Neutral Citation Number: 2016 EWHC 146 (Comm)

Case No: CL-2014-000637

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2016

Before :

MR JUSTICE KNOWLES CBE

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Between :

(1) GSO CREDIT – A PARTNERS LP
(2) GSO PALMETTO OPPORTUNISTIC INVESTMENT PARTNERS LP
(3) GSO SPECIAL SITUATIONS FUND LP
(4) GSO SPECIAL SITUATIONS OVERSEAS MASTER FUND LIMITED
(5) BLACKSTONE/GSO MARKET NEUTRAL CREDIT MASTER FUND LP

- and - **Claimants**

BARCLAYS BANK PLC

Defendant

- and-

HCC INTERNATIONAL INSURANCE COMPANY PLC

Third Party

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Tom Smith QC and Andrew Shaw (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimant**
Bankim Thanki QC and Rupert Allen (instructed by **Simmons & Simmons LLP**) for the **Defendant**
Guy Philipps QC (instructed by **Stephenson Harwood LLP**) for the **Third Party**

Hearing dates: 2, 3, 5 November 2015

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Approved Judgment

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

……
MR JUSTICE KNOWLES CBE

Mr Justice Knowles :

Introduction

1. This dispute concerns secondary trading using standard form documentation published by the Loan Market Association (the "LMA") and governed by English Law.

2. The documentation is used widely and internationally. Mr Bankim Thanki QC (with Mr Rupert Allen and instructed by Simmons & Simmons LLP) for the Defendant ("Barclays", described as a substantial participant in the secondary debt market) emphasised the significance of the case to the financial markets. Mr Tom Smith QC (with Mr Andrew Shaw and instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) for the Claimants ("GSO", funds of the Blackstone firm) described the dispute as one involving issues of wider significance.

3. At the request of all parties, including the Third Party ("HCC", a major insurance and reinsurance company, appearing by Mr Guy Philipps QC, instructed by Stephenson Harwood LLP), the case was transferred into the Financial List. The Financial List was introduced by Lord Thomas of Cwmgiedd, the Lord Chief Justice of England & Wales, in October 2015. This is the second case to reach trial in the List.

4. At the request of the Court, the parties have notified the LMA of the fact that the dispute involves its documentation and of the transfer of the case into the Financial List.

5. At the heart of the dispute, the parties take different views on the identity of the subject matter of trades where LMA standard form documentation is used and the seller is a lender under a surety bonds facility. Their difference of view is in respect of the meaning of terms in LMA documentation that are not directly defined in that documentation.

6. These terms are, primarily: "funded" and "unfunded" (within a calculation of "Settlement Amount") and "interest" (not here in the sense of compensation for the time value of money), "utilisation" and "participation" (within a definition of "Purchased Assets").

The trades

7. As at 7 June 2013 a Senior Facilities Agreement dated 19 October 2007, as subsequently amended and restated, ("the SFA") provided for certain lenders to make credit facilities available to certain borrowers. The borrowers included Codere SA, a gaming company. For convenience, "Codere" is used in this judgment to describe all borrowers relevant to the particular situation being described.

8. The credit facilities included a surety bonds facility, and HCC was the lender under that facility. HCC agreed to issue surety bonds in favour of (in particular) certain public authorities in Spain and Italy. A surety bond was defined by the SFA as "a guarantee, indemnity, performance bond, surety bond, documentary credit or other instrument of suretyship in a form requested by [Codere] … and agreed by [HCC]". The termination date under the surety bonds facility was 15 June 2013.

9. By Clause 7.2(b) and 9.2(b) of the SFA, where the issue of a surety bond had been requested Codere was obliged to pay HCC the amount of any claim by the public authority under the bond. By Clause 12.1(h) and (i) of the SFA, upon termination of the SFA Codere was obliged to provide HCC with security for this contingent obligation, in the form of cash cover in an amount equal to all outstanding issued surety bonds.

10. Clause 31 of the SFA provided, in part, that subject to certain provisions HCC was entitled to assign any of its rights or transfer by novation any of its rights and obligations under, in particular, the SFA to another bank or financial institution. Forms for assignment and transfer were scheduled to the SFA.

11. By 7 June 2013 HCC's maximum liability under surety bonds it had issued was Euro 23,790,371.45. No demand had been made under those bonds and no money had been paid out by HCC.

12. By trades on 7 June 2013, made orally by telephone, GSO agreed to buy from Barclays, and Barclays agreed to buy (back-to-back) from HCC, what was to be described as a Euro 23,790,371.45 portion of the commitment under the surety bonds facility. The trades between GSO and Barclays were at a "purchase rate" of 77.125 cents/ 1 Euro. The trade between Barclays and HCC was at a "purchase rate" of 76 cents/ 1 Euro.

13. On the evidence given at trial by Mr Akshay Shah and Mr Craig Snyder of GSO, and Mr Martyn Ward of HCC, the overall transaction implemented by the trades was agreed between GSO and HCC directly. There was however a telephone call on 7 June 2013 between HCC (by Mr Ward) and Barclays (by Mr Hillel Drazin). In that call Mr Ward described "the underlying bonds" as "the actual business". When Mr Drazin said that Barclays "buy in aggregate that exposure at 76 cents on the euro", Mr Ward agreed.

