Neutral Citation Number: [2022] EWHC 3251 (Comm)

Case No: CL-2022-000072

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

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

Date: 16/12/2022

Before :

MR JUSTICE JACOBS

- -

Between :

BNP PARIBAS TRUST CORPORATION UK LIMITED (in its capacity as Bond Trustee, Issuer Security Trustee and Borrower Security Trustee)	**Claimant**
- and -	
URO PROPERTY HOLDINGS, S.A	**Defendant**

- -
- -

David Allison KC and Ryan Perkins (instructed by **Baker & McKenzie LLP**) for the **Claimant**
Sonia Tolaney KC, James MacDonald KC and Oliver Butler (instructed by **Humphries Kerstetter LLP**) for the **Defendant**

Hearing date: Wednesday 30th November 2022

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Approved Judgment

This judgment was handed down remotely at 16:30pm on 16th December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE JACOBS

Mr Justice Jacobs:

A: Introduction and the arguments of the parties in outline

1. The Defendant ("Uro") seeks summary judgment or to strike out the proceedings on the basis of what it describes as a short point of construction of financial contracts made between sophisticated commercial parties.

2. The Claimant in these proceedings ("BNPP") seeks to recover a substantial sum, approximately €251 million, alleged to be due and payable under a Loan Agreement ("the Loan Agreement") between an SPV called Silverback Finance Ltd ("Silverback" or "the Issuer") and Uro. BNPP is the assignee of Silverback. BNPP alleges that Uro is liable to make this payment pursuant to terms of the Loan Agreement which concern a Bond Make Whole Premium ("BMWP"). The underlying reason for the obligation is that there was an event, namely the loss of a particular tax status enjoyed by Uro at the time that the Loan Agreement was agreed, which meant that the monies advanced thereafter ("the loan") had to be repaid many years prior to its full term. There is no dispute that this event did occur, and indeed Uro has – albeit somewhat belatedly – made repayment of the loan itself.

3. The dispute concerns an additional payment which Uro is potentially liable to make in certain circumstances where the loan is required to be repaid, or is repaid voluntarily, prior to its term. This is the BMWP. It is, as explained in the expert evidence served by BNPP for the purposes of this application, a provision which is designed to provide compensation for the early termination of the Loan Agreement and thus the early repayment of the loan. The compensation is calculated by reference to the interest that BNPP (as assignee of Silverback) – but in reality the bond holders who had financed the loan under the overall transaction structure – would have received if the Loan Agreement had run to its full term. Accordingly, the BMWP is essentially immediate compensation for the premature termination of a contract and loss of the benefits that would have been received by the lender (and in reality the bondholders) if the contract had been fully performed.

4. The concept of a party to a financial instrument receiving compensation for loss suffered in consequence of early termination is, of course, familiar from the many cases on the ISDA contract form which have been litigated over the past 10 – 15 years. The parties referred, in the course of argument, to many of these authorities. It is also the approach of the common law where damages fall to be assessed consequent upon a repudiatory break leading to early termination of a contract.

5. There are a number of circumstances in which, under the Loan Agreement, this compensatory BMWP becomes payable. One circumstance is where there is a voluntary repayment by Uro; in other words, where Uro simply decides to repay early. That is not what happened here, although the provisions concerning the payment of the BMWP in that event are of some relevance to the parties' arguments. Another circumstance is the loss of Uro's tax status, known as "SOCIMI" status. There is no dispute that this did happen in the present case, and that therefore an early prepayment of the loan was indeed required. However, the BMWP would only become payable if "the relevant SOCIMI Status Loss Event giving rise to such prepayment was caused by any act or omission of [Uro]". There is a substantial dispute as to whether the loss of tax status here was, or was not, caused by any act or omission of Uro. It is, however, common

ground that that dispute raises issues which cannot be resolved in the context of a summary judgment or strike-out application.

6. The obligation to pay the BMWP, when there is a loss of tax status, is expressed in the following terms in Clause 7.1 of the Loan Agreement:

> "the Borrower must pay to the Issuer, on the Loan Payment Date specified for prepayment, an amount equal to the Bond Make Whole Premium applicable to such prepayment (as certified by or on behalf of the Issuer to the Borrower and the Borrower Security Trustee at least five Business Days prior to the specified date of prepayment)."

7. This provision utilises various expressions defined elsewhere. These are described below. In summary, however, Uro contends that there was a failure by the "Issuer" (i.e. Silverback) to follow the procedures which were preconditions to any liability to pay the BMWP. There were two aspects to that argument, and Uro contended that these were separate points. They concerned (i) the calculation of the BMWP, and (ii) the certification of the BMWP.

8. The issue in relation to calculation concerns the failure of Silverback to obtain, at the relevant time, price quotations from certain dealers in German "Bunds". Bunds are German government bonds, and are the equivalent of "gilts" in the UK. Uro contends that, in order for there to be an effective calculation of a BMWP, such written price quotations had to be obtained at or about 3.30 pm Frankfurt time on 7 February 2022. It is common ground that this was not done, at that time. BNPP contends that it was not essential to do so then, and that quotations could be (and were in this case) obtained retrospectively. Such retrospective quotations are, BNPP submits, sufficient for the purposes of calculating the BMWP. In any event, even if the retrospective process was not contractually effective, this does not mean that no BMWP is payable: the court can step in and ascertain and fix the appropriate pricing for the purposes of calculating the BMWP.

9. For the purposes of the calculation argument of the Loan Agreement, none of the procedures relied upon are apparent from the words of Clause 7.1 quoted above. In order to find those procedures, it is necessary to walk through a large number of complex provisions, and these are set out below.

10. By contrast, the issue concerning certification does arise on the words quoted above. This refers to the BMWP being "certified by or on behalf of the Issuer to the Borrower and the Borrower Security Trustee at least five Business Days prior to the specified date of prepayment". In the present case, it is common ground that the specified date of prepayment under the Loan Agreement was 21 February 2022, and accordingly the certificate should have been provided by 14 February 2022. There is no dispute that it was not so provided. Uro contends that the provision of a certificate no later than that date is a condition precedent to any obligation to pay the BMWP. Accordingly, if it is not provided by that time, it can never be provided subsequently. BNPP says that this construction is wrong.

11. On behalf of Uro, Ms Tolaney KC's written and oral argument focused principally on the calculation issue, rather than the certification issue which was addressed relatively

briefly. Mr Allison KC's argument on behalf of BNPP dealt in some detail with the certification issue, and why it was not a condition precedent. He submitted that this, or at least the principles governing the question of whether it was a condition precedent, had some bearing on the calculation issue, which he also addressed in some detail.

12. Accordingly, Uro's application is based on the proposition that BNPP, and Silverback (the "Issuer") whose rights BNPP is seeking to enforce, have failed to comply with the contractual terms they seek to enforce. Since the sum claimed by way of the BMWP was not calculated or certified at the required time in accordance with the terms of the applicable contracts, Uro contends that there is no contractual amount due from Uro and that BNPP's claim has no real prospect of success.

13. The reference to "real prospect of success" reflects the standard for summary judgment. Although the application was also advanced on a strike-out basis, there was no suggestion that this added anything to the summary judgment application. Accordingly, if the Claimant's case has a real prospect of success, then the claim must proceed. If it does not, then reverse summary judgment is appropriate and the claim can also be struck out.

14. Both parties referred to the approach to summary judgment applications in the well-known judgment of Lewison J in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. The court must consider whether the claimant has a realistic, as opposed to a fanciful, prospect of success. A realistic claim is one that carries some degree of conviction. This means a claim that is more than merely arguable. In reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial. In relation to issues of law or construction, Lewison J said:

> "On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

15. In the *ICI* case quoted in this extract, Moore-Bick LJ said at [13]:

> "Where it is said that the circumstances in which a document came to be written are relevant to its construction, particularly if they are said to point to a construction which is not that which the document would naturally bear, the respondent must provide sufficient evidence of those circumstances to enable the court to see that if the relevant facts are established at trial they may have a bearing on the outcome".

16. This passage is potentially relevant in the present case, where BNPP relies upon expert evidence concerning the factual matrix, and the commercial consequences of Uro's construction, in responding to Uro's case concerning the natural meaning of important words used in the contractual documents.

17. I now turn to the factual background and the relevant contractual terms.

B: The contractual background and the relevant contract terms.

18. Uro is the landlord of numerous real estate assets leased by Banco Santander S.A. ("Santander"), comprising the majority of Santander's retail branches in Spain. Santander was required to make very substantial rental payments to Uro.

19. In 2015 a suite of transaction documents was executed by which Silverback (described in the transaction documents and hereafter in this judgment as "the Issuer") issued a substantial number of bonds ("the Bonds") to various investors who agreed to acquire them ("the Bondholders"). The Issuer used the proceeds of the Bonds to fund the loans to Uro under the Loan Agreement. Uro's payments to the Issuer, and in turn the Issuer's payments to the Bondholders, are funded and secured by rental payments from Santander. The overall structure is therefore a securitisation of Santander's rental obligations in respect of its Spanish retail branches. The transaction therefore worked on the basis that Uro's payments of interest and principal under the loans would be used to fund payments of interest and principal under the Bonds. The Bonds and the loans were therefore closely connected.

20. Santander marketed the Bonds to investors in its capacity as a "Joint Lead Manager" of the securitisation programme. The prospectus for the Bonds ("the Prospectus") explained that Uro enjoyed a special "SOCIMI" tax status under Spanish law. This allowed Uro to pay 0% income tax on the rental income from Santander.

21. Upon issuance, the Bonds had an aggregate principal amount of approximately €1.35 billion. They comprise the Class A1 Bonds, with a principal amount of approximately €576 million as at 7 February 2022, and the Class A2 Bonds, with a principal amount of approximately €477 million as at 7 February 2022. The Bonds (and the loans) amortise under a fixed payment schedule over a very long term, with maturity in 2037 and 2039.

22. Uro provided security for its obligations to be released only on payment of all outstanding sums. This would include the BMWP, if payable.

23. BNPP was appointed under the transaction documents to act as "Bond Trustee", "Issuer Security Trustee" and "Borrower Security Trustee". These and numerous other terms were defined in a Master Definitions Agreement ("MDA"). BNPP took an absolute assignment of the Issuer's rights under various documents including the Loan Agreement.

24. The transaction documents of principal relevance to the present dispute are as follows:

    (1) the Loan Agreement;

    (2) the MDA;

    (3) a Bond Trust Deed, which contains at Schedule 3 the Terms and Conditions of the Bonds ("the Bond T&Cs").

25. Clause 1.1 of the Loan Agreement states that capitalised terms used but not defined in that agreement have the meaning set out in Part 1 of the MDA. The definition of BMWP is to be found in the MDA, although important terms which feed into it are to be found in the Bond T&Cs.

26. The key contractual terms relevant to the parties' arguments are as follows.

The Loan Agreement

> **7. PREPAYMENT**
>
> **7.1 Mandatory prepayment in whole**
>
> […]
>
> **(c) Mandatory SOCIMI Prepayment – loss of SOCIMI status**
>
> (i) If a SOCIMI Status Loss Event occurs then the Borrower must:
>
> (A) notify the Issuer and the Borrower Security Trustee promptly upon becoming aware of that event; and
>
> (B) prepay the Loan in whole (but not in part) on the next succeeding Loan Payment Date (or, if there are less than 15 Business Days between the date of receipt of the notice referred to in paragraph (A) and the next succeeding Loan Payment Date, on the second succeeding Loan Payment Date after receipt of such notice).
>
> (ii) Any prepayment required pursuant to this paragraph (c) is a **Mandatory SOCIMI Prepayment**.
>
> (iii) If:

(A) the Borrower is required to make a Mandatory SOCIMI Prepayment; and

(B) the relevant SOCIMI Status Loss Event giving rise to such prepayment was caused by any act or omission of the Borrower,

then the Borrower must pay to the Issuer, on the Loan Payment Date specified for prepayment, an amount equal to the Bond Make Whole Premium applicable to such prepayment (as certified by or on behalf of the Issuer to the Borrower and the Borrower Security Trustee at least five Business Days prior to the specified date of prepayment).

[…]

7.4 Standard Voluntary Prepayment – in whole or in part

(a) The Borrower may, if it:

(i) gives the Issuer and the Borrower Security Trustee not less than 15 Business Days' prior notice (such notice to expire on a Loan Payment Date); and

(ii) supplies to the Issuer a certificate signed by two directors of the Borrower to the effect that it has or will have the funds on the relevant Loan Payment Date, not subject to the interest of any other person, required:

(A) to make the prepayment of the Loan referred to in the notice given under paragraph (i);

(B) to make payment of the estimated Bond Make Whole Premium (on the basis of the estimated Present Value of the Bonds to be redeemed as a result of such prepayment) as notified to the Borrower by the Issuer copied to the Borrower Cash Manager and the Issuer Cash Manager (such notification to be provided within five Business Days of the Borrower requesting the Issuer provide the same); and

(C) to meet all of its obligations of a higher priority under the Borrower Pre-Enforcement Priority of Payments,

prepay the whole or any part of the Loan (but, if in part, being an amount that reduces the aggregate amount of the Loan by a minimum principal amount of €1,000,000) on the Loan Payment Date specified in the notice referred to in paragraph (i) above.

(b) A prepayment under this Clause 7.4 is a Standard Voluntary Prepayment.

