurisdiction (the New York court) which is clearly or distinctly more appropriate than England for the trial of the action: *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460. The employees of UBS who made the alleged misrepresentations to HSH were and are based in New York. The employees of HSH who negotiated the transaction were based in Germany. There were meetings between UBS and HSH in New York prior to the completion of the transaction, in which it is alleged that UBS confirmed that its management of NS4 would be performed in New York. Negotiations occurred in New York, between HSH and UBS's New York lawyers. No individual at HSH involved in the purchase of the NS4 Notes or the negotiation of the RPSA was located in London. No meetings or negotiations concerning the Notes or the RPSA occurred in London. The transaction was concluded in New York. The UBS employees who administered NS4 and were responsible for ensuring UBS complied with the terms of the RPSA were based in New York.

100. But against that, it is most unusual for an English court to stay proceedings brought in England pursuant to an English jurisdiction agreement. In *British Aerospace v Dee Howard* [1993] 1 Lloyd's Rep. 368, at 376, Waller J. said (in the context of an exclusive English jurisdiction clause) that it should not be open to a party to start arguing about the relative merits of fighting an action in the foreign jurisdiction as compared with fighting an action in London, where the factors relied on would have been foreseeable at the time that they entered into the contract. That case involved an application to set aside service out of the jurisdiction. It has been approved in this court in the context of an application to stay English proceedings (*Ace Insurance SA-NV v Zurich Insurance Co* [2001] EWCA Civ 173, [2001] 1 Lloyd's Rep 618, at [62], per Rix LJ) and of an application to restrain foreign proceedings in which the foreign court was asked to prevent a party suing in England pursuant to an English jurisdiction clause (*Sabah Shipyard (Pakistan) Ltd. v Islamic Republic of Pakistan* [2002] EWCA Civ 1643, [2003] 2 Lloyd's Rep 571, at [36], per Waller LJ) and it has been applied in many decisions in the Commercial Court.

101. The next difficulty is that there is an express agreement in the jurisdiction clause the effect of which is that HSH irrevocably waived any claim that proceedings had been brought in an inconvenient forum. In *National Westminster Bank v Utrecht-America Finance Co* [2001] EWCA Civ 658, [2001] CLC 1372, at [23], Clarke LJ thought it was "fatal" to any forum non conveniens case, whereas in *Sabah Shipyard (Pakistan) Ltd. v Islamic Republic of Pakistan*, ante, at [36] Waller LJ

did not treat such an agreement as decisive, but thought that it underlined the point that the jurisdiction agreement would be overridden only in exceptional circumstances.

102. Finally, it is a matter of controversy whether there is any room at all under the Brussels I Regulation regime for a stay on forum conveniens grounds. The effect of the ruling of the European Court in Case C-281/02 *Owusu v Jackson* [\[2005\] ECR I-1383](#), [\[2005\] QB 801](#) is that the Brussels I Regulation precludes a court of a Member State from declining jurisdiction under Article 2 (domicile of the defendant) on the ground that a court of a non-Member State would be a more appropriate forum for the trial of the action. The Supreme Court of Ireland has made a reference to the European Court as to whether the ruling in *Owusu v Jackson* applies even where proceedings have been commenced in a non-Member State prior to the proceedings in Ireland (the so-called "reflexive effect" of Regulation provisions, which does not arise in the present case): *Goshawk Dedicated Receivables Ltd v Life Receivables Ireland Ltd* [\[2009\] IESC 7](#), [2009] ILPr 26.
103. The prevailing view is that there is no scope for the application of forum conveniens to remove a case from a court which has jurisdiction under the Regulation, even as regards a defendant who is not domiciled in a Member State: see, e.g. Dicey, Morris & Collins, *Conflict of Laws*, 14th ed 2006, paras 11-023, 12-020, and specifically in relation to jurisdiction agreements, para 12-124, and Briggs, *Agreements on Jurisdiction and Choice of Law* (2008), para 7.02; and it has been held at first instance that *Owusu v Jackson* applies to cases where Article 23 applies: *Equitas Limited v. Allstate Insurance Company* [\[2008\] EWHC 1671](#), [\[2009\] Lloyd's Rep IR 227](#), at [64].
104. I am therefore disinclined (in common with the judge) to express a view on this controversial area where, on my view of the case, it does not arise for decision. For the reasons given on the main point, I would dismiss the appeal.
105. I add only one more point. As I have said, the motion in New York to dismiss the relevant parts of the Amended Complaint is still pending. The motion to dismiss was due to be heard shortly after the hearing in this appeal, and judgment is expected in the autumn. If the motion is successful this appeal would have been entirely unnecessary, since the English proceedings will have no point. I do not understand why the parties did not co-operate to have this appeal stood out of the list to await the outcome of the motion in New York.

Lord Justice Toulson:

106. I agree.

Lord Justice Ward:

107. I also agree.