14. By a later email on 7 June 2013 Mr Ward wrote to Mr Drazin attaching "a schedule of bonds which aggregate to our total exposure of Euro 23,790,371.45". He added "Our instruction is to sell our position in the SFA of Codere (in respect of the above exposure) … at a net price of 76cent/1Euro (i.e. sale price of €18,080,682.30)." Mr Drazin, Mr Shah and Mr Snyder gave evidence to the effect that they did not attach significance to the reference to the figure of €18,080,682.30: although that evidence is not ultimately material, I record that I accept it.

15. It is in any event common ground between all parties that the trades were confirmed in signed Trade Confirmations dated 10 and 11 June 2013 using the standard form LMA Trade Confirmation (Bank Debt) ("the Trade Confirmations"). These provided that, and it is common ground that, the trades were subject to the Standard Terms and Conditions for Par and Distressed Trade Transactions (Bank Debt/Claims) of the LMA dated 14 May 2012.

The dispute

16. The parties dispute the effects of the trades, and as a result the trades have not been settled.

17. In particular, HCC contends that the subject matter of the trades comprised (only) HCC's rights as lender against Codere as borrower under the SFA. GSO contends that the subject matter of the trades also included HCC's contingent obligations to public authorities under issued surety bonds. The difference between these contentions affects the calculation of Settlement Amount and whether the Settlement Amount is a sum due from GSO or to GSO.

18. A principal concern of Barclays is that all the trades are construed or interpreted consistently.

19. On GSO's understanding of the trades, on a basis that the burden of any payments under issued surety bonds would ultimately be for its account and not HCC's, Euro 5,442,047.47 would be due to GSO from Barclays, and Euro 5,709,689.15 would be due to Barclays from HCC. On HCC's understanding of the trades, on a basis that the burden of any payments under issued surety bonds would ultimately be for its account and not GSO's, Euro 18,080,682.30 would be due from Barclays to HCC, and Euro 18,348,323.94 would be due from GSO to Barclays.

20. GSO and HCC have the same understanding as each other in one respect. This relates to Codere's obligation to pay the amount of any sum demanded of HCC by a public authority under an issued surety bond. The shared understanding is that, as between HCC and GSO, GSO is entitled to payments made by Codere pursuant to that obligation.

21. Shortly after the trades, on 5 July 2013 Codere entered into a restructuring and the SFA was further amended and restated. Under the restructuring Credit Suisse issued a letter of credit to reimburse HCC for any sums it would pay in respect of the issued surety bonds and GSO and others agreed to indemnify Credit Suisse for reimbursement payments it made under that letter of credit. GSO, Barclays and HCC agreed that HCC should consent to the restructuring on the basis that the restructuring would be without prejudice to the parties' rights in respect of the trades and the dispute which has arisen and that all rights of the parties in this respect would be fully reserved.

Applicable principles of interpretation

22. The task of the court is to determine what the parties meant by the language used: Rainy Sky SA v Kookmin Bank [2011] UKSC 50; [2011] 1 WLR 2900 at [14] per Lord Clarke JSC; Pink Floyd Music Ltd v EMI Records Ltd [2010] EWCA Civ 1429 at [17].

23. This "involves ascertaining what a reasonable person would have understood the parties to have meant": Rainy Sky SA v Kookmin Bank (above) at [14] per Lord Clarke JSC; Pink Floyd Music Ltd v EMI Records Ltd (above) at [17]. The reasonable person is to be taken to have "all the background knowledge which would reasonably have been available to the parties in the situation they were in at the time of the contract": Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 at 912 per Lord Hoffmann.

24. In determining the meaning of the language of a commercial contract the law generally favours a commercially sensible interpretation. This is because a commercially sensible interpretation "is more likely to give effect to the intention of the parties": Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749 at 771 per Lord Steyn.

25. That said, the purpose of interpretation "is to identify what the parties have agreed, not what the court thinks they should have agreed"; thus "the reliance placed in some cases on commercial common sense and surrounding circumstances … should not be invoked to undervalue the importance of the language of the provision which is to be construed": Arnold v Britton and Others [2015] UKSC 36; [2015] 2 WLR 1593 at [20] and [17] per Lord Neuberger PSC.

26. There is a particular consideration when commercial contracts are entered into which incorporate standard terms. This has been described as follows (Pioneer Shipping Ltd v BTP Tioxide Ltd ("The Nema") [1982] AC 724 at 737 per Lord Diplock):

> "… it is in the interests alike of justice and of the conduct of commercial transactions that those standard terms should be construed … as giving rise to similar legal rights and obligations in all [cases] in which the events [that] have given rise to the dispute do not differ from one another in some relevant respect. It is only if parties to commercial contracts can rely upon a uniform commercial construction being given to standard terms that they can prudently incorporate them in their contracts without the need for detailed negotiation or discussion …".

27. Overall, the principles described above provide for an approach that seeks to respect the parties' choice, to understand the commercial context, and to provide certainty and consistency in matters of business.