(c) If the Borrower makes a Standard Voluntary Prepayment then it must pay to the Issuer, on the Loan Payment Date specified for prepayment, an additional amount equal to the Bond Make Whole Premium applicable to such prepayment, as certified by the Issuer (or on its behalf by the Issuer Cash Manager) to the Borrower and the Borrower Security Trustee at least five Business Days prior to the specified date of prepayment.

27. CALCULATIONS AND CERTIFICATES

27.2 Certificates and determinations

Any certification or determination by the Borrower Security Trustee or the Issuer of a rate or amount under any Borrower Finance Document is, in the absence of manifest error conclusive evidence of the matters to which it relates.

Master Definitions Agreement

Bond Make Whole Premium means the premium above the Principal Amount Outstanding of the relevant Bond calculated pursuant to Condition 5.3(d) (Redemption, Purchase and Cancellation – Early redemption in whole or part) or Condition 5.3(e) (Redemption, Purchase and Cancellation – Early redemption in whole or part);

Principal Amount Outstanding means an amount equal to the principal amount of the Bonds less the aggregate amount of all principal payments (excluding any premium payable in accordance with Condition 5.3 (Redemption, Purchase and Cancellation – Early redemption in whole or part)) in respect of such Bond which have become due and payable since the Closing Date, except if and to the extent that any such payment has been improperly withheld or refused;

The Bond T & C's

5.3 Early redemption in whole or part

(a) Except in circumstances where Condition 5.3(b) or Condition 5.4 (Redemption, Purchase and Cancellation– Optional redemption due to change of tax law and illegality) applies, on the receipt by the Issuer of a notice from the Borrower under the Loan Agreement that it will make a mandatory or voluntary prepayment in whole or in part of any of the Loan, as the case may be, on any following Loan Payment Date the Issuer shall give not less than 10Business Days' and not more than 20 Business Days' prior written notice to the

Bondholders, the Bond Trustee and the Paying Agents that it will, to the extent it receives such prepayment proceeds, apply the same to redeem the Bonds *pro rata* and *pari passu* on the immediately following Bond Payment Date.

[…]

(d) Any Bond redeemed pursuant to Condition 5.3(a) in respect of a Mandatory SOCIMI Prepayment caused by an act or omission of the Borrower, a Mandatory Disposal Prepayment Event, a Substitution Voluntary Prepayment or a Standard Voluntary Prepayment will be redeemed at an amount equal to the higher of (i) the Principal Amount Outstanding of the relevant Bond (or, as the case may be, the relevant part of it) or (ii) the Present Value (as defined below) together with, in each case, accrued and unpaid interest on the Principal Amount Outstanding of the relevant Bond (or, as the case may be, the relevant part of it) up to (but excluding) the Bond Payment Date on which such redemption occurs.

[…]

Bund Rate means, with respect to any Reference Date, the rate per annum equal to the equivalent yield to maturity as of such date of the Comparable German Bund Issue, assuming a price for the Comparable German Bund Issue (expressed as a percentage of its principal amount) equal to the Comparable German Bund Price on such date of determination.

Comparable German Bund Issue means, in respect of each Class of Bonds, the German *bundesanliehe* security selected by any Reference German Bund Dealer the average life of which most closely matches the then average life of such Class of Bonds and that would be utilised, at the time of selection and in accordance with customary financial practice, in pricing new issues of euro- denominated corporate debt securities in a principal amount approximately equal to the then Principal Amount Outstanding of the relevant Class of Bonds and with an average life most closely matching the then average life of the relevant Class of Bonds.

Comparable German Bund Price means, with respect to any relevant date, the average of all Reference German Bund Dealer Quotations for such date (which, in any event, must include at least two such quotations), after excluding the highest and lowest such Reference German Bund Dealer Quotations or, if the Financial Adviser obtains fewer than four such Reference German Bund Dealer Quotations, the average of all such quotations.

> **Financial Adviser** means an internationally recognised investment bank in Frankfurt (selected by the Issuer and approved by the Bond Trustee).
>
> **Present Value** means aggregate of the present values, as at the Reference Date, of (i) the Principal Amount Outstanding of the relevant Bond (or, as the case may be, the relevant part of it) to be redeemed and (ii) all interest which would have been payable in respect of the relevant Bond (or, as the case may be, the relevant part of it) up to (and including) the Bond Payment Date on which such redemption occurs, assuming in both cases that the Principal Amount Outstanding of the relevant Bond (or, as the case may be, the relevant part of it) would have been paid on its scheduled Bond Payment Date as set out in Condition 5.2 (Scheduled mandatory redemption in part) (as adjusted to take account of any early redemptions already effected), computed using a discount rate equal to the Bund Rate plus (for the Class A1 Bonds) 0.380 per cent. and (for the Class A2 Bonds) 0.410 per cent. as of the Reference Date and assuming the relevant Bond would otherwise have been redeemed on the relevant Bond Maturity Date (as reported and notified in writing to the Issuer, the Issuer Cash Manager and the Bond Trustee by the Financial Adviser).
>
> **Reference Date** means the date which is the third business day in Frankfurt prior to despatch of the notice of redemption referred to in this Condition 5.3(a).
>
> **Reference German Bund Dealer** means any dealer of German *bundesanliehe* securities appointed by the Financial Adviser.
>
> **Reference German Bund Dealer Quotations** means, with respect to each Reference German Bund Dealer and any relevant date, the average as determined by the Financial Adviser of the bid and offered prices for the Comparable German Bund Issue (expressed in each case as a percentage of its principal amount) quoted in writing to the Financial Adviser by such Reference German Bund Dealer at or about 3.30pm (Frankfurt time) on the Reference Date.

27. Capitalised terms in the following sections of this judgment are references to the defined terms set out above.

C: Factual background to the dispute

The Santander acquisition in 2020 and its consequences

28. When the Bonds were issued, Santander held only a minority interest in Uro's share capital. However, by September 2020, Santander had acquired 99.99% of Uro's share capital ("the Santander Acquisition"). Following the Santander Acquisition, Uro lost its favourable "SOCIMI" tax status.

29. On 17 December 2020, Uro notified the Issuer that a "Potential SOCIMI Status Loss Event" had occurred under the Loan Agreement. This was essentially because SOCIMI status does not apply under Spanish tax law to a landlord company which is a subsidiary of its own tenant. Under the terms of the Loan Agreement, a "Potential SOCIMI Status Loss Event" is required to be remedied within the financial year following its occurrence in order to avoid triggering a "SOCIMI Status Loss Event" ("SSLE"). This meant that the deadline for remedying the "Potential" SSLE was 31 December 2021.

30. It is common ground that a mandatory prepayment event, namely an actual SSLE, did occur in December 2021. This was because the loss of SOCIMI tax status was not remedied within one year.

31. This SSLE destroyed tax advantages that were intended to exist under the finance structure. The Prospectus had stated that an SSLE could have a material adverse effect on Uro's financial position, and it could therefore in turn impact upon the Issuer's ability to make payments on the Bonds.

32. Clause 7.1(c) of the Loan Agreement sets out what is to happen in the event of an SSLE. In summary, Uro was required to notify the Issuer of the SSLE promptly, and prepay the loan facilities in whole on the next succeeding "Loan Payment Date": see clause 7.1(c)(i). If the SSLE had been "caused by any act or omission" of Uro, Uro was also obliged to pay an amount equal to the BMWP.

33. The words "Bond Make Whole Premium" (i.e. the BMWP) in clause 7.1(c) of the Loan Agreement refer to both Conditions 5.3(d) and 5.3(e) of the Bond T&Cs. It was common ground that the relevant provision, for present purposes, was Condition 5.3(d).

34. Condition 5.3(d) requires the calculation of a "Present Value" determined by reference to certain quotations obtained from German Bund dealers "at or about 3.30 pm (Frankfurt time) on the Reference Date". The Reference Date is defined in the Bond T&Cs as the date three Business Days before the Issuer serves a notice of redemption. The amount (if any) by which the Present Value exceeds the Principal Amount Outstanding of the Bonds equates to the BMWP. The lengthy definition of "Present Value" required, in summary, a calculation of the aggregate, as at the Reference Date, of the present value of the Principal Amount Outstanding of the Bonds, plus the present value of all future interest that would have been earned had the Bonds been held to maturity, in each case assuming each payment of principal and interest being valued would (but for the redemption) have occurred on its scheduled date and discounting each payment back to the Reference Date. (The expression Principal Amount Outstanding was itself defined in the MDA, but it is not relevant to the parties' arguments in this case).

31 December 2021: notice of SSLE

35. On 31 December 2021, Uro gave formal notice, in accordance with clause 7.1(c)(i) of the Loan Agreement, that an SSLE had occurred. This was accompanied by a prepayment notice which specified a prepayment date of 21 February 2022. That date was the "next succeeding Loan Payment Date" as defined in Clause 7.1(c) of the Loan Agreement. Paragraph 4 of Uro's notice asserted that no BMWP was due on grounds that it had not caused the SSLE. This remains Uro's position. Accordingly, even if Reference German Bund Dealer Quotations had been obtained from the Reference

German Bund Dealers (or "Bund dealers" as I refer to them in this judgment), on the Reference Date itself, it is clear that no payment would have been made by Uro.

36. Uro contends that the occurrence of the SSLE came as no surprise to the Issuer or BNPP. They submitted that BNPP had been on notice for some time that an SSLE was likely to occur on the first anniversary of the acquisition of Uro's shares that had taken place in 2020.

37. It is not necessary to address that argument in the context of the present application. If disputed, its resolution may depend upon the feasibility of the "Potential" SSLE being remedied within the relevant time period. In correspondence in April 2021, Uro said that the question of whether an SSLE would occur was at that stage "hypothetical", and its occurrence could only be determined at the end of the period allowed for remedy. This suggests some uncertainty as to whether the SSLE would definitely occur.

38. It is, however, clear that by April 2021 there was a developing dispute as to whether the BMWP would be payable in the event that an SSLE occurred. Slaughter and May, writing on behalf of Santander, wrote to Quinn Emanuel, acting for the Bondholders, stating that the BMWP would not be payable. BNPP wrote to Uro asserting that Uro would be liable to pay a BMWP when the anticipated SSLE occurred. Uro disputed this, on the basis that the SSLE was not caused by Uro's own act or omission. BNPP repeated its assertion in a 'Letter Before Action' served on its behalf on 23 December 2021, before Uro had given formal notice of the occurrence of the SSLE.

39. Against this background, Uro submitted that the Issuer and BNPP could, in anticipation of the occurrence of the formal notice served on 31 December 2021, have appointed and approved a "Financial Adviser", as defined in the Bond T&C's, or otherwise put arrangements in place for the BMWP to be calculated and certified. Again, however, it is not necessary to address this argument in the context of the present application. The evidence of Mr Mark, described below, indicates that the appointment of a Financial Adviser is not necessarily straightforward. The extent to which a Financial Adviser could in practice be appointed, in advance of the occurrence of the SSLE Event and notification thereof, is a matter to be explored at trial, if Uro's application fails.

February 2022

40. Subsequently, on 10 February 2022, the Issuer served a notice of redemption ("Redemption Notice") on the Bondholders. This notice stated that the proceeds of the repayment by Uro on the Loan Payment Date of 21 February 2022 would be remitted to the Bondholders on the immediately following "Bond Payment Date" of 25 February 2022. Pursuant to Condition 5.3(a), the Issuer was required to issue this Redemption Notice within not less than 10 and not more than 20 business days of the next Bond Payment Date, namely 25 February 2022. Accordingly, it had to be served within a window which opened on 28 January 2022 and closed on 11 February 2022. It was therefore in fact served on the penultimate day of the window.

41. The service of this notice has an important contractual consequence: it set the Reference Date as 7 February 2022, which was the third business day prior to service of the Redemption Notice. This Reference Date is the critical date for the purposes of the calculations relevant to ascertaining Present Value under the Bond T&Cs.

42. It is common ground that the Issuer did not appoint a Financial Adviser at that time, or otherwise seek to obtain quotations from Bund dealers at that time. In consequence, the Issuer was not in a position to provide a certification, pursuant to Clause 7.1(c)(iii) of the Loan Agreement, on 14 February 2022. 14 February 2022 was five days prior to the date for prepayment, namely 21 February 2022.

43. Accordingly, a number of different dates in late January and February 2022 are relevant by reference to the definitions in the various agreements, and it may be helpful to summarise them here:

> **28 January 2022**: the first date for the opening of the "window" for service of the Redemption Notice.
>
> **7 February 2022**: this is the "Reference Date" as defined in the Bond T&Cs. It is an important date for the purposes of the calculation of Present Value, which requires a comparison of figures "as at the Reference Date". It became the Reference Date because it was the date 3 business days prior to the dispatch of the Redemption Notice sent by the Issuer to the Bondholders pursuant to Clause 5.3(a) above.
>
> **10 February 2022:** date of service of the Redemption Notice.
>
> **11 February 2022:** the final date of the "window" for service of the Redemption Notice.
>
> **14 February 2022**: this is the last date when, in accordance with Clause 7.1(c) of the Loan Agreement, the Issuer was to provide a certification of the amount of the BMWP. It is the relevant date, because it is 5 business days prior to the "specified date of prepayment". The specified date for prepayment was 21 February 2022, because that was the next Loan Payment Date following Uro's notification of the SSLE.
>
> **21 February 2022**: this was, as described above, the next Loan Payment Date following Uro's notification of the SSLE. It was therefore the date on which the loan was to be repaid pursuant to clause 7.1(c)(i)(B). It was also the date when, in principle and assuming that the necessary calculation and certification had been carried out, any BMWP was to be paid, pursuant to the final words of clause 7.1 of the Loan Agreement.
>
> **25 February 2022**. This was the next "Bond Payment Date" (as defined in the MDA) following Uro's notification of the SSLE. The Bond Payment Dates were set a few days after the Loan Payment Dates in the Loan Agreement, reflecting the fact that it would take a few days for payments made by Uro to be paid over to the Bondholders. It is this date that dictated the window for service of the Redemption Notice, whose service would determine the Reference Date.

