Neutral Citation Number: [2021] EWHC 987 (Ch)

Case No: FL-2017-000002

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
FINANCIAL LIST

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
19th March 2021

Before :

MR JUSTICE MILES

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Between :

The Federal Deposit Insurance Corporation as Receiver for Amcore Bank, N.A. and Others	**Claimant**
- and -	
Barclays Bank PLC and Others	**Defendants**

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- -

Sue Prevezer QC, Richard Blakeley and Alex Barden (instructed by **Quinn Emanuel Urquhart & Sullivan LLP)** for the **Claimant**
Adrian Beltrami QC & James Willan QC (instructed by **Clifford Chance LLP);**
Brian Kennelly QC & Paul Luckhurst (instructed by **Gibson, Dunn & Crutcher LLP);**
Richard Handyside QC, James Duffy, & Christopher Brown (instructed by **Hogan Lovells International LLP);**
Robert O'Donoghue QC & Adam Sher (instructed by **Clifford Chance LLP);**
Josh Holmes QC, Conall Patton QC & Emma Jones (instructed by **Milbank LLP);**
Ms Sonia Tolaney QC & Ms Nehali Shah (instructed by **Slaughter and May);**
Charles Bear QC & Matthew Cook QC (instructed by **Macfarlanes LLP)** for the **Defendants**
Hearing dates: **17 - 19 March 2021**

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APPROVED JUDGMENT

Mr Justice Miles:

1. This is an approved transcript of series of extempore rulings made at the first CMC held between 17 and 19 March 2021.

(1) Case management documents

2. The first issue under this heading is whether the list of common ground should contain the BBA's admissions in relation to what is called "the LIBOR flagging system". This is set out in paragraph 7 of the draft and its inclusion contested by the Defendants.

3. The Claimant says that this paragraph records common ground in the pleadings between it and the BBA Parties. It says that the draft makes clear that it is not admitted, or accepted, by the Bank Defendants. The Claimant says that the draft records the fact that there was a flagging system in place, and says that there is no good reason why it should not, therefore, be included in this part of the document.

4. The Defendants submit that the purpose of documents of this kind is to set out important pieces of common ground, agreed between the parties to be relevant. They say that these documents are neutral and do not include everything that is admitted in the pleadings.

5. The Defendants also say that there are live issues as to the significance of such flagging system as there was. They say that such system was not, as is alleged by the Claimant, evidence of anything secretive or collusive. They also point out that there is a specific issue (no. 9) in the list of issues, concerning the flagging system and its significance, if any, for the case.

6. On balance, I do not think that paragraph 7 should be included. It seems to me that it is but one of a many issues in this case. It is a point that the Claimant clearly relies on and will no doubt make much of when seeking to allege collusion or the secret transmission of information. That will no doubt feature as part of their case. The Defendants, for their part, contend that matters set out in paragraph 7 were open and known, that they do not lead to any particular inference, and they say that by including the paragraph in this document, it gives it undue prominence. I think they are right about that. I also think that this is best dealt with in the list of issues rather than as common ground.

7. The next point arises from paragraph 9, which refers to investigations by regulatory authorities. There are two sentences which are contentious. The first reads, "The investigations of which the Bank Defendants have been the subject include but not limited to those set out in Schedule 2 hereto." The second contentious sentence reads, "Certain individuals employed by the Bank Defendants have also been the subject of criminal trials in respect of USD LIBOR."

8. The Claimant says that it would be helpful to have an agreed schedule setting out the regulatory findings. The findings themselves run to many thousands of pages, and, it says, a short summary would assist. It says that the findings are at least relevant to the question of limitation and could have a broader relevance.

9. The Defendants say that the investigations themselves are simply irrelevant and not part of the relevant matrix of fact. I do not accept that broad submission. Indeed, the drafting of the agreed parts of paragraph 9 shows that the fact of the investigations is part of the relevant matrix. The Defendants then say that it is not necessary for there to be an agreed schedule of the findings. The Claimant has set out, in its pleading, those parts of the findings it contends are relevant and the Defendants have addressed those in their pleadings.