The 2012 LMA Terms

28. The relevant edition of the LMA Terms is, as indicated, that dated 14 May 2012 ("the 2012 LMA Terms").

29. The 2012 LMA Terms have since been amended, in particular on 3 March 2014. As they postdate the trades the subject of the present dispute the amended LMA Terms are not material to the present dispute. It may nonetheless assist to draw attention to the fact that one of the amendments made to the 2012 LMA Terms is to the language of Condition 2.

30. Condition 2 of the 2012 LMA Terms provided as follows:

> "A binding contract for the sale or participation by the Seller to the Buyer of the Purchased Assets shall come into effect between the Seller and the Buyer upon oral or, in the absence of such oral agreement, written agreement of the terms on the Trade Date and shall be documented and completed in accordance with these Conditions."

31. Under the 2012 LMA Terms the following terms were given the following meanings, so far as material for present purposes:

> " 'Purchased Assets' means any and all of the Seller's rights, title and interest in and to:
>
> (a) the commitment, advances, other utilisations (including letters of credit), claims and other rights of the Seller … included in the Traded Portion of the Seller's participation under or in respect of the Credit Documentation together with any and all corresponding rights and benefits under any ancillary guarantee or security relating to the Traded Portion;
>
> (b) in the case of a Claims Trade, the Claim; and
>
> (c) the Ancillary Rights and Claims
>
> provided that the Purchased Assets shall not include any of the Seller's rights that are attributable to the Seller's rights in any capacity other than as a Lender."
>
> " 'Purchased Obligations' means all of the obligations under the Credit Documentation expressly assumed or to be assumed by the Buyer from the Settlement Date in accordance with the provisions of the Transaction Documentation including without limitation the obligations of the Seller with respect to the Traded Portion but excluding the Retained Obligations."
>
> " 'Retained Obligations' means, save as otherwise provided in the Agreed Terms, all obligations of the Seller (a) under the Credit

> Documentation that relate to facts, events or circumstances arising or occurring before the Settlement Date, (b) under the Predecessor Transfer Agreement, (c) that relate to a breach of any of the Seller Warranties, (d) that arise out of the Seller's bad faith, gross negligence or wilful misconduct, (e) that arise out of any Predecessor in Title's bad faith, gross negligence or wilful misconduct, (f) that do not relate to the Purchased Assets or (g) that are attributable to the Seller's actions or obligations in any capacity other than as a Lender."
>
> " 'Retained Portion' means, in relation to a facility or, as the case may be, tranche of a facility specified in the Traded Portion, that part of the commitments, loans and other utilisations in respect of such facility or, as the case may be, tranche that are retained by the Seller and not included in the Traded Portion."
>
> " 'Credit Documentation' means the Credit Agreement (including all schedules and appendices to the Credit Agreement), any amendments, supplements, accessions, waivers or variations to the Credit Agreement and all guarantee, security, intercreditor and restructuring documentation relating to the Credit Agreement."
>
> " 'Credit Agreement' means the credit agreement to which the transaction relates as set out in the applicable Confirmation."

32. Condition 6.2 of the 2012 LMA Terms provided, in part, as follows:

> "(a) If the Agreed Terms provide that the Form of Purchase for the transaction is a Legal Transfer then the transaction shall be settled by way of novation or assignment (as provided in the Agreed Terms) unless:
>
> (i) …
>
> (ii) any third party consent required in connection with the transaction has not been obtained by the proposed Settlement Date or at any time prior to the Settlement Date the Seller receives notice that any third party consent required in connection with the transaction has not been granted,
>
> and in such cases the transaction shall, unless paragraph (b) below applies, be settled on the terms of a funded participation (using an LMA recommended form of funded participation with such changes as are mutually agreed between the parties). If settlement of the transaction cannot be effected by a funded participation, or if the parties fail to agree on any proposed change to such LMA recommended form of funded participation, the transaction shall be settled on the basis of an alternative structure or arrangement mutually acceptable to the Seller and the Buyer that provides the Seller and the Buyer with the economic equivalent of the agreed-upon trade (including, for the avoidance of doubt, cash settlement).

(b) If the Agreed Terms additionally provide "Legal Transfer only", the Seller and the Buyer shall be under no obligation to settle a transaction by a funded participation pursuant to paragraph (a) above. In such cases, the Seller and the Buyer shall instead be obliged to settle the transaction on the basis of an alternative structure or arrangement mutually acceptable to the Seller and the Buyer which provides the Seller and the Buyer with the economic equivalent of the agreed-upon trade (including, for the avoidance of doubt, cash settlement)."