44. On 15 February 2022, Uro wrote to the Issuer stating that it had not received a certification of the BMWP. The letter stated that the deadline for certification of the BMWP had passed such that no BMWP was payable.

45. On 16 February 2022, BNPP issued the present proceedings. At that time, BNPP sought various declarations, namely that:

> (1) the SSLE on 31 December 2021 was caused by an act or omission of Uro;
>
> (2) Uro is required to make a payment to the Issuer of an amount equal to the BMWP applicable to the Mandatory SOCIMI Prepayment on 21 February 2022 in accordance with clause 7.1(c)(iii) of the Loan Agreement; and
>
> (3) Until such time as Uro pays the BMWP as set out above, BNPP has no obligation to release the Borrower Security under Clause 15.1 of the English Borrower Deed of Charge.

46. At that time, BNPP did not quantify the amount of the BMWP. This has been done subsequently, as described below, following the appointment of Rothschild as Financial Adviser in August 2022.

47. Uro did not in fact make any prepayment of the loan until July 2022. Ms Tolaney was inclined to accept that this was a default, but I accept her submission that it has no real bearing on the construction issues that are to be considered on the present application.

The appointment of Rothschild

48. On 1 March 2022, Baker McKenzie on behalf of BNPP wrote to Reed Smith, on behalf of the Issuer, requesting that the Issuer appoint a Financial Adviser for the purpose of calculating the BMWP. Mr Lyons of Baker McKenzie has subsequently made enquiries with Reed Smith to understand why the Issuer did not appoint a Financial Adviser at an earlier stage.

49. It took approximately 6 months to appoint a Financial Adviser. The reasons were explained in Mr Lyons' evidence. I do not consider that the exact reasons why it took so long, in the present case, have any significant bearing on the issues of construction. However, it is clear on the expert evidence of Mr Mark (which is of potential relevance to the construction issues) that the process of appointing a Financial Adviser, and then obtaining quotations, is not straightforward and may therefore take some time. This is potentially relevant as part of the "factual matrix" relevant to the issues of contract interpretation.

50. On 3 August 2022, the Issuer and BNPP jointly engaged Rothschild to act as Financial Adviser.

51. On 10 August 2022, the Issuer instructed Rothschild to contact potential Reference German Bund Dealers to ask for quotations "as at" 3.30pm Frankfurt time on the Reference Date "or as near as possible to that date and time". The instruction letter includes the following:

> "1. Please contact potential Reference German Bund Dealers to request Reference German Bund Dealer Quotations for each class of Bonds as at 3.30 pm Frankfurt time on 7 February 2022 or as near as possible to that date and time which each Reference German Bund Dealer is able to provide in writing. Once you

> have received Reference German Bund Dealer Quotations for each class of the Bonds from all Reference German Bund Dealers which are able to provide them in writing, please calculate the Comparable German Bund Price for each class of the Bonds and, therefore, the Bund Rate and Present Value for each class of the Bonds ...
>
> 2. Additionally and in any event, but as a separate process, please obtain the closest possible estimate of the Comparable German Bund Price for each class of the Bonds with reference to any other reliable sources of information available to you, e.g. data from Bloomberg, Thomson Reuters, or any other similarly well-recognised service providers in your market (the "Estimated Comparable German Bund Price") ..."

52. Uro contends that this was a contractually non-compliant exercise. BNPP contends to the contrary. Whether compliant or not, it did result in a number of bid/offer figures being received from some of the Bund dealers contacted by Rothschild. BNPP submits that these figures were bid/offer prices, whereas Uro describes them as "estimates". A large number of dealers did not, however, respond. Again, Mr Mark's evidence is relevant in explaining why there may be difficulties in obtaining responses from dealers. The dealers who did respond were reputable and experienced financial institutions, namely Credit Agricole CIB, Nomura and Goldman Sachs. Each of their written quotations was given retroactively as at 3.30 pm Frankfurt time on the Reference Date, being 7 February 2022. The Nomura quotation identified the relevant Bund prices at the "end of the day" on 7 February 2022; i.e. approximately 2 ½ hours after 3.30 pm.

53. Rothschild also downloaded German bund pricing data "as at" the Reference Date from Bloomberg, Refinitiv Eikon and Factset. These are well-recognised data providers. There was a variance of less than 0.1% between the screen prices and the figures provided by the dealers, thereby (in BNPP's submission) demonstrating the reliability of the figures which had been received from the Bund dealers, which BNPP submitted were indeed "quotations".

54. Rothschild used the figures provided by the Bund dealers to calculate a Present Value. It also made a similar calculation based on the other data sources. The results of Rothschild's work were set out in the Rothschild Report which was issued on 12 September 2022.

55. Thereafter, on 22 September 2022, the Issuer served a certificate on Uro claiming the amount alleged to be owed as the BMWP. The sum certified was €250,806,819.97, based on the calculation performed by Rothschild. BNPP then provided a draft Amended Particulars of Claim claiming this figure. Uro now accepts that permission to amend should be granted, if the summary judgment application fails and the case is to proceed to trial.

D: Summary of the contractual calculation process

56. The contractual provisions set out in Section B above contain what is on any view a complex set of arrangements for the determination of Present Value. These can be summarised as follows:

(1) The Issuer shall select, subject to the approval of the Bond Trustee, a Financial Adviser that is an "internationally recognised investment bank in Frankfurt".

(2) The selected Financial Adviser shall then "appoint" at least two Reference German Bund Dealers; in other words, dealers of German government bonds.

(3) The Reference German Bund Dealers shall provide written quotations of the bid and offer prices "at or about 3.30pm (Frankfurt time) on the Reference Date" for the German bund issues that most closely match the average life of the Bonds (being the Comparable German Bund Issue).

(4) The Financial Adviser shall determine the average of the bid and offered prices quoted by each dealer (each such average being a Reference German Bund Dealer Quotation), provided that at least two Quotations are obtained.

(5) Based on the Reference German Bund Dealer Quotations, the Financial Adviser shall determine the average of the Reference German Bund Dealer Quotations (unless the Financial Adviser obtained four or more such quotations, in which case the highest and the lowest shall be excluded).

(6) The Financial Adviser shall calculate the Bund Rate as the annual yield-to-maturity implied by the Comparable German Bund Price.

(7) The Financial Adviser shall calculate the Present Value of the Bonds by discounting the principal and remaining interest payments at the Bund Rate plus: (i) 0.38% for the Class A1 Bonds; and (ii) 0.41% percent for the Class A2 Bonds.

(8) The Financial Adviser shall report the results of the calculation in writing to the Issuer, the Issuer Cash Manager, and the Bond Trustee. Any excess of the Present Value above the outstanding principal represents the BMWP.

(9) The Issuer then certifies the BMWP to Uro pursuant to the Loan Agreement.

E: The witness evidence

57. Witness statements were served by the solicitors acting for BNPP (Mr Lyons), Uro (Mr Russell) and the Bondholders (Mr Bunting). The factual background described in Section C above is largely uncontroversial and is based upon the correspondence and those witness statements.

58. In relation to both the "factual matrix", and the commercial consequences of the construction proposed by Uro, BNPP relied upon the expert evidence of Mr Terence Mark. He is a very experienced bond trader and financial analyst. Ms Tolaney did not oppose the introduction of this evidence. Although BNPP's pleading does not presently set out the features of the factual matrix which can be drawn from Mr Mark's report, it is clear that expert evidence along the lines of that report could potentially be adduced

at trial. I must therefore consider it in the context of an application for summary judgment.

59. In his report, Mr Mark explained the commercial background to bond prepayments and make whole payments. Many bond issues contain early redemption provisions. These can typically be optional or mandatory. Mandatory early redemption is triggered by events specified within the transaction documentation at the time that the bonds are issued. They serve an important role in protecting bondholders from events which may expose them to various risks, including credit or investment risks. In some cases, mandatory redemption payments must include not only the outstanding principal, but also the present value of any remaining interest payments. This is commonly known as a "make whole" payment. As the name implies, these payments are supposed to compensate investors, or make them whole, in the event that the bond is called prior to maturity. The make whole price is determined by a formula which typically includes a pre-specified margin versus a benchmark rate. The make whole price will generally be higher than the outstanding principal sums due under the bond. This is to discourage the exercise of an option to prepay, or triggering a mandatory redemption, without compensating the investor. In principle, therefore, if a bond is redeemed with a make whole payment, investors will usually benefit by receiving the principal back plus a premium.

60. Pausing there, it seemed to me that all of these typical features of redemption and make whole payments were reflected in the various provisions set out in Section B above.

61. Mr Mark was asked to address three specific issues. The first was whether it was possible to carry out the process for the calculation of the Present Value set out in Condition 5.3(d) of the Bond T&Cs after 14 February 2022. That process is summarised in Section D above. Mr Mark said that, with one exception, the inputs required for the calculation were all either constants or (such as the Reference Date) are pre-determined following the occurrence of the event in question. The only remaining input is the Comparable German Bund Price, which is the average of the Reference German Bund Dealer Quotations obtained. This input was, in Mr Mark's view, obtainable retrospectively, after the Reference Date. This was because of the nature of the market for German bunds.

62. The market for German bunds is highly liquid. They are widely traded, with many market participants active in trading bunds on multiple electronic platforms on any given day. On the Reference Date (7 February 2022), the bund which best fitted the criteria for calculating the BMWP for Class A1 was traded 88 times, and the bund which best fitted the criteria for Class A2 was traded 54 times. These trades were executed on various electronic platforms with historical pricing easily accessible via any number of market data systems. There may in fact have been more trades than 88 and 54; because those numbers exclude transactions executed outside of the electronic platforms. Bund market trades are tracked by a number of organisations: exchanges, brokers, investment banks and government agencies. Historical prices of trade bunds are obtainable going back decades. Using Bloomberg, Mr Mark could obtain the prices of German bunds most comparable to the Bonds for trades completed on the Reference Date, and for bid and offer quote prices, every few seconds. To illustrate this, he exhibited a screen shot from Bloomberg showing 19 bid and offer prices between 15:30 and 16 seconds and 15:30 and 58 seconds on 15 August 2022.

63. In addition to identifying prices from these sources, it would (Mr Mark said) be possible to approach dealers in German bunds and request the relevant prices from the Reference Date. Those dealers would have access to data sources which would enable them to provide either traded prices or quotes for the relevant German bunds at approximately 3.30 pm on the Reference Date.

64. Mr Mark therefore said as follows:

> "3.2.9. One could also approach dealers in German bunds (that is, potential Reference German Bund Dealers) and request the relevant prices from the Reference Date. Such dealers would invariably have access to records of concluded trades. If they did not trade the specific issue on that day, they would have access to data sources that would provide bid and offer quotes, and so, assuming they were willing to cooperate, could provide either traded prices or quotes for the relevant German bunds at approximately 3.30pm on the Reference Date.
>
> 3.2.10 In my view, because of the highly liquid nature of the bund market, I would expect that although the quoted prices obtained retrospectively may not be identical to those that would have been obtained on the Reference Date (as I explain below, even two contemporaneous calculations would not necessarily be identical), any differences would be immaterial. I note that the averaging required for the calculation of the BMWP would further minimise or remove the effect of outlying quotes received from Reference German Bund Dealers.
>
> 3.2.11 Indeed, even if obtained on the Reference Date, the quotes obtained from Reference German Bund Dealers would have likely varied depending on the specific dealers selected by the Financial Adviser. Even at the same time on the same day, different dealers could have different prices, depending, for example, on their view of market conditions and their own position with respect to bunds."

65. Mr Mark's conclusion on the first question was that there was no reason why the calculation of the BMWP could not be carried out retrospectively. He referred to the fact that Rothschild was able to obtain retrospective price quotations for the purposes of their report.

66. The second question addressed by Mr Mark concerned the time-frames leading to the certification of the BMWP. He was asked whether, if the BMWP was to be certified in connection with an SSLE pursuant to Condition 5.3(d) of the Bond T&Cs, there was a risk that the BMWP could not have been certified by 14 February 2022.

67. Mr Mark considered the period of 31 business days between 31 December 2021 (when notice of the SSLE was given by Uro) and 14 February 2022. To complete the calculation and certification, it would be necessary for: the Issuer to select a Financial Adviser, subject to the approval of the Bond Trustee; the Financial Adviser to appoint Reference German Bund Dealers and obtain price quotes and complete the calculation;

the Issuer to certify the amount of the BMWP. He thought that it would have been possible for the above steps to be completed in 31 business days, but that it would have required prompt action by the Issuer and efficient cooperation by the various parties involved, including the Financial Adviser and the Reference German Bund Dealers.

68. Mr Mark identified various matters which any internationally recognised investment bank in Frankfurt would need to consider before accepting appointment. These included being confident that the engagement would not create any conflict or damage to any existing or future relationship with any of the parties or any relevant third parties. In that regard, I note that the evidence of Mr Lyons showed that this consideration was, in practice, a real problem in relation to the appointment of a Financial Adviser in 2022, because of potential conflicts with Santander which is a very significant financial institution.

69. Mr Mark said that any Reference German Bund Dealers approached to provide quotes for bunds "would also have considered potential conflicts and relationship issues, taking into account that they would receive no trading business from providing this service". Mr Mark did not expand in his report on why the dealers would receive no trading business. However, Mr Allison explained in his submissions that this was because of the probability that any dealer would ask questions as to why the quotation was being requested, particularly bearing in mind the potential size of the transaction: as at the Reference Date, the principal amounts outstanding were in the order of €1 billion. Any discussion would therefore likely lead to the Financial Adviser explaining that the purpose of the quotation was not to enter into an actual trade, but rather to assist in fixing an amount payable under a transaction. He said that this is why Mr Mark had said that the dealer would understand that it would receive no trading business.

70. Mr Mark said that there was indeed a risk that the calculation and certification process could not have been completed on the timeline provided in the transaction documents. He could not quantify that risk, but given the number of parties and steps involved, there was a chance that certification would not be completed on schedule. This would have been a significant concern to an investor if the failure to certify the BMWP by 14 February 2022 would mean the loss of the entire BMWP.

71. Mr Mark was also asked for his views on the realism of timeframes if clause 7.4 of the Loan Agreement (concerned with a voluntary prepayment) applied, and there was a period of only 6 working days to complete the process. This question related to an argument advanced by BNPP based upon notice of prepayment being given, under clause 7.4, on 31 January 2022. (I return to the details of the timing below). Mr Mark's view was that 6 working days would likely be considered an insufficient time period in which to appoint a Financial Adviser and to obtain the required dealer quotations. There was a "significant risk" that the process would not be able to be completed on such a tight timeline.

72. The third question considered by Mr Mark was as follows:

> "5.1.1 If the requirement to certify the Bond Make Whole Premium by 14 February 2022 was a necessary pre-condition for the payment of the premium (such that the Bond Make Whole Premium cannot now be payable due to the fact that the

> calculation and certification of the amount were not performed by that deadline), would you have expected this to be:
>
> (I) Specifically flagged to prospective purchasers of the Bonds? If so, where and how?
>
> (II) Otherwise reflected in the Bonds' structure and/or pricing?"

73. Mr Mark's evidence was that he had never seen a process as complex as that prescribed in the Bond T&Cs for the calculation of a make whole payment. He had never encountered a situation in which the failure to perform what he considered to be an administrative task, such as the calculation and then certification, would nullify the obligation to make such payments to bondholders, with no fallback or alternative option provided as a remedy in the event of delay. The mandatory prepayment of the Bonds, including payment of the BMWP, would have been an important consideration in mitigating the SOCIMI regime risk for investors. The potential that any such mitigation could have been entirely forfeited as a result of a lack of timely certification would in his view "have been considered a significant risk factor by a potential investor".

74. His conclusions were as follows:

> "5.3.8 In respect of Question 3(a), therefore, if it was indeed the case that the lack of certification of the BMWP by 14 February 2022 would result in the non-payment of the BMWP, then I would (based on my experience in this area) expect it to have been disclosed to prospective investors as a risk factor and clearly spelled out in the sections of both the Loan and Bond documents relating to calculation of the BMWP. Consequently, I would have expected it would have impacted the assessment of the Bonds by credit rating agencies. The non-payment of the BMWP would be a very material adverse financial impact for bondholders (in the event a prepayment was required), and risks of this magnitude are generally disclosed.
>
> 5.3.9 In respect of Question 3(b), the potential for non-payment of the BMWP in the event of a failure to complete certification in time would increase the risk faced by investors related to the Borrower's SOCIMI status. An increase in this risk (that is, a very material reduction in the payment due to investors in the event that risk materialised), would reduce the value of the Bonds, resulting in a higher yield-to-maturity requirement by investors and higher borrowing cost for the issuer."

75. Mr Mark's evidence was served on 14 November 2022, just over 2 weeks before the summary judgment hearing. No responsive expert evidence was served by Uro. The essence of Uro's argument was that Mr Mark's evidence did not assist BNPP in its case on the interpretation of the clear provisions of the relevant contractual terms. Uro submitted that assistance was, if anything, provided for Uro's interpretation on the calculation issue, since Mr Mark's report showed: (i) that it would have been possible for the certification and calculation process to have been completed in the present case in the time-frame between 31 December 2021 and 14 February 2022, and (ii) that it was

not possible precisely to reproduce, by a retroactive exercise, the quotations that would have been obtained on the Reference Date.

F: The parties' arguments

Uro's submission

76. In summary, Uro submitted as follows.

77. The relevant (English-law governed) transaction documents were entered into by a number of legally-advised and sophisticated commercial parties, as part of the contractual terms documenting a complex capital markets bond issuance.

78. The transaction documents contain a detailed and contractually binding mechanism for calculating and certifying the amount of any BMWP. This mechanism is both technical and highly prescriptive as to exactly what steps are required – and for good reason. It provides for real time, independent and verifiable market quotations to be used to calculate the amount of any BMWP.

79. The amount of the BMWP so calculated must then be certified to Uro by a contractually stipulated deadline. This deadline falls shortly before a contractual prepayment date on which Uro must prepay all principal and interest, together with any BMWP – to the extent that any BMWP is properly due and calculated in accordance with the contracts. Certification of the amount of the BMWP ensures that Uro knows exactly how much to pay by way of any BMWP to discharge its obligations and thereby obtain a release of its security.

80. The contractual mechanism for calculating the amount of any BMWP requires live bid and offered prices to be obtained in writing from German bund dealers, in respect of German bund issuances judged by the dealers to meet contractually specified criteria. These prices are to be obtained by an internationally recognised bank in Frankfurt (the "Financial Adviser") going into the market at or about 3.30pm, Frankfurt time, on (not 'as at') the contractually specified "Reference Date". These prices are then used by the Financial Adviser to determine a "Present Value". The amount, if any, by which the Present Value exceeds the "Principal Amount Outstanding" of the Bonds equates to the BMWP.

81. Responsibility for implementing the contractual mechanism lies primarily with the Issuer, acting through its professional agents, and its legal advisors. The Issuer appoints the relevant bank as its Financial Adviser and instructs it to obtain the necessary prices. The Issuer must then calculate the amount of any BMWP based on the Financial Adviser's determination of Present Value, and certify the amount of any BMWP to Uro by the contractual deadline.

82. BNPP too plays an important role, since it must approve the Issuer's selection of the Financial Adviser on behalf of the Bondholders.

83. It is common ground that the Reference Date was 7 February 2022 and that the contractual deadline for certification of any BMWP allegedly payable was 14 February 2022.

84. It is also common ground that the Issuer chose not to operate or implement any part of the contractual mechanism on or prior to the Reference Date. The Issuer did not appoint (and BNPP did not approve) a Financial Adviser on or prior to the Reference Date. No German bund prices were obtained on the Reference Date and no Present Value was determined. The Issuer then failed to certify the amount of any BMWP to Uro by the contractual deadline.

85. The Issuer took a deliberate decision not to operate the contractual mechanism, and BNPP did not prompt it to do so. There is no suggestion the Issuer was unable to do so on the date or in the way required. Arrangements could have been made well in advance.

86. The appointment of Rothschild in August 2022, six months after these proceedings, and the work that they then carried out were not in accordance with the parties' agreement. The exercise performed by Rothschild, on the Issuer's instructions, failed to comply with the contractual mechanism in numerous respects.

87. In particular: (i) Rothschild did not obtain quotations on the Reference Date, but rather six months later in August/September 2022; (ii) it did not obtain live quotations, but hypothetical *ex-post* estimates given 'as at' the Reference Date; (iii) in one case, the estimate was not even obtained at or about 3.30pm Frankfurt time; and (iv) the estimates were not provided in respect of German bund issues selected by dealers as the contracts require – on the contrary, Rothschild instructed each dealer as to which bunds to price. These hypothetical *ex-post* estimates obtained by Rothschild are not what the contracts require, and so they cannot form the basis of a contractual BMWP.

88. Accordingly, the BMWP claimed is not due from Uro, because it does not reflect any BMWP calculated in accordance with the contracts.

89. Moreover, the BMWP was not certified by the contractual deadline, which is a further free-standing reason why it is not due.

90. BNPP has no sustainable answer in the face of the clear contractual terms. Its case would involve the court re-writing the very contracts it seeks to enforce via a process of construction or by implying terms which contradict the express contractual mechanism agreed. Essentially, BNPP's case is that the mechanism and dates for calculating and certifying this alleged liability are matters for the Issuer's discretion, and the agreed contractual mechanism (requiring live quotations obtained at the specified date and time) should be replaced with one permitting the Issuer to use estimated prices obtained long after the event at a time and date of its own choosing. In the alternative, it suggests the court should ignore the contractual mechanism altogether and perform its own ad-hoc determination of the BMWP. All of these arguments should be rejected.

BNPP's submissions

91. BNPP submitted that if Uro's construction is correct, Uro would receive a windfall of €250 million at the expense of the Bondholders. The ultimate beneficiary of the windfall would be Santander (as the parent company of Uro), since Santander would effectively be able to block rental payments of over €250 million from being remitted to the Bondholders. Having acquired Uro's share capital (thereby destroying the tax

advantages of the securitisation structure), Santander would then be able to prevent the Bondholders from receiving a very large proportion of the returns to which they would otherwise be entitled – solely by reason of a delay in obtaining quotations of Bund prices. The Issuer is an Irish SPV without any other assets, and the Bondholders would be left in the lurch.

92. BNPP submitted that this is an opportunistic argument which should be rejected by the court. The argument is not supported by any express term of the contractual documents; it is not consistent with the nature and commercial purpose of the BMWP; it is contrary to business common sense and has absurd consequences for the contract as a whole; and it is based on a misreading of certain authorities which were decided in a different context. These points were developed in detail in Mr Allison's written and oral submissions, and I refer in my conclusions to the points which I consider to be most significant.

93. BNPP submitted that Uro's case does not come anywhere close to the high threshold for summary judgment or strike-out. The proper course would be for Uro to advance its arguments at trial. The matter certainly cannot be resolved in Uro's favour by a summary determination at a one-day hearing.

94. BNPP's position on the key issues of construction was therefore as follows:

95. On its true construction, Clause 7.1(c)(iii) of the Loan Agreement does not have the effect that the failure to certify the BMWP "five Business Days prior to the specified date of prepayment" extinguishes any obligation to pay the BMWP. Clause 7.1(c)(iii) should not be construed as imposing a deadline in the nature of a guillotine, the expiry of which destroys any entitlement to the BMWP.

96. On the true construction of the definition of "Reference German Bund Dealer Quotations", bid and offer prices at 3.30pm (Frankfurt time) on the Reference Date may be retroactively quoted in writing by a Reference German Bund Dealer to the Financial Adviser.

97. Mr Allison submitted that even if he was wrong on the "retroactive" point, so that the exercise carried out by the Issuer and Rothschild in August/ September 2022 was non-contractual, Uro's obligation to pay the BMWP did not disappear. The court could determine the amount which was properly due and payable. Mr Allison referred in that context to the approach of the court taken in cases involving the ISDA contract form.

G: Legal framework

Principles of interpretation

98. The basic legal principles as to the interpretation of contracts were not in dispute. They are conveniently summarised in the judgment of Popplewell J. in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* [2018] EWHC 163 (Comm), which is quoted in *Chitty on Contracts* 34th edition paragraph 15-053:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and

> ascertain what a reasonable person, that is a person who has 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, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

99. This summary is a synthesis of the principles that have been authoritatively stated in a trilogy of Supreme Court decisions in the past 10 years: *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; *Arnold v Britton* [2015] UKSC 36; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.

100. In *Rainy Sky*, Lord Clarke described the exercise of construction as being essentially a "unitary exercise" in which the court must consider the language used and ascertain what a reasonable person, with the relevant background knowledge, would have understood the parties to mean. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Where the parties have used unambiguous language, the court must apply it: *Rainy Sky* at [23] and [25].

101. Whilst this unitary exercise of interpreting the contract requires the court to consider the commercial consequences of competing constructions, commercial common sense should not be invoked retrospectively, or to rewrite a contract in an attempt to assist an unwise party, or to penalise an astute party. This is clear from the judgment of Lord Neuberger in *Arnold v Britton* at [15] – [22]. At [20], Lord Neuberger said:

> "Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term

> for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party".

102. In *Wood v Capita,* Lord Hodge set out the applicable principles following *Rainy Sky* and *Arnold v Britton* as follows:

> "[10] The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381, 1383H-1385D and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen – Tangen)* [1998] 1 WRL 896, 912-913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extrajudicial writing, "A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision" (2008) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.
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> [11] Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the *Rainy Sky* case [2011] 1 WLR 2900, para 21f. In the *Arnold* case [2015] AC 1619 all of the judgments confirmed the approach in the *Rainy Sky* case: Lord Neuberger of Abbotsbury PSC, paras 13-14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the *Rainy Sky* case, para 26, citing Mance

> LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.
>
> [12] This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold* case, para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.
>
> [13] Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn* [2010] 1 ALL ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of the disputed provisions."

103. There is discussion in the case-law as to the circumstances in which consideration of the factual matrix or context may lead to an interpretation of words which is not,

according to conventional usage, an "available" meaning of the words or syntax which the parties had actually used, and the correction of an obvious drafting mistake by interpretation. In *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, Lord Hoffmann said that the relevant background "may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax". However, this was not a point on which BNPP relied in its argument.