33. Condition 13 of the 2012 LMA Terms provided:

"13.1 Settlement Amount calculation

The amount payable for the Purchased Assets shall be determined for:

(a) each currency in which the principal amount of the Purchased Assets has been funded;

(b) the base currency of any portion of the Purchased Assets which is unfunded as of the Settlement Date; and

(c) the currency of any Non-Recurring Fees received by the Seller on or before the Settlement Date to which the Buyer is entitled pursuant to the Agreed Term,

and shall be equal to the Purchase Rate multiplied by the principal amount of the Purchased Assets funded in the same currency as of the Settlement Date less:

(i) (100% minus the Purchase Rate) multiplied by the unfunded portion of the Purchased Assets as of the Settlement Date, where the base currency of such unfunded portion is the same currency as the principal amount of the funded portion of the Purchased Assets;

(ii) (100% minus the Purchase Rate) multiplied by any Permanent Reductions (as defined in Condition 12 (Permanent Reduction)) made in the same currency as the principal amount of the funded portion of the Purchased Assets and which occur in respect of the Purchased Assets on or after the Trade Date and on or before the Settlement Date; and

(iii) without double counting, any Non-Recurring Fees received by the Seller (where the currency of those Non-Recurring Fees is the same currency as the principal amount of the funded portion of the Purchased Assets) on or before the Settlement Date to which the Buyer is entitled pursuant to the Agreed Terms,

adjusted to take account of any Delayed Settlement Compensation and any applicable recordation, processing, transfer or other fee and Agent's Expense which under the Agreed Terms is to be payable by either party in the same currency as the principal amount of the funded portion of the Purchased Assets.

If none of the funded portion of the Purchased Assets is denominated in the same currency as either:

(d) the base currency of any unfunded portion of the Purchased Assets as of the Settlement Date; or

(e) any Non-Recurring Fees received by the Seller on or before the Settlement Date to which the Buyer is entitled pursuant to the Agreed Terms,

the amount payable in respect of the unfunded portion of the Purchased Assets or the Non-Recurring Fees (as the case may be) shall be determined in accordance with the preceding provisions of this Condition 13.1 but with a zero amount in the currency of the unfunded portion or the Non-Recurring Fees (as the case may be) in substitution for the principal amount of the funded Purchased Assets.

13.2 Payments

If the amount payable in respect of any currency is positive it shall be payable by the Buyer to the Seller; if negative the absolute value of the amount in the relevant currency shall be payable by the Seller to the Buyer."

34. Condition 21.4 of the 2012 LMA Terms provided, in part, as follows:

"21.4 Seller's representations – Distressed Trades

If this is a Distressed Trade the Seller represents to the Buyer as of the Seller Representation Date that:

…

(c) *No bad acts*: neither it nor any of its Predecessors-in-Title has engaged in any acts or conduct, or made any omissions, independently of the other Lenders … that would result in the Buyer receiving proportionately less payments or distributions or less favourable treatment in respect of the Purchased Assets or Purchased Obligations than any other Lender holding advances or a participation (of a similar nature to the Traded Portion) and similar claims under the Credit Documentation … "

…

(f) *No funding obligations*: it has no obligations to make loans or advances or other extensions of credit or to provide any other facility or financial accommodation under or in accordance with the Credit Agreement which will be transferred to the Buyer hereunder other than the Purchased Obligations and it has no other liabilities or obligations in respect of the Purchased Assets other than the Agent's Expenses;

…"

The Trade Confirmations

35. The Trade Confirmations specified, under the heading "Details of Traded Portion", the surety bond facility and gave a Euro figure as "Traded Portion of Commitment".

36. Under the heading "Form of Purchase", the Trade Confirmations specified at Section 10:

> "Legal Transfer by Transfer Certificate/ Assignment Agreement in form prescribed by the Credit Agreement *or* (where there is no form of transfer provided under the Credit Agreement) novation using LMA standard form of Transfer Agreement (Bank Debt) *or* (where there is no form of transfer provided under the Credit Agreement) assignment using the LMA standard form of Assignment (Bank Debt).
>
> Legal Transfer only …"

37. After "Legal Transfer only" (which the parties specified) the text of the Trade Confirmations noted that this was (the italics are in the original) *"(applicable only if "Legal Transfer" has been selected above and if the Seller and the Buyer do not wish to settle the transaction by a Funded Participation if a third party consent or other specified condition is not obtained or fulfilled)".* The parties also however specified a term modifying the standard form LMA Funded Participation Agreement (Par/Distressed) "if this transaction settles by Funded Participation".

Other material LMA standard forms

38. As noted above the standard form Trade Confirmation under the heading "Form of Purchase" refers to the LMA standard form of Transfer Agreement (Bank Debt) and the LMA standard form of Assignment (Bank Debt).

39. The standard form LMA Transfer Agreement (Bank Debt) (January 2010) provides for "the transfer by way of novation of the Novated Assets and Novated Obligations from the Transferor to the Transferee". A Schedule

provides for the insertion of details of the relevant "Credit Agreement". Under the headings "Novation Details" and "*Novated Tranches"* there is provision for the insertion of details of "Name of Tranche/Facility", "Nature (Revolving, Term, Acceptances Guarantee/Letter of Credit, Other)" and "Traded Portion (amount)". "Traded Portion (amount)" is divided between "Drawn Amount" and "Undrawn Amount". There is further provision for the insertion of "Details of outstanding Credits", with "Drawn Amount", "Traded Portion (amount)", "Tranche/Facility" and "Nature" to be detailed.

40. In annexed Terms and Conditions ("LMA Transfer Agreement 2010 Terms") "Credit Documentation" has the meaning given to it in the relevant Trade Confirmation. "Credit" is defined to mean, among other things, "Credit Support, … Loan and any other form of credit or facility provided under the Credit Agreement" and "Credit Support" is in turn defined to mean, among other things "a guarantee, indemnity, bond or other similar assurance against financial loss (other than a Letter of Credit [provision for a Letter of Credit being made elsewhere in the LMA Transfer Agreement 2010 Terms) entered into or issued by the Transferor or any other person in connection with the Credit Agreement under or in respect of which the Transferor has any liability whatsoever".