104. Ms Tolaney submitted that where (as here) the contracts have been drafted by skilled professionals and are at the high end of sophistication, textual analysis is likely to be the principal method of analysis: see *Lehman Brothers Holdings Scottish v Lehman Brothers Holdings Plc* [2021] EWCA Civ 1523 (CA) (per Lewison LJ at para 28) and *Arnold v Britton*. Broadly speaking, I agree with that approach, but I do not consider that the analysis should pay no regard to the factual matrix or to commercial considerations.

105. Ms Tolaney relied upon *Lehman Brothers Holdings Scottish* also for the proposition that factual matrix has a very limited part to play. In my view, Lewison LJ's remarks in paragraph [28] do not exclude the possibility of relevant factual matrix evidence. Indeed, he went on to say, at the end of that paragraph, that the court may "admit expert evidence of market practice in order to explain shorthand terms used in that market; or to enable the court to understand the factual background".

The Prospectus

106. The Bonds in the present case were listed securities. BNPP submitted that the decision of the Court of Appeal in *Credit Suisse Asset Management LLC v Titan Europe 2006-1 plc* [2016] EWCA Civ 1293 showed that the court can consider whether any risks arising out of a particular construction have been disclosed in the Prospectus. If, therefore, such risks have not been disclosed, then this tends to suggest that the construction is wrong. In *Credit Suisse* at [29], Arden LJ stated that an Offering Circular did not constitute "mere 'surrounding circumstances'", because the Notes in that case had been issued on the basis of it and would be available for reference by subsequent purchasers of Notes. At [30], she said that there were special considerations which applied to the Offering Circular, including that a purchaser of the Notes was entitled to expect that the statements in it were prepared with care. At [31], she said that the Offering Circular was an aid to construction. When applying these principles at [47] – [48], Arden LJ reiterated a point made by the Chancellor at first instance (see [19]): namely that the unusual and prejudicial implications of the rights, for which the appellants in that case contended, were not spelt out in the Offering Circular.

107. For her part, Ms Tolaney did not dispute the admissibility of the Prospectus as an aid to construction, in accordance with the *Credit Suisse* case. She submitted, however, that it was of no assistance to BNPP here, because the relevant contractual terms were clear and the Prospectus could not be used in order to contradict them. She also submitted that one would not expect the Prospectus to identify, as a relevant risk, the risk of the Issuer defaulting in its contractual obligations to carry out the process leading to the certification to be provided by the Issuer itself under Clause 7.1 of the Loan Agreement.

Implied terms

108. BNPP's written argument did not, expressly at least, rely upon the implication of terms into the Loan Agreement or the Bond T&Cs, although Mr Allison made it clear in his oral argument that if necessary BNPP relied upon implied terms. However, that the point was not then developed in his oral submissions.

109. It seemed to me that, at least on one possible view, BNPP's argument that the court would "step in" and do the BMWP calculation itself, if the contractual mechanism had not been operated effectively or at all, was based upon an implied term. However, this does not seem to be the way in which this point has been addressed in the case-law, including the leading House of Lords authority *Sudbrook Trading Estate Ltd v Eggleton* [1983] AC 444 or the more recent ISDA cases where the court has been willing to "step in": see *Lehman Brothers Special Financing Inc v National Power Corp* [2018] EWHC 487 (Comm) ("*National Power*") and *Macquarie Bank Ltd v Phelan Energy Group* [2022] EWHC 2616 (Comm) (*"Macquarie"*). Against this background, I do not consider it necessary to discuss the principles relating to the implied terms.

ISDA cases

110. Each side referred to, and to some extent sought to distinguish, a number of cases concerning the interpretation of the ISDA Master Agreement. Ms Tolaney referred, in particular, to the decision of Burton J in *Lehman Brothers Finance SA (in liquidation) v SAL Oppenheim Jr & Cie. KGAA* [2014] EWHC 2627 (Comm) ("*Oppenheim*") in support of the proposition that the calculation mechanism for the BMWP required "live" quotations from each Reference German Bund Dealer. That case had been applied in a number of other cases.

111. Mr Allison's submission was that these cases were in a different market context, and concerned a different contract form with very different wording, to that with which the court is here concerned.

112. For his part, Mr Allison relied in particular upon the decision of the Court of Appeal in *Videocon Global Ltd v Goldman Sachs International* [2016] EWCA Civ 130 in support of his argument that certification of the BMWP by 14 February 2022 was not a condition precedent to its recoverability. He also relied upon the decision of Foxton J in *Macquarie* in support of the argument that the court could step in, if the retrospective quotations sought in the present case were non-contractual.

113. Ms Tolaney distinguished these ISDA cases on various grounds. In relation to the possibility of the court stepping in to perform the calculation for itself, she said that this was impermissible in circumstances where the contractual mechanism was essential and where the only reason that it had not operated was the fault of the issuer. She relied in that context on the decision of the House of Lords in *Sudbrook Trading Estate Ltd v Eggleton* [1983] AC 444, and two subsequent Court of Appeal authorities: *Gillatt v Sky Television Ltd* [2000] 1 All ER (Comm) 461 and *Infiniteland Ltd v Artisan Contracting Ltd* [2005] EWCA Civ 758. I discuss these cases below.

H: Discussion

H1: General considerations

114. The issues of construction are to be addressed in the context of an application for summary judgment, where the relevant question is whether BNPP's case for recovery of the BMWP has a real prospect of success. In many cases involving issues of construction, a court is willing to "grasp the nettle" by determining such issues on a summary basis. This will be so where it can readily be seen that there is no material evidence, bearing on the issues of construction, which could be given at trial.

115. In the present case, however, I need to tread more carefully. BNPP has adduced expert evidence on the commercial background to the loan and bond agreements, including the terminology used in those documents, and also on the commercial consequences of the construction for which the Defendant contends. This expert evidence is, for reasons which will be apparent from the discussion below, of actual or at least potential relevance to the construction issues. The well-known recent Supreme Court authorities concerning the approach to contractual interpretation make it clear that construction is an iterative process, taking into account the language which the parties have used, the factual matrix, and the commercial consequences of the parties' respective constructions. I accept that in the case of carefully worded instruments, drafted by professionals for professional parties, textual analysis will be extremely important and the principal method of analysis. I also accept that this conclusion is reinforced by the fact that these are traded instruments. But the authorities do not suggest that the factual matrix can be disregarded, particularly when the factual matrix evidence does not concern particular dealings between the parties, but rather explains the general commercial background to the documentation and to the terms used in that documentation. Nor do the authorities suggest that the commercial consequences of the rival constructions, in the case of professionally drafted contracts or traded instruments, are irrelevant and can therefore be disregarded. Indeed, the decision in *Videocon*, discussed below, shows that this is relevant and indeed important in the ISDA context, which is in many respects the paradigm example of a professionally drafted contract.

116. Where there is potentially relevant evidence bearing on the factual matrix and commercial consequences, the court may not be best placed on a summary judgment application to carry out the iterative process required. There may, of course, be cases where the evidence of a party, even if accepted in full, could make no real difference to the construction of a clearly worded contract. This will, however, not always be so. As will become apparent, I do not think that BNPP's evidence in the present case, if accepted in full, could make no difference on the construction issues.

117. Against this background, I turn to the question of whether BNPP's arguments on construction have a real prospect of success, or can even now be dismissed. I limit myself to that question, although Mr Allison did at one stage suggest that if I was persuaded by his argument – in particular on the certification issue – I should consider granting summary judgment in BNPP's favour. I do not think that this would be appropriate. No cross-application for summary judgment has been made by BNPP, and Uro has therefore not prepared its evidence with a view to defeating any such application. Furthermore, BNPP's case has relied upon expert evidence from Mr Mark served relatively shortly before the hearing, and which has not been responded to, let alone tested at trial. I should not proceed on the basis that this evidence will, in due course, be uncontested or that it will necessarily be accepted in full.

H2: The certification argument

118. I start by addressing the certification issue. The question here concerns the consequence of the Issuer certifying the BMWP at any time later than "five Business Days prior to the specified date of prepayment". This is the period of time referred to in Clause 7.1(c)(iii) of the Loan Agreement. On the facts here, there is no dispute that the relevant date was 14 February 2022, and also that no certificate was provided on that date. The question of construction is in summary whether:

    (i) as Uro contends, timely certification is a pre-condition to any obligation on the part of Uro to pay BMWP, with the consequence that late certification permanently releases Uro from its obligation to pay the BMWP that would otherwise be payable;

    or

    (ii) as BNPP contends, the failure to provide a certificate on the contractual date was a breach of the Issuer's obligation under the Loan Agreement, for which a potential liability in damages might arise. It does not, however, invalidate a claim for the BMWP based upon a certification which was late.

119. It seemed to me that the arguments addressed in this context, and their resolution, did have some relevance to the calculation (including the retrospectivity) issue. Mr Allison submitted that this was so, whereas Ms Tolaney submitted that the calculation issue and the certification issue were distinct points. I do not think that they are wholly distinct. For example, if timely certification was essential and a condition precedent to any recovery, as Uro submitted, then it would tend to negate the possibility of a retrospective calculation (particularly one which was delayed by many months as here). It would also tend to negate the possibility of the court stepping in and determining the amount of the BMWP itself, since this would inevitably take place long after the time for certification. If, however, timely certification was not essential and a precondition to any recovery, that conclusion might lend some support to the possible availability of either or both of the two routes (retrospective calculation or court calculation) relied upon by BNPP to defeat Uro's case on the calculation issue.

120. I start with the language of Clause 7.1(c). I agree with Mr Allison's submission that there is nothing in the language which suggests that timely certification is a condition precedent to the obligation that would otherwise exist to pay the BMWP. Indeed, the contractual language indicates the contrary. Mr Allison made a number of points in this regard, and I consider that they were more than sufficient to give BNPP a realistic prospect of success on this point. Indeed, were I to decide the point on the present materials, I would likely hold in favour of BNPP on this issue. The most significant points in relation to the contractual language are as follows.

121. First, the structure of Clause 7.1(c)(iii) is that the obligation to pay arises if the two conditions set out in (A) and (B) are satisfied. If those conditions are satisfied, then Uro "must pay to the Issuer". There is therefore nothing in the language which suggests that the accrual of the obligation is conditional on certification of the amount. The language of certification is contained in parentheses at the end of the clause 7.1(c). I agree with Mr Allison that the relevance of the certification contemplated by these parenthetical words is to provide a way of quantifying the BMWP, rather than to lay down any

additional condition for the accrual of the obligation. Moreover, if an additional condition were to be laid down, it would be surprising for this to be done by the use of words in brackets at the end of the clause. As he submitted, this would be a "particularly extreme example of the tail wagging the dog in the interpretation exercise".

122. Secondly, the Loan Agreement does not expressly state what will happen in the event that the Issuer certifies the BMWP at any time after the period of 5 Business days prior to the specified date for prepayment. The contractual consequences of such a situation are not spelt out, and there is nothing to suggest that Uro will be relieved of its obligation to pay the BMWP which arises if the two events in (A) and (B) happen. As Mr Allison submitted, it is one thing for a contract to contemplate that a certificate will be issued within a particular period. It is another thing entirely for a contract to impose a specified sanction if the certificate is not issued within that period, or to provide for a valuable contractual right to be lost forever, for no consideration, if a particular deadline is not met.

123. Thirdly, the Loan Agreement does not state that time is of the essence, or use any similar phrase. That phrase is not used anywhere in the Loan Agreement, or indeed anywhere else within the contractual suite. The MDA has a number of parts. Part 1, which is the longest section, contains detailed definitions. Part 2 contains "Principles of Interpretation and Construction". Part 3 relates to notices. These occupy some 56 pages, but there is nothing which suggests that time is of the essence in relation to any aspect of the contractual arrangements.

124. Fourth, clause 27.2 of the Loan Agreement, headed "Certificates and determinations", provides as follows:

> "Any certification or determination by the Borrower Security Trustee or the Issuer or a rate or amount under any Borrower Finance Document is, in the absence of manifest error, conclusive evidence of the matters to which it relates".

125. There is nothing here which suggests that time is of the essence when dealing with certificates and determinations.

126. The decision of the Court of Appeal in *Videocon* provides, in my view, some general guidance on the question of whether, as Uro submitted, certification by the deadline is a precondition to any liability to pay a BMWP. *Videocon* is a decision on the ISDA Master Agreement 1992, and I acknowledge (as Ms Tolaney submitted) that there are many significant differences between the intricate provisions of that agreement and the Loan Agreement in this case. However, the judgment of the Court of Appeal, which was given by Gloster LJ, identifies a number of general points when considering arguments, such as are advanced here, to the effect that timely performance is a condition precedent to the right to payment.

127. At [50], Gloster LJ referred to the possibility that detailed semantic analysis must give way to business common sense. At [51], she said that courts are wary of interpreting commercial contracts so as to invalidate provisions for payment. Paragraph [64](iv) shows the importance of considering the commercial consequences of the rival constructions. I note that this is in the context of contractual interpretation of a standard form contract which is very widely used: in other words, the court did not confine itself

to textual analysis. Gloster LJ described as "commercially absurd" the idea that a late notice should be "ineffective with the result that the sum claimed will never be payable". In that paragraph, she identifies the importance of considering whether there is a reason why the parties would have intended that a late notice should have been an ineffective notice. In paragraph [64](v), she refers to the fact that there may still be a legal consequence if notice is served late, because a party may be able to allege and prove damage suffered in consequence.

128. In *Videocon*, Teare J had granted summary judgment to Goldman Sachs notwithstanding his view (see [43]) that it had served a particular notice late. He said that the late provision of information would be a breach of contract which might found an action in damages. However, he rejected the argument that, in the event that a timely notice was not served, any later notice would be ineffective with the result that the sum claimed will never be payable. The Court of Appeal, in paragraph [64](iv), agreed that this result was commercially absurd. Teare J's reasons on this point, set out within paragraph [44] of the Court of Appeal's judgment were as follows:

> "I consider this construction to be so lacking in commercial sense that it cannot have been the meaning which a reasonable person with the background knowledge available to the parties would have understood the clause to bear. Indeed, it is difficult to conceive of a reason why the parties would have intended that a late notice should be an ineffective notice. By contrast there is commercial sense in a construction pursuant to which a notice is effective if it provides the paying party with the information required by clause 6(d). That is not to say that the provision of a late notice, that is, one which is not served "on or as soon as reasonably practicable" following the Early Termination Date is devoid of legal consequence. It is a breach of contract and so it may found an action in damages if the lateness has caused loss. Although Mr Wheeler did not suggest that the lateness in this case has caused any loss I do not consider that it can be said that lateness can never cause loss. All will depend upon the circumstances of the case."

129. Against this background of the approach in the *Videocon* case, I turn to the commercial consequences of the parties' rival constructions, which is one aspect of the so-called "iterative" approach to contract interpretation.

130. In my view, the proposition that BNPP's entitlement (as assignee) to the BMWP should fall away completely if the Issuer is late in certifying the amount of the BMWP lacks any commercial sense. The BMWP represents the financial benefit of the transaction which has come to an end, in the scenario presently under consideration, as a result of an SSLE which was caused by "any act or omission of the Borrower". Whether the SSLE in the present case was so caused is in dispute. However, Uro's argument on the effect of late certification must be considered in the context of a case where the SSLE was indeed so caused, and where the only answer to payment of the BMWP is delayed certification. It should also be considered in the context of another contractual situation where a BMWP is payable under the Loan Agreement, and certification is required, namely where there is a Standard Voluntary Prepayment. In that event, the BMWP would be payable, and the same requirement as to 5 business day certification is

provided for in clause 7.4. In either case – as in *Videocon* – it is difficult to conceive of a reason why the parties would have intended that a late notice should be a wholly ineffective notice. To apply the words of Teare J, the fact that it was not delivered on time does not render the notice ineffective, but merely renders it late. Uro's argument results in BNPP's claim for potentially a very significant BMWP being subject to a cliff-edge, with even a delay of a minute or a day resulting in the total loss of the BMWP. Here, of course, the delay was longer, but again Uro's case should be tested by considering a situation where there was only momentary, or a short period, of delay. In my view, the approach taken in *Videocon*, namely to treat late certification as a breach of contract giving rise to a potential claim in damages, makes far more commercial sense than Uro's approach.

131. In the present case, it would appear unlikely that Uro could establish any damages claim resulting from late certification. This is because the evidence indicates that Uro was never going to make any payment of the BMWP anyway, because of its argument that nothing was payable at all, in circumstances where (as Uro alleged) the SSLE had not been caused by Uro's act or omission. However, it is possible to envisage that there may be cases where, on the facts, a party may be able to show some damage flowing from late certification. This leads to consideration of one point on which Ms Tolaney placed much emphasis, in the course of various aspects of her argument, on both the certification and calculation issue.

132. In relation to certification, Ms Tolaney submitted that there was a coherent commercial rationale for a time limit on Uro's liability to pay the BMWP. It promoted certainty for all parties and enabled Uro to know how much to pay to release its security. Uro should therefore be able to pay all the sums of principal, interest and any BMWP owed on the contractual prepayment date, and thereby obtain a release of its transaction security and thereafter continue in business with its new finance parties as it wishes. It was, she submitted, wholly implausible that the parties could have intended Uro to remain trapped in the security structure indefinitely, facing an uncertain liability to be determined by the Issuer in its discretion at an uncertain future date. (Essentially the same arguments were advanced in the context of the calculation issue as well).

133. It seemed to me, at least on the basis of the evidence of Mr Mark, that this argument had an air of unreality. In a case where the BMWP is admittedly payable, it is improbable that there would be any significant dispute as to its quantification such as to lead to an inability of Uro to obtain the release of security and move to another lender. Mr Mark's evidence indicates that any differences between the different quotations, for the relevant Bund Rate, would be within a very narrow range indeed. Any disputed figure would similarly be within a very narrow range, with there being no realistic prospect of a dispute as to the overwhelming majority of the amount payable.

134. This is illustrated in the present case, where BNPP's claim is for just over €250 million. This figure was only certified to Uro in September 2022. However, long before this time, both Santander and Uro were able to make their own calculation of the BMWP. In Santander's annual report dated 24 February 2022, Santander estimated that the BMWP "amounts to approximately EUR 250 million". Similarly, in Uro's annual report dated 28 April 2022, Uro stated that

> "The [BMWP] would be calculated in accordance with the specific requirements set out in the applicable transaction

> documents by reference to the net present value of all interest that would have been paid if the Loan had continued in place until its original maturity … The [BMWP] is estimated to amount to, at a maximum, approximately €250,000,000."

135. Thus, Uro and Santander knew the likely amount of the BMWP several months before the certificate provided by the Issuer, and their estimate of the approximate amount (€250,000,000) was accurate to within 0.3% of the figure ultimately certified (€250,806,819.97). This is no doubt because, consistent with Mr Mark's evidence, Uro and Santander were able to use publicly available information to determine the relevant Bund prices at 3.30pm Frankfurt time on the Reference Date, even though no certificate had been provided at or shortly after that time.

136. Since any dispute as to the BMWP would be within very narrow limits, it is difficult to envisage any real difficulty in obtaining the release of the security, provided of course that Uro was willing to pay the sum that was indisputably owed. In relation to any small disputed balance, there would be obvious mechanisms for ensuring that this did not prevent the release of other security. For example, the small disputed balance could be paid into escrow and held as security, or there could be a payment under protest under reservation of a right to reclaim it. In the unlikely event of some insoluble problem arising from the Issuer's delay in providing certification, Uro would retain its right to claim damages consequential thereupon in accordance with the analysis in *Videocon*. The more realistic scenario where security might be retained is not where there is disagreement as to the quantification of BMWP admittedly owed, but rather a disagreement (as here) as to whether it was payable at all, on the basis that the SSLE was not caused by Uro's act or omission. This, however, has nothing to do with late certification of the BMWP.

137. Accordingly, whilst Uro's argument does (as Ms Tolaney submitted) promote certainty, it results in an entirely uncommercial cliff-edge approach to the payment of the BMWP.

138. When the factual matrix is considered alongside the contractual language and commercial consequences discussed above, there are in my view further reasons why BNPP's argument on the certification issue has a realistic prospect of success. The factual matrix also serves further to illustrate the uncommercial consequences of Uro's proposed construction.

139. Uro submitted that there should have been no difficulty for the Issuer to operate the contractual machinery and serve the certification in time. This was, Uro submitted, not onerous, and it was a commercial advantage for the Issuer to be the party entitled to appoint the Financial Adviser and oversee the process of calculation; but in order to take the benefit of that, the parties' bargain was that the Issuer was required to act expeditiously.

140. It seemed to me, however, that Mr Mark's evidence showed that there were realistic scenarios in which certification might not be achieved in time, notwithstanding expedition on the part of the Issuer. The very detailed process for obtaining the relevant figures, summarised in Section D above, did not depend simply upon work being carried out promptly by the Issuer. It also depended upon the Issuer being able to appoint a Financial Adviser in Frankfurt, and then the Financial Adviser being able to appoint of Bund dealers who were willing to provide quotations, and then at least two

quotations actually being provided so as to enable the calculation to be performed. There was, on Mr Mark's evidence as to the commercial background, clearly scope for difficulties to arise at any of these stages, leading to the possible consequence and real risk that no quotations were obtained by the time that certification was required.

141. This was clearly illustrated by BNPP's analysis of the BMWP becoming payable pursuant to clause 7.4 in consequence of a voluntary repayment. BNPP submitted that, in realistic scenarios, Uro's construction meant that the contractual machinery was in practice unworkable, or at least there was a very significant risk that it could not operate. This is because the deadlines are simply too tight, as shown by the following timeline:

i) By Clause 7.4(a) of the Loan Agreement, Uro is required to give notice of a Standard Voluntary Prepayment at least 15 Business Days before the next Loan Payment Date. Assuming that the relevant Loan Payment Date is 21 February 2022, this means that the notice of Standard Voluntary Prepayment could be given by Uro on 31 January 2022.

ii) On that basis, the 'deadline' for the certification of the BMWP by the Issuer would (on Uro's case) be 14 February 2022 (being 5 Business Days prior to the Loan Payment Date of 21 February 2022). This is because clause 7.4(c) contains materially the same language as clause 7.1(c)(iii) ("as certified by the Issuer … at least five Business Days prior to the specified date of prepayment").

iii) In turn, the Issuer would be required to issue a redemption notice during the period falling between 10 and 20 Business Days prior to the next Bond Payment Date: see condition 5.3(a). The relevant Bond Payment Date would be 25 February 2022. The redemption notice would therefore need to be issued between 28 January and 11 February 2022.

iv) If the Issuer issues the redemption notice on the latest possible date, i.e. 11 February 2022, then the "Reference Date" would be 8 February 2022.

v) On Uro's case, it would be necessary for the Issuer to instruct a Financial Adviser, with the approval of BNPP, and obtain the requisite quotations in a period of 6 Business Days between 31 January 2022 (being the date of the notice of Standard Voluntary Prepayment) and 8 February 2022 (being the Reference Date). Otherwise, on Uro's case, the BMWP would cease to be payable – even though the constrained timetable would be caused entirely by Uro's voluntary decision to prepay the Loan (and to notify the Issuer of it at the last possible moment).

vi) As BNPP submitted, it would likely be impossible to accomplish next steps in a 6 day period. Mr Mark's evidence was that 6 working days would likely be considered an insufficient time period in which to appoint a Financial Adviser and to obtain the required Reference German Bund Dealer quotations.

vii) Furthermore, the contractual scheme gave the Issuer an entitlement to serve the redemption notice within a wider window. The Issuer should therefore have been entitled to serve that notice prior to 11 February 2022. The Issuer should have been able to serve the redemption notice, for example, at the mid-point of the required period under condition 5.3(a). That would be 4 February 2022,

> which is 15 Business Days prior to the Bond Payment Date of 25 February 2022. The Reference Date would then be 1 February 2022. In that event, there would be less than a single Business Day to instruct and agree terms with the Financial Adviser, and obtain the requisite quotations.

142. Uro's construction would mean that, in the context of a voluntary prepayment, it could avoid a liability of €250 million, or at least have a very strong chance of avoiding that liability, by giving notice of that prepayment as close as possible to the relevant Loan Payment Date: in the above example, on 31 January 2022. This is because of the difficulties in operating the machinery so as to produce a certification by 14 February 2022. I agree with BNPP that this produces a result which lacks commercial sense, and that it reinforces the conclusion that clause 7.1(c)(iii) cannot be construed as imposing a deadline in the nature of a guillotine, the expiry of which destroys any entitlement to the BMWP.

143. I did not think that Ms Tolaney had a good answer to this point. She referred to Mr Mark's evidence that it would have been possible for the machinery to work, in the present case of notification of the SSLE on 31 December 2021, in the 31 Business Days before 14 February 2022. Even then, however, there was a risk that it could not be completed within the timeline, on Mr Mark's evidence. Perhaps more importantly, Uro's argument on construction (i.e. that timely certification was a condition precedent to recovery of the BMWP) should be tested against realistic alternative scenarios, such as that set out above, where the BMWP might become payable. In one realistic scenario of notice of prepayment being given on 31 January 2022, there would be an insufficient time for the process to work, at least on the evidence currently before the court. Moreover, Uro's construction would in practice force the Issuer to give notice of redemption at the last possible moment, in order to give itself any chance at all (albeit only 6 days) in order to operate the process. However, this is contrary to the parties' agreement which gave Uro a wider window in which to issue this notice.

144. There is then a further point, related to the above, which is addressed in Mr Mark's response to Question 3 (see Section E above). On Uro's construction, there was a risk, and in some scenarios a significant risk, that the machinery could not operate so as to produce a figure that could be certified by 5 Business Days prior to the Reference Date. Contrary to Ms Tolaney's submission, this risk did not relate solely to the Issuer's performance of its own obligations. It arose because the calculation process required the appointment and effective co-operation of third parties, namely the Financial Adviser and the Bund dealers. The consequence of the risk, if it materialised, would be (on Uro's proposed construction) the loss of BNPP's entitlement to the economic future value of the Loan Agreement (in the form of the BMWP). If Mr Mark's evidence is accepted, one would expect this risk to have been disclosed in the Prospectus. *Credit Suisse* indicates that this is relevant factual matrix for the purpose of the interpretation exercise.

145. Accordingly, when the language of the Loan Agreement is considered alongside the commercial consequences of the rival constructions, and the factual matrix, I conclude that BNPP has a real prospect of successfully showing at trial that late certification does not preclude Uro's liability for the BMWP.

H3: The calculation argument: can the court "step in"?

146. Ms Tolaney's principal argument focused on the calculation of the BMWP, rather than the certification issue which I have considered in Section H2 above. Uro contended that if bid and offer prices from Reference German Bund Dealers were not obtained at or about 3.30 pm (Frankfurt time) on the Reference Date (7 February 2022), then the BMWP fell away and could never become payable.