41. The LMA Transfer Agreement 2010 Terms go on to define "Novated Assets" and "Novated Obligations" as follows:

    "'Novated Assets' means, subject to [an exception that is not presently material] all of the rights and benefits of the Transferor under or in respect of the Credit Documentation corresponding to the Traded Portion including, without limitation, the rights and interests of the Transferor in and in respect of:

    (a) the benefit of any guarantee or other assurance against loss given by any Guarantor;

    (b) the benefit of any other security; and

    (c) any amounts owing to the Transferor under the Credit Agreement,

    in each case corresponding to the Traded Portion.

    'Novated Obligations' means all of the Transferor's obligations (but excluding the Retained Obligations) under or in respect of the Credit Documentation corresponding to the Traded Portion including, without limitation, any commitment under the Credit Documentation to make or issue a Credit and any obligations under any outstanding Credit, in each case corresponding to the Traded Portion."

42. Clause 2.1 of the LMA Transfer Agreement 2010 Terms made provision in relation to the consent of "the beneficiary of any Credit Support" to the transfer by novation of the Novated Assets and the Novated Obligations.

43. Clause 2.2(a) of the LMA Transfer Agreement 2010 Terms provided:

> "(a) The Transferee agrees:
>
> (i) that, on the Transfer Effective Date, it shall accept the transfer by novation of the Novated Assets; and
>
> (ii) that, on and from the Transfer Effective Date, it shall assume, perform and comply with the Novated Obligations under the Credit Documentation as if originally named as an original party in the Credit Documentation."

44. The standard form LMA Assignment (Bank Debt) (24 March 2011) provides for "the assignment of the Assigned Assets by the Assignor to the Assignee and the assumption of the Assumed Obligations by the Assignee". A Schedule provides for the insertion of details of the relevant "Credit Agreement". Under the headings "Assignment Details" and "*Assigned Tranches"* there is provision for the insertion of details of "Name of Tranche/Facility", "Nature (Revolving, Term, Acceptances Guarantee/Letter of Credit, Other)" and "Traded Portion (amount)". There is further provision for the insertion of "Details of outstanding Credits", with "Drawn Amount", "Traded Portion (amount)", "Tranche/Facility" and "Nature" to be detailed.

45. In annexed Terms and Conditions ("LMA Assignment Agreement 2011 Terms") "Credit Documentation" has the meaning given to it in the relevant Trade Confirmation. The meanings given to "Credit" and "Credit Support" are so far as material identical to those in the LMA Transfer Agreement (Bank Debt). The LMA Assignment Agreement 2011 Terms go on to define "Assigned Assets" and "Assumed Obligations" in the same way as the LMA Transfer Agreement (Bank Debt) defines "Novated Assets" and "Novated Obligations" (substituting the word "Assignor" for the word "Transferor").

46. Clause 2 of the LMA Assignment Agreement 2011 Terms provided, in part:

> "2.1 Consents
>
> The Assignment is conditional upon the obtaining of all necessary consents or other documents required to allow such Assignment to be effected."

47. Clause 2.2(a) of the LMA Assignment Agreement 2011 Terms provided:

> "(a) The Assignee agrees:
>
> (i) that, on the Assignment Effective Date it shall accept the assignment of the Assigned Assets; and
>
> (ii) that, on and from the Assignment Effective Date it shall assume, perform and comply with (vis-à-vis the Assignor, the Agent

and the other providers of credit in relation to the Assigned Assets) the Assumed Obligations under the Credit Documentation as if originally named as an original party in the Credit Documentation."

Back-to-back trades

48. The Trade Confirmations put in place trades on a back-to-back basis. Barclays was correct in its argument (not disputed by GSO or HCC) that the Trade Confirmations should be construed and given effect consistently.

"Purchased Assets" ("interest", "utilisation" and "participation")

49. As stated above, HCC contends that the subject matter of the trades comprised (only) HCC's rights as lender against Codere as borrower under the SFA.

50. If HCC was required to pay the public authorities under the surety bonds then, argues HCC, that payment remained ultimately for its account, not GSO's. What it had sold to GSO was, argues HCC, the right under the SFA to be paid an equal sum by Codere if HCC did have to pay the public authorities under the surety bonds.

51. In support of this contention HCC argues that the term "Purchased Assets" is to be "contrasted with" the term "Purchased Obligations", and "Purchased Assets" "excluded" "Purchased Obligations". Moreover, HCC argues, the rights with which the term "Purchased Assets" was concerned are those as a lender under or in respect of the "Credit Documentation" and that referred to the SFA and not to the surety bonds. Obligations (not rights) owed to the public authorities (not to Codere), under surety bonds (not the SFA) were not "Purchased Assets", argues HCC.