147. Mr Allison had two answers to that argument: (i) retrospective quotations could be obtained subsequent to 3.30 pm on 7 February 2022, and in any event (ii) the court could "step in" and calculate the BMWP payable if (contrary to his primary argument) there had been a failure to follow the contractual mechanism.

148. If there is a realistic prospect of success on either argument, then summary judgment would not be appropriate. I will deal first with second argument, albeit that it was not Mr Allison's primary case. For the reasons which follow, I consider that BNPP's second argument does have a real prospect of success, and that it derives support from two Commercial Court authorities in the ISDA context. For present purposes, I will assume that Ms Tolaney is correct in her argument that retrospective quotations are not contractually permissible (an issue considered in Section H4 below), so that the Issuer's attempt in August/ September 2022 to operate the contractual process, with Rothschild, was contractually ineffective.

149. The question of whether the court can "step in", if there has been a failure to operate the contractual process for the calculation of the BMWP, should be considered in the light of my conclusion in Section H2; i.e. that timely certification of the amount of the BMWP is not a precondition to its recovery, albeit that damages for the failure to certify in time are potentially recoverable. In the light of that conclusion, it is no objection to BNPP's argument that the court will necessarily be doing the calculation at some much later stage than 14 February 2022.

150. There are a number of cases, in the ISDA context, where a party has failed properly to carry out the process for calculating the sum payable where there has been an "Early Termination", and where the parties had agreed upon "Market Quotation" for the purposes of calculating that sum. The general approach in the ISDA context is described in paragraphs 12.148 – 12.149 of the leading textbook, *Firth, Derivatives Law and Practice* as follows:

> "**Calculation of value for Market Quotation**
>
> 12.148 In order to ensure that the quotations obtained accurately represent market rates prevailing at the time, quotations from four Reference Market-makers must be sought. If four quotations are obtained, the highest and lowest are disregarded and the arithmetic mean of the remaining two are used. If only three can be obtained, the Market Quotation is the one remaining after the highest and lowest have been disregarded and, if fewer than three quotations are available, it is assumed that no value for Market Quotation can be obtained for such Transaction(s) so that "Loss" applies in respect of the instead.

> There appears to be no reason why a party should not ascertain whether a dealer is prepared to provide a quotation before formally selecting it as a Reference Market-maker, appointing another dealer instead if it declines to do so. However, once quotations have formally been requested it is probably too late to change the identity of the Reference Market-makers if it turns out that quotations are not available from them.
>
> **Quotations to be "firm" rather than "indicative"**
>
> 12.149 A quotation will be valid only if it is a "firm" quotation, i.e. "one capable of being taken up there and then". This reflects the fact that the natural meaning of the word "quotation" is a statement of the price at which a person is willing to transact. Furthermore, the Agreement expressly contemplates that any quotation will be for an amount that would be paid to or by the relevant party "in consideration of an agreement between such party ... and the quoting Reference Market-maker to enter into" are placement transaction. This excludes prices which are provided for valuation purposes only and do not represent the price at which the Reference Market-maker is prepared to trade (sometimes referred to as "indicative quotations"). Such prices could be less reliable than actual trading prices, given that there will be no financial consequences for the Reference Market-maker if the figure it quotes is inappropriate. This is particularly true in the case of more complex Transactions, where the Reference Market-maker may not have analysed the economics of the Transaction in the same level of detail as a normal trade."

151. At paragraph 12.195, *Firth* addresses questions including the effect of an invalid determination in the ISDA context as follows:

> "**Determination binding on both parties**
>
> 12.195 Once a determination has been validly made of the Market Quotation, Loss or Close-out Amount, it will be final and binding on both parties. The determining party cannot subsequently change its mind (fore example, on the basis that further information has come to light or it has become apparent that a mistake has been made) and withdraw or amend the notice. This is the case even if the original determination was invalid (for example, because it was based on a misinterpretation of the Agreement), or it was founded on or infected by a manifest numerical or mathematical error. In such circumstances, unless the parties settle the dispute, the court will decide what the result would have been if the determining party had acted correctly. If that party produces a revised calculation statement, this may be evidence of the fact that a mistake was made, and of the

> conclusion that would have been reached in the absence of error. However, the statement has no contractual force."

The principal cases referred to by Firth in that context are *National Power* and *Macquarie.* Before considering those cases, I refer to the decision of Burton J in *Oppenheim*, on which each party to some extent relied in the course of argument.

152. In *Oppenheim*, the claimant (Lehman Brothers) sought the balance of sums in respect of the early termination of four contracts governed by the 1992 ISDA Master Agreement. The parties had selected "Market Quotation" for the purposes of calculating the "Settlement Amount" payable. The ISDA Master Agreement contains an extensive definition of Market Quotation, requiring quotations to be obtained from Reference Market-makers. The defendant, as the non-defaulting party, was required to make the calculation, albeit that on the facts of that case it would result in a payment being made to Lehman Brothers, the defaulting party. Oppenheim carried out a calculation, but Lehman said that the figure had been wrongly calculated and resulted in an incorrect and substantial underpayment. The case was relied upon by Ms Tolaney in support of the proposition, relevant to the argument on "retrospective" quotations in the present case, that the quotations to be obtained under the ISDA Master Agreement had to be "live" quotations. Burton J accepted that this was so (see e.g. paragraph [16] of his judgment), and that such quotations had not been obtained although they could have been (see e.g. paragraph [27]).

153. It was in that context that the court then carried out the calculation using the process which the defendant, Oppenheim, should have followed. Burton J said at [35]:

> "In the absence of the Defendant having performed those obligations, the court must plainly do its best to reconstruct what the *Market Quotation* route would have arrived at. It is clearly not open to the Defendant to assert that that cannot now be performed, when as the experts now agree as far as concerns the 16th September … the quotations could have been obtained at that time."

154. Ms Tolaney submitted that this case provides limited assistance in the present context, because it was (at least in substance) a claim for damages by the claimant against a defendant who had failed to carry out the appropriate calculation.

155. In that case, the claimant was Lehman, which was claiming an additional sum that would have been payable by Oppenheim if the latter had performed its contractual obligation. Oppenheim had not followed the contractual process, to the disadvantage of Lehman Brothers. At the conclusion of the judgment at [54], Burton J asked counsel to calculate the "sums due for which I shall give judgment in the light of these findings as to principal due under the Agreement and interest". There is nothing in this paragraph, or the judgment as a whole, which indicates that Burton J was treating the claim as one for damages, rather than simply for the correct contractual sum that was due to Lehman. Accordingly, I think that it can properly be said that this was a case where the court did "step in", and perform the relevant calculation which then became the sum contractually payable. This was how Foxton J treated the case in *Macquarie* at [41], and I do not think that he was wrong to do so.

156. It is fair to say, however, that the case can be distinguished from the present, because the party (Lehman Brothers) seeking the court's calculation of the appropriate figure was not the party which had failed to follow the contractual process. In the present case, by contrast, it is BNPP (as assignee of the Issuer) which is claiming the BMWP, and which would (in relation to the argument that I am considering) be seeking the court's calculation of the appropriate figure. There is no suggestion that Uro acted in breach of contract in relation to the process to be followed for calculating the BMWP. The process was not followed by the Issuer itself (assuming for present purposes that retrospective quotations are not permissible).

157. Although distinguishable, *Oppenheim* does illustrate, that in the ISDA context there may be no real difficulty in the court, with the benefit of expert evidence, carrying out the calculation itself. Indeed, the earlier decision of Briggs J in *Anthracite Rated Investments (Jersey) Ltd v Lehman Brothers Finance SA (in Liquidation)* [2011] EWHC 1822 (Ch) shows clearly that the court, in an ISDA context, is able to step in and carry out the calculation itself, where the ISDA machinery fails because a third party has failed to carry out the contractual process. Briggs J said at [72]:

> "I am not impressed by the submission based upon the absence of an actual determination by LBIE as Calculation Agent. It is well settled that where the working out of a formula regulating the parties' rights under an agreement depends upon something to be done by a third party, the formula, and the rights dependent upon its implementation, do not fall to the ground merely because that party declines or is unable to act. In extremis, the court will step in and perform the relevant function: see *Sudbrook Trading Estate Limited v. Eggleton* [1983] 1 AC 444. LBIE's descent into administration strikes me as a good example of the type of machinery breakdown which the House of Lords held could be remedied by the court, so as to avoid the destruction of the parties' bargain."

158. In *Macquarie*, however, it was the claimant itself (Macquarie) which was alleged to have made a material error in the calculation. There were a number of points argued, but one issue before Foxton J was whether, where a party makes an error in its "Early Termination Amount" calculation in the ISDA context, its effect was that it had no right to recover any such amount as a debt at all: see paragraphs [36] – [45]. In answering that question, Foxton J referred to authorities (such as *Videocon*) which establish that, in the ISDA context, there is a debt obligation which arises as from the "Early Termination Date", even if that debt is not yet payable – for example because the appropriate calculation has not yet been performed. He said at [40] that:

> "If no such calculation is performed, it is clear that this does not render the debt which has accrued forever unquantified or unpayable".

159. At [41], he said that:

> "The effect of the invalid calculation of the Early Termination Amount, therefore, will frequently be that the court will determine the amount due itself."

160. He referred in that context to both *Oppenheim* and *National Power*, from which he quoted Mr Justice Knowles' summary of the position in paragraph [51] of his judgment:

> "In my judgment on the true interpretation of the 2002 ISDA Master Agreement the position is as follows:
>
> (a) With its letter dated 17 October 2008 NPC caused a debt obligation to arise and with delivery of NPC's letter dated 26 January 2009 an obligation to pay arose.
>
> (b) These are significant contractual events and once they have arisen the relationship between the parties is thereafter affected, and not reversible (save by agreement, or in some cases an order of a court or tribunal).
>
> (c) NPC was required and permitted to make a determination.
>
> (d) NPC made a determination that US$3,461,590.93 (plus interest and aside from Expenses) was payable. The Annex showed how that determination had been calculated. This completed its obligation and right to make a determination.
>
> (e) If there is an error in the determination then (absent agreement) the court or tribunal chosen by the parties will be left to declare that and to state what the Close-out Amount would have been on a determination that was without error. (Emphasis supplied).
>
> (f) However, the Determining Party is also a party to the contract. It can make and accept proposals in its capacity as a party to the contract, including to correct an error in the determination.
>
> (g) The revised calculation statement may still serve as evidence to inform the question of whether there was an error, and the question what the Close-out Amount would have been on a determination that was without error …"

161. In my view, neither *National Power* nor *Macquarie* can be explained on the basis that the court was seeking to correct, for the benefit of a claimant, a breach of contract committed by a defendant in failing to follow the proper process. Rather, the court was recognising that, in the ISDA context, the court could put right an error in order to ensure that a party could recover a sum that would be payable pursuant to a proper calculation, even if the party's purported contractual calculation was infected by material error and was therefore invalid.

162. In *National Power*, Robin Knowles J was dealing (amongst other things) with an argument that a party who had made an error in its determination could then make a redetermination. He considered that this was not appropriate, and said at [56]:

> "There are examples, within and outside the field of financial instruments, where the courts have not remitted determinations back, consistently with the view that the parties should be taken to have contemplated that the court or tribunal would make the determination if the party required and entitled to make the determination did not; these include *Lehman Brothers Finance SA v SAL Oppenheim Jr & Cie, KGAA* [2014] EWHC 2627 (Comm) and *Clark v Nomura International* [2000] IRLR 766. The case of manifest numerical or mathematical error would still be a case for correction of the determination (by agreement or by court or tribunal, and in the respect where there was error) rather than a fresh determination."

163. Thus, in the ISDA context, as *Firth* says at 12.195 (quoted above), where there has been an invalid determination, the court will decide what the result would have been if the determining party had acted correctly. This is because, as Robin Knowles J says in the quoted passage, they must be taken to have contemplated that the court or tribunal would make the determination if the party required and entitled to make that determination did not.

164. The question therefore becomes, in my view, whether the approach taken in the ISDA context can be applied in the present context. Ms Tolaney did not suggest that *Macquarie* was wrongly decided, but she submitted that the ISDA cases were distinguishable on the basis that the "Early Termination Amount" became due as a debt, even if it was not payable until the calculation had been performed. She submitted that this analysis was not available here, because the only obligation in Clause 7.1(c) was to pay the BMWP; that the definition of BMWP required reference to the calculation under Clause 5.3(d); and that therefore there could be no BMWP at all if the proper calculation was not performed.

165. Mr Allison disputed this analysis, and submitted that the *Macquarie* approach of Foxton J was also applicable in the present context. He referred again to the existence of only two conditions in Clause 7.1(c)(iii), namely (A) and (B), which needed to be fulfilled for the accrual of Uro's obligation to pay the BMWP. The fact that the definition of the BMWP cross-refers to the calculation of the BMWP under Condition 5.3(d) of the Bond T&Cs made no difference to the analysis. He said that the same point could be made in relation to the 1992 ISDA, which expressly defines the amount payable on "Early Termination" by reference to Market Quotations, where that method had been selected. However, Market Quotations were not essential to the existence of the payment obligation under ISDA, so that the court could determine the quantum of the amounts payable if the calculating party had failed to do so.