52. I cannot accept HCC's contention.

53. In commercial terms, the seller under the 2012 LMA Terms is trading a "position". Indeed, HCC is content with the notion that what was traded was HCC's "position under the SFA". It describes this as "common ground". It was the language used between Mr Shah of GSO and Mr Manuel Fernandez of HCC on 6 June 2013 in an initial conversation about the possibility of the trades. HCC distinguishes a trade of its "position under the SFA" with a trade of its position under the surety bonds.

54. A trade of a commitment or portion of a commitment under a surety bonds facility but not including the position under surety bonds issued under that facility is a feasible trade. But a more commercial representation of a trade of a "position under the SFA" is a trade extending both to the seller's liability to pay under the surety bonds it had

issued pursuant to the SFA together with its right, when it did pay, to be paid an equal sum by the borrower. A trade that extended only to the first, is a trade that leaves the seller retaining exposure (in an amount equal to the difference between the price it received on the trade and the amount of the liability under the surety bonds) while ceding the benefit of cover for that exposure to a buyer who did not have the exposure.

55. Turning to the 2012 LMA Terms, the definition of "Purchased Obligations" expressly contemplated the Buyer assuming obligations. Thus the definition referred to "the obligations under the Credit Documentation expressly assumed or to be assumed by the Buyer … including without limitation the obligations of the Seller with respect to the Traded Portion …". Obligations that would be left with the seller "with respect to the Traded Portion" were defined in the 2012 LMA Terms as "Retained Obligations".

56. The representations at Condition 21.4 in the 2012 LMA Terms are also material. Condition 21.4(f) showed that the 2012 LMA Terms contemplated that the seller may have liabilities and obligations in respect of the Purchased Assets, that those liabilities and obligations are in the form of "Purchased Obligations", and that "Purchased Obligations" may be transferred to the Buyer. And Condition 21.4(c) showed the 2012 LMA Terms addressing treatment of the buyer (not seller) in respect of "Purchased Obligations".

57. Condition 6 of the 2012 LMA Terms contemplated that the parties might in the Trade Confirmation provide that the "Form of Purchase" for the transaction was "Legal Transfer", and if they did then (subject to certain qualifications) "the transaction shall be settled by way of novation or assignment". The reference to novation is again consistent with a transfer of obligations.

58. The 2012 LMA Terms went on to address the situation where "any third party consent required in connection with the transaction" required for a novation of obligations (or for an assignment of rights where consent was required) was not forthcoming. Condition 6 contemplated that "the transaction shall be settled on the basis of an alternative structure or arrangement mutually acceptable to the Seller and the Buyer that provides the Seller and the Buyer with the economic equivalent of the agreed-upon trade". The same provision for an alternative structure or arrangement would engage if (as in the present case) the parties agreed "Legal Transfer only" in the Trade Confirmations.

59. HCC argued that public authorities to whom surety bonds had been issued fell outside the term "any third party", but in my judgment the term was wide enough to include them. The term "any third party" in the 2012 LMA Terms was not limited, contrary to part of the argument advanced by HCC in this respect, by the terms of the particular SFA in the present case. As referenced further below, the standard form LMA Trade Confirmation makes clear that the range of situations in which the 2012

LMA Terms are designed to operate include a situation "where there is no form of transfer provided under the Credit Agreement".

60. The standard form LMA Trade Confirmation provided for the use of the standard form LMA Transfer Agreement (Bank Debt) or standard form LMA Assignment (Bank Debt). The parties could (and the parties in the present case did, at Section 10 of the Trade Confirmations) provide that that standard form documentation would be used "where there is no form of transfer provided under the Credit Agreement". The fact that there was in any particular case a "form of transfer provided under the Credit Agreement" (the present is such a case, but that is not to say that the form provided was suitable) does not, in my judgment, make the provision for the use of the standard forms irrelevant to an understanding of the meaning of the 2012 LMA Terms.

61. The standard form LMA Transfer Agreement (Bank Debt) provided (where the consent of the third party beneficiary of the obligations was available) for the transfer of obligations by novation as well as the transfer of rights. Where the consent of the third party to a novation might not be available, the standard form LMA Assignment (Bank Debt) provided for the assumption of obligations as well as the assignment of rights.

62. Importantly for present purposes, each standard form went on to include as a "Novated Obligation" or an "Assumed Obligation" an obligation under a bond entered into or issued by the seller in connection with the relevant Credit Agreement, "corresponding to the Traded Portion". Thus the definitions of "Novated Obligations" and "Assumed Obligations" each included an "obligation[] under any outstanding Credit" as an obligation "under or in respect of the Credit Documentation". The definition of "Credit" included "Credit Support". The definition of "Credit Support" included a bond entered into or issued "in connection with" the Credit Agreement.

63. These definitions of the terms "Credit" and in turn "Credit Support" in the LMA Transfer Agreement 2010 Terms and the LMA Assignment Agreement 2011 Terms would, in my judgment, extend to the surety bonds. It is true that the terms "Credit" and "Credit Support" with their definitions are not provided by the 2012 LMA Terms themselves. But that does not mean that there is nothing to be drawn, when interpreting the 2012 LMA Terms, from the relationship to be found in the LMA Transfer Agreement 2010 Terms and the LMA Assignment Agreement 2011 Terms between the term "Credit Documentation" (which has the same definition in those terms as it has in the 2012 LMA Terms) and the terms "Credit" and Credit Support". And in any event, as part of the set of standard form documentation provided by the LMA, these documents formed part of the background available to the parties.

64. In the written opening argument of HCC it was argued that Section 10 of the Trade Confirmations was inconsistent with an agreement that HCC should transfer its obligations under issued surety bonds. In a written closing note it argued that it is "… impossible to settle a trade confirmed

by [a] Trade Confirmation (Bank Debt) (ie to be settled by assignment/novation, adding or substituting a New Lender for Existing Lender) by 'indemnity under a letter of credit'…". In light of the provisions reviewed in this section of this judgment, I am not able to accept these arguments.

65. A further contribution to the task of interpretation is made by the LMA's Secondary Debt Trading Documentation (Par and Distressed) Users Guide, dated 5 November 2012 ("the 2012 LMA Users Guide"). This too formed part of the background available to the parties. It provided at paragraph 6.2(a)(xviii): "Purchased Assets are defined to mean (a) the rights included in the traded portion of the relevant asset, but subject to the obligations and liabilities of the Seller attributable to the traded portion …". Approached in this way, the provisions of the Trade Confirmations, identifying the subject matter of the trade as a Euro 23,790,371.45 portion of HCC's commitment in respect of the surety bonds facility, can be readily understood.

66. Returning to the 2012 LMA Terms themselves, the subject matter of the trade was described in a definition of "Purchased Assets" that extends to what is described as "the Seller's … interest" "in … the commitment … of the Seller" and "in … other utilisations (including letters of credit)". When regard is had to the points made previously, it is sufficiently apparent, in my judgment, that the word "interest" extended to interest in the form of obligation, under surety bonds, arising from a utilisation of a surety bonds facility through the issue of those surety bonds.

67. The words "commitment" and "utilisation" were referenced in the definition of "Purchased Assets" to what was described as "the Seller's participation under or in respect of the Credit Documentation". In my judgment, even assuming (despite the wide definition of "Credit Documentation" in the 2012 LMA Terms) that the "Credit Documentation" in the present case is the SFA and not the surety bonds, the phrase "participation under or in respect of" in the definition of "Purchased Assets" in the 2012 LMA Terms was wide enough to extend to, and did extend to, participation (by the seller) as the issuer of surety bonds. Some of HCC's argument, particularly its oral closing argument, in support of a narrower or different interpretation of the words "commitment" and utilisation", sought to read across from the SFA rather than interpret the 2012 LMA Terms, and I do not consider that to be a correct approach.

68. As is obvious, the definitions of "Purchased Assets" and "Purchased Obligations" shared the word "purchased". In my judgment there was no true "contrast", as HCC argues, between "Purchased Assets" and "Purchased Obligations". Nor, in my judgment, is its argument that "Purchased Assets" "excluded" "Purchased Obligations" ultimately supported by the language, interpreted as above, of the two definitions.

"Funded" and "unfunded"

69. Condition 13 of the 2012 LMA Terms made clear that "Purchased Assets" may have a "portion" that is "unfunded" and a portion that is "funded". There is no definition of "funded" in the 2012 LMA Terms. The word does not appear in the definition of "Purchased Assets".

70. HCC contends that Purchased Assets are "funded" to the extent that the facility being traded has been "drawn" by the borrower; that is, the extent to which a commitment under the facility is no longer available to be utilised. Purchased Assets are "unfunded", argues HCC, to the extent that the facility being traded remains "undrawn" by the borrower; that is, the extent to which the borrower remains entitled to utilise the commitment under the loan facility.

71. Thus, in the present case, argues HCC, the Purchased Assets were funded because Euro 23,790,371.45 of the commitment under the surety bonds facility had been utilised, by the issue of surety bonds in that total.

72. I cannot accept HCC's contention in the context of a surety bonds facility.

73. In my judgment, where, at the time of the trade, surety bonds have been issued but no sums have been paid under those bonds, that circumstance leaves the Purchased Assets wholly unfunded. Had sums been paid under those bonds the Purchased Assets would to that extent be "funded" (a funded "portion"), and the balance would be "unfunded" (an unfunded "portion").

74. "Funded" is not just another word for "drawn" as where a surety bonds facility is drawn in order to issue surety bonds. Nor is it just another word for utilisation of the facility at the point of issue of surety bonds. "Funded" is a word directed to the question whether and what money has been paid by the lender pursuant to the facility.

75. With an advance under a loan facility the borrower owes a debt to the lender when money is paid by the lender at the point of the advance. Under a surety bonds facility it is when the lender pays money under the bond, not when the bond is issued, that the borrower under the facility owes a debt to the lender. In each situation, until money is paid by the lender, the lender is a person with an obligation to pay. Further, subject to the particular terms of the bond, the suretyship obligation constituted by a surety bond may never, in the events that happen, be called by the beneficiary under the bond.

76. In support of an interpretation that would equate the word "funded" in the 2012 LMA Terms with the word "utilised", HCC again sought to read across from the SFA (and the use of the word "utilisation" there). Again, I do not consider the SFA informs the meaning of the word "funded" in the 2012 LMA Terms in this way.