166. In my view, there is a sufficiently close analogy between the sum to be calculated under an ISDA contract (where the court can "step in" if the calculation has not been performed correctly), and the BMWP payable under the Loan Agreement, to give BNPP a real prospect of succeeding in its argument on this point. The parties in Clause 7.1(c) contemplated that an obligation to pay a sum would arise if the two conditions set out in (A) and (B) were satisfied. Even if (contrary to BNPP's contention) this was not in itself a "debt" obligation, it was in my view closely analogous to the debt obligation which arises on Early Termination in the ISDA context. The precise amount of the sum payable was to be calculated, in accordance with the definition of BMWP

in the MDA, pursuant to Condition 5.3(d) of the Bond T&Cs. Condition 5.3(d) required a calculation, with a detailed process to be followed. The process was in some respects modelled on the ISDA approach of seeking "reference" quotations. This was done (as Ms Tolaney submitted) for the purpose of bringing an element of objectivity or independence into the calculation, as is the case with the ISDA "Market Quotation" process. In both the Loan Agreement, and the market quotation process in the ISDA context, the end result is a figure obtained or obtainable from the market. I can see no good reason why the court should be able to effect or correct a calculation which has not been properly carried out in the ISDA context, but should be unable to do so in the case of the present Loan Agreement. Indeed, if the evidence of Mr Mark is accepted, there is an abundance of data which exists which would enable the calculation to be performed by the court with ease (and probably more ease than in many ISDA cases) and where the scope for dispute is within very narrow limits. The court can thereby provide the necessary objectivity, which the parties were seeking to achieve. BNPP have a real prospect of succeeding in their argument that as in the ISDA context, the parties here must be taken to have contemplated that the court or tribunal would make the determination if the party required and entitled to make that determination did not.

167. Ms Tolaney submitted, in reliance on *Sudbrook, Gillatt and Infiniteland*, that there were two stringent conditions that needed to be fulfilled before the court could be asked to step in. These were: (i) that the inability to operate the contractual mechanism must not be the fault of the party that is asking the court to substitute its own determination; and (ii) that the contractual machinery must not be part of the essential terms of the contract. She submitted that BNPP had no prospect of fulfilling either of these conditions.

168. Ms Tolaney accepted that the decision of the House of Lords in *Sudbrook* went no further than establishing that the court would only substitute its own determination where the contractual machinery was not essential. She submitted that, in the present case, the machinery was essential. I disagree, and consider that there is a real prospect of BNPP showing that it was similarly not essential here.

169. The line of ISDA cases, commencing with *Anthracite*, shows that the court is able to carry out the calculation where the ISDA machinery has failed. Hence the machinery is not treated as essential in those cases. I do not consider that there is any reason to take a different approach here. The case for doing so is strong, in the light of Mr Mark's evidence as to the widespread availability of data and the relative ease of calculation, in the context of German bunds. Furthermore, the parties here must have contemplated that the machinery might fail, not least because there needed to be a minimum of two quotations for the Financial Adviser to perform the BMWP calculation. The parties cannot have intended that, in circumstances where only one quotation was obtained, the machinery was so essential that Uro would escape all liability for the BMWP, with the court being powerless to intervene.

170. Ms Tolaney's main argument, however, focused on the other "stringent condition", namely that the inability to operate the contractual mechanism must not be the fault of the party that is asking the court to substitute its own determination. I am not persuaded that the two authorities, on which she relied, established that there is, in every contractual situation, a stringent condition of this kind. It must in my view be relevant to consider, for example, the nature of the contract, the market background, what the parties must have contemplated in the light of those matters, and the reason that the court is being asked to step in.

171. In both *National Power* and *Macquarie*, the court was willing to make corrections to erroneous calculations that had, or had at least arguably, been wrongly performed by a party seeking to claim. In *Macquarie*, the court considered that it could do this even if the claimant, which was responsible for the calculation, had made an error. The position was similar in *National Power*, where the relevant determination by National Power (namely the first determination that it had made) was corrected so as to remove the effect of an option in the replacement transaction relied upon by National Power: see [90] and [92]. As I have said, there is a close analogy between the obligation to make payments on Early Termination in the ISDA context, and the payment of the BMWP (which arises because there has been an early termination) in the present case. By analogy with the approach taken in the ISDA cases, I consider that there is a real prospect of BNPP showing that any "fault" on the part of the Issuer, in failing to obtain timely quotations or otherwise failing to follow the contractual process, does not prevent the court from calculating the appropriate figure itself. There is a real prospect of a successful argument that, in the context already described, the parties must be taken to have contemplated that the court or tribunal would make the determination if the party required and entitled to make that determination did not or did not do so properly.

172. I do not consider that either *Gillatt* or *Infinteland* compels a different conclusion. The importance of considering the contractual context is clear from *Gillatt*. At page 467, Mummery LJ said that little assistance on the construction of the relevant agreement could be gained from decisions in other cases on differently worded agreements concluded in different circumstances. Having considered *Sudbrook* and one other authority, Mummery LJ said:

> "Those cases do not, however, determine the decision in this case. The critical question is, as the judge appreciated, to determine whether cl 6 of the TAS agreement, construed both linguistically and contextually, made the determination of the independent chartered accountant essential to Mr Gillatt's entitlement to payment for the shares in TAS. Only the terms and the surrounding circumstances of the TAS agreement can supply the answer to that question."

173. The context of *Infiniteland* is also a very long way from the present. It was not an ISDA or similar case. The contract expressly provided that the purchaser should prepare a calculation of Net Asset Value before 1 September 2001. Another provision was that "time shall be of the essence of this agreement". It is unsurprising that the court was unwilling to intervene, by doing the calculation itself, in the context of this contractual provision.

174. I therefore conclude that, when considering only Mr Allison's alternative submission on the calculation issue, BNPP has a realistic prospect of success. This conclusion, in view of my earlier conclusion in relation to the certification issue (see H2), is sufficient to defeat Uro's application for summary judgment. It is therefore unnecessary to consider BNPP's argument on the retrospectivity issue in detail. I will, however, briefly state my conclusions on that issue in the following section.

H4: Can quotations be obtained retrospectively?

175. Uro submits that the quotations from the Reference German Bund Dealers must always be sought, by a properly appointed Financial Adviser, prior to 3.30 pm on the Reference Date; so as to enable quotations in writing to be given "at or about" that time. It is therefore impermissible to seek quotations retrospectively after that date, and in particular impermissible to do so many months after the Reference Date as happened here. BNPP submits otherwise.

176. The important clause is the definition of "Reference German Bund Dealer Quotations", albeit that this must be seen in the context of the contractual scheme as a whole. It is convenient to set out this definition again:

> "**Reference German Bund Dealer Quotations** means, with respect to each Reference German Bund Dealer and any relevant date, the average as determined by the Financial Adviser of the bid and offered prices for the Comparable German Bund Issue (expressed in each case as a percentage of its principal amount) quoted in writing to the Financial Adviser by such Reference German Bund Dealer at or about 3.30pm (Frankfurt time) on the Reference Date."

177. In order to arrive at this definition, it is necessary to take a rather lengthy journey. Clause 7.1 of the Loan Agreement refers to the BMWP. The BMWP is defined in the MDA, by reference (in the context of the present case) to Condition 5.3(d) of the Bond T&C's. Condition 5.3(d) refers to a calculation, including of Present Value. Present Value refers to the Bund Rate. The Bund Rate refers to both the Comparable German Bund Issue and the Comparable German Bund Price. Comparable German Bund Price refers to German Bund Dealer Quotations "for such date". It is only this final reference (Comparable German Bund Price) that brings in the definition of German Bund Dealer Quotations.

178. Mr Allison submitted that there was nothing in the various terms, in the journey prior to "German Bund Dealer Quotations", which suggested that a quotation had to be obtained on the Reference Date itself, rather than subsequently. This was a fair point, as far as it went. It seemed to me that the references in the other terms, which used various expressions ("… Quotations <u>for</u> such date", "<u>as at</u> the Reference Date", "<u>as of</u> the Reference Date") are neutral on the present issue, and could support either side's interpretation. However, BNPP's case needs to address the definition of "Reference German Bund Dealer Quotations" itself.

179. As a matter of pure textual analysis of the definition of these words, when viewed in conjunction with the ISDA case law, Uro certainly has a strong argument that the dealers will be asked to provide "live" quotations. The definition contemplates that "bid and offered prices" will be "quoted in writing". This does suggest that the Financial Adviser will be seeking, from each Reference German Bund Dealer, a "live" quotation, which can either be accepted or rejected. This is the approach taken in the context of "Market Quotation" in the ISDA cases: see e.g. *Oppenheim*. There is also no difficulty in reading the words "at or about 3.30 pm on the Reference Date" as being referable to the time when the bid and offered prices, quoted in writing, will be provided. If these are "live" quotations given at that time, then they will by definition be bid and offer

prices reflecting the market at that point in time. They will, therefore, fulfil what I understood BNPP to submit was the essential purpose of the quotations to be requested: namely to identify a price at a particular point in time.

180. Nevertheless, a case can be made for reading the words as permitting the Financial Adviser to use quotes for bid and offered prices which were given subsequently, provided that such bid/offered prices were referable to the specific time set out in the clause; i.e. at or about 3.30 pm (Frankfurt time) on the Reference Date. That construction involves reading the final words as identifying the reference time for the bid/ offer prices, rather than the time when the quote had to be given; in other words, as Mr Allison said, "as at 3.30 pm (Frankfurt time)". On this basis, the words "quoted in writing to the Financial Adviser" simply require the prices (which are considered by the Financial Adviser in the averaging exercise) to be in writing, irrespective of when they were given. Those prices would be for the Comparable German Bund Issue at or about 3.30 pm.

181. I accept that this is not the most natural reading of the text, in the context of a clause which refers to pricing and "Quotations". However, the process of interpretation does require consideration of the factual matrix and the commercial consequences of the parties' respective arguments. There are a number of points which assist BNPP's case in that regard, and which give rise to an argument on retrospectivity which has a real prospect of success and cannot be dismissed on a summary judgment application.

182. First, and most importantly, the evidence of Mr Mark is that, because of the abundance of available data in the context of a highly liquid market, any differences between the prices that would be obtained in real time at or around 3.30 pm on the Reference Date, and retrospectively, would be "immaterial". I do not think that this conclusion is in some way negated by Mr Mark's acknowledgment that even two contemporaneous calculations would not necessarily be identical. His point is that any differences are insignificant in the first place, and would be further minimised or removed by the averaging exercise. If this is indeed the commercial background to the provisions under consideration, then it assists the conclusion that retrospective quotations are permissible.

183. Secondly, an important basis of Uro's case is that the quotations must be "live", so that the dealer is actually committing itself to a potential transaction: as Ms Tolaney said, the dealer must have some skin in the game. However, Mr Mark's evidence as to the commercial background indicates that this is unrealistic, and that the dealers would "understand that they would receive no trading business from providing this service".

184. Thirdly, and as discussed above, Mr Mark's evidence is that there were risks that the process – the appointment of a Financial Adviser, and thereafter the appointment of the dealers – could simply not be carried out within tight timescales. In the case of a voluntary prepayment, there might only be 6 days to complete the process, which would likely be an insufficient time period. If so, then an interpretation which permits retrospective quotations – particularly if such quotations are not materially different to those which would have been obtained in real-time – makes more commercial sense than Uro's contrary argument, namely that BNPP loses any entitlement to the BMWP.

185. Fourth, if it is correct (see Section H2 above) that timely certification is not a precondition to recovery, then there would appear to be no good reason why

retrospective quotations should not be obtained, again assuming that (as Mr Mark says) these would be materially the same as quotations obtained in real-time.

186. In response to many of these points, Ms Tolaney emphasised that the process envisaged the exercise of discretion or judgment at various stages, and this could never be reproduced in the context of a retrospective quotation which (as the dealer would know) would never be taken up. She referred to the judgments which the Financial Adviser would have to make as to the Bund dealers to be approached. The Bund dealer would need to exercise judgment in identifying the most closely matching bund, as provided for in the definition of Comparable German Bund Issue. She also referred to the judgment which would need to be exercised in relation to the decision of the Bund dealer as to whether or not to quote a price at all, and if so what price. Mr Mark's evidence indicates, however, that these discretions or judgments do not, in practice, lead to any material difference in the real-time versus retrospective scenarios. As I have said in another context, that evidence seems to be supported by the ability of Santander and Uro to identify, with a considerable degree of accuracy, the BMWP some months before the Rothschild's exercise was carried out and the certificate was produced. It is also supported by the cross-check of data performed by Rothschild following receipt of the responses from the Bund dealers.

187. Fifth, if I am wrong on the issue considered in Section H3 above (so that the court cannot intervene), then this seems to me to reinforce the commercial sense of construing the contract so as to permit retrospective quotations. The contrary argument produces the uncommercial result that BNPP's entitlement to the BMWP was dependent upon the complicated process working sufficiently smoothly so as to produce quotations on the Reference Date itself – in circumstances where there were risks that this would not happen, and where such risks were not identified in the Prospectus. Uro's contrary argument results in the BMWP becoming a very fragile contractual entitlement, despite its importance (on Mr Mark's evidence) to the pricing of the Bonds and its obvious commercial importance.

188. Ms Tolaney advanced an argument that even if the exercise could be carried out retrospectively, the approach taken by or in conjunction with Rothschild was non-contractual. In my view, however, this raised questions which were not appropriate for resolution on a summary judgment application, and which in any event did not matter in view of my conclusion in Section H3 above.

189. Overall, I consider that BNPP has a real prospect of success on the retrospectivity issue.

CONCLUSION

190. Accordingly, Uro's application for summary judgment, and to strike out the claim, is dismissed.