77. Whilst "funded" is not defined in the 2012 LMA Terms, "funding" is used in Condition 21.4, though as a "heading" and thus "for reference only" according to Condition 1.3(d) of the 2012 LMA Terms. HCC argues that the use of the word in Condition 21.4 supports its contention. However in my judgment that argument overlooks the inclusion of the phrase "other than the Purchased Obligations" in the Condition.

78. The 2012 LMA Users Guide, again forming part of the background available to the parties, referred at paragraphs 8.1(a) and (b) to the situation "where the drawn credit is funded (for example a conventional term or revolving loan facility)" and the situation "where the asset in question, although 'drawn' is not actually funded (for example a letter of credit)".

79. These references are directly contrary to HCC's contention. They appeared in the Introduction to a section on Funded Participation Agreements and Risk Participation Agreements. The parties did not use the LMA's Risk Participation model for the trades. They did, in the Trade Confirmations, arguably contemplate the possibility of using the Funded Participation model. But in any event the materiality of the references goes, in my judgment, beyond the context of participation.

80. It was pointed out in the course of argument that towards the end of the 2012 LMA Users Guide some worked examples apparently equated "funded" with "drawn". This is explicable by the fact that the examples were dealing with a situation where the type of facility taken for the example was a term or revolving loan facility.

81. In the formulation of an issue in a written closing note, HCC spoke of "that portion of the Purchased Assets that comprised HCC's rights". Any proposition that Condition 13 of the 2012 LMA Terms divided Purchased Assets into a "portion" comprising rights and a "portion" comprising obligations is not sound in my view. Even though the Purchased Assets include rights against Codere, that does not make the Purchased Assets "funded" where, although surety bonds have been issued under the facility, money has not been paid under those bonds.

Other arguments

82. HCC suggested that unless the consent of each public authority to the cancellation of each surety bond and its replacement by a new bond with a different issuer was obtained, trades of the type that GSO was suggesting were made could not be settled in June 2013 or now.

83. This is however the situation for which the 2012 LMA Terms provided, in particular at Condition 6.2. If a trade did not settle by a funded participation, the parties to that trade were obliged to settle the trade on the basis of an alternative structure or arrangement mutually acceptable to them which provided them with the economic equivalent of the agreed-

upon trade. Even without Condition 6.2, among the solutions where HCC remains liable to the public authorities but has (as GSO contends) traded its exposure, is for GSO (recognising that there are back-to-back trades) to provide cash cover or a letter of credit.

84. I should then address shortly a number of points raised on the facts.

85. HCC pointed out that the traded position had additional value to GSO because GSO had reasons, separate from the trades, for wishing to influence a renegotiation of the SFA. Whether right or wrong, this point does not inform or alter the answer to the question of what the traded position was.

86. HCC argued that a stance taken by GSO since 13 June 2013, that certain draft Assignment Agreements prepared by Barclays did not reflect the trades, was impossible to reconcile with GSO's argument that it was not just acquiring rights. But whether GSO's stance since 13 June was right or wrong, this again does not inform or alter the answer to the question of what trades had been made.

87. HCC drew attention to the reference to a figure of Euro 18,080,682.30 in Mr Ward's email of 7 June 2013 to Mr Drazin, referred to above. This is not material. The email was not part of the trades between HCC and Barclays. Nor in my judgment does it inform the background to the trades.

88. HCC pointed out that other trades at the time valued Codere's covenant at near to 100, rather than 76. However that is a function of the negotiation of the level of "purchase rate" on each occasion. It does not affect the meaning of the trades the subject of this dispute. HCC argued in closing that where a Lender's security was worth 100, no-one was at risk of economic loss from participation in the SFA even if Codere went into an insolvency process, and thus it was not likely that HCC would have agreed to pay a substantial sum to remove the exposure. But, with respect, and among other answers to it, the argument does not adequately address the question of when payment would be received in an insolvency.

89. HCC argued that if GSO was correct then "it agreed to assume a liability of up to €23.8 million to the [public authorities] – whose identities it did not know – under the Issued Surety Bonds – whose terms it did not know, and the likelihood of claims under which it made no inquiry about, and was in no position to analyse or even guess at – in return for an immediate cash payment, or premium, from HCC of just €5.7 million". The argument does not inform the meaning of the trades. It also overlooks the fact that what a party in GSO's position would know was that its maximum exposure was the difference between Euro 23.8 million (which might be called by the public authorities) and what and when it would recover from Codere on a claim for Euro 23.8 million.

Conclusion

90. The case turns on the meaning of terms in the 2012 LMA Terms that were not directly defined in those Terms.

91. The key conclusions are, for a trade on the 2012 LMA Terms in respect of a surety bonds facility:

    (a) the trade will, generally speaking, include the economic burden of the seller's obligations under issued surety bonds;

    (b) the "Purchased Assets" are, generally speaking, "funded" to the extent that money has been paid by the seller under issued surety bonds, rather than to the extent by which the facility has been drawn by the mere issue of the surety bonds.

92. I am very grateful for the quality of the contributions made by Counsel and Solicitors on all sides. I will hear any necessary further argument over the calculation of the Settlement Amount in light of the decisions reached in this judgment.