10. I do not think that the Defendants should be required to seek to agree a document of this kind. It seems to me to be the sort of exercise which is likely to lead to a much work and may well end in disagreement. It is open to the Claimant to put forward its own short summary of what it says the findings are and rely on that. It will then be for the court to make of that what it will and for the Defendants to comment on it, as they think fit, depending on the occasion. But I do not think that the parties should be compelled to spend time and resources seeking to agree a document of this kind.

11. Nor do I think that there is any real point in including the last sentence of paragraph 9. It seems to me that the fact that there have been criminal trials is likely to be relevant only to the issue, possibly, of limitation. It may be that the parties wish to rely on evidence given at criminal trials, but they will do so as part of the evidence in the case. I do not think it is necessary to say anything about those trials in this part of the case management document.

12. The final point under this head concerns the list of issues and, in particular, whether issue 3 should be included. It says this: "3. What was the role, significance and/or prevalence of USD LIBOR as a benchmark in global (or other) financial markets during the Claim Period?"

13. The Claimant submits that it has pleaded a number of assertions about the importance of the LIBOR benchmark in relevant global markets. It has pleaded that that benchmark had certain characteristics; and that it was characteristically or typically used in various markets as a benchmark rate. It has also given some figures, seeking to emphasise, the importance of the benchmark in various markets.

14. The Defendants say that the issue in paragraph 3 is very broadly worded and that to the extent that the use of the LIBOR benchmark, as a benchmark, is relevant to this case, it is covered in other issues, including issues 11, 12 and 20. They also says that there is a possible concern that this issue will be used as a peg for seeking very broad disclosure.

15. I think on balance that this paragraph should not be included. I agree with the Defendants that it is very broadly drafted, indeed is almost open-ended. It is

very hard to know quite what to make, for example, of the notion of "the significance or prevalence of the benchmark in global markets", and quite what view the court could ever usefully reach on that. It seems to me that it is much more likely that the court will be interested in uses of the benchmark that are relevant to the actual markets in issue on the competition claim and to the use of the benchmark by the Closed Banks, as alleged in the claim. Those matters are sufficiently covered by the other listed issues.

16. I should add that I would be surprised if there were any real issue in the case that LIBOR is very broadly a widely used benchmark. That much is obvious.

(2) Further information requests

17. For this ruling I need to say a little more about the background. The Claimant is the Federal Deposit Insurance Corporation, in its capacity as receiver for 19 closed US-based depository institutions, which are called "The Closed Banks".

18. The Defendants consist essentially of two groups: the first is the Bank Defendants, each of whom were, at material times, a member of a panel of 16 banks who made submissions for the purpose of fixing US dollar LIBOR, or are alleged by the Claimant to be responsible for such submissions.

19. The second group is the BBA Parties. The BBA is an unincorporated trade association. In these proceedings, there are also two companies owned by the BBA which are now acting as representatives of the BBA. The BBA membership included all of the Bank Defendants and also some 150 other banks who are not parties to these proceedings.

20. At all material times, US dollar LIBOR was a widely used US dollar interest rate benchmark. The process by which it was set was this. Each day shortly before 11 am, the panel banks submitted to Thomson Reuters their answers in respect of US dollars for 15 different maturities to the following question: at what rate could you borrow funds were you to do so by asking for and then accepting interbank offers in a reasonable market size just prior to 11 am?

21. The US dollar daily rate was then calculated by Thomson Reuters, by excluding the highest and lowest quartiles of the submissions and calculating the arithmetic mean of the central two quartiles. That number was then published.

22. In very broad terms, the Claimant contends that in a period from August 2007 to the end of 2009, the Bank Defendants consistently and knowingly made artificially low US dollar LIBOR submissions, which did not honestly reflect the perceived cost of obtaining funds and did not comply with the relevant definition of "LIBOR".

23. The Claimant alleges that such conduct (which it calls "lowballing") meant that the published US dollar LIBOR rate was suppressed and was set at a materially lower rate than would have been the case in the absence of lowballing.

24. The Claimant brings, first, competition law claims under article 101 TFEU and Chapter 1 of the Competition Act 1998 on the basis that the alleged suppression was either the product of an agreement or was collusive and concerted behaviour, participated in by each of the Bank Defendants and facilitated and/or directed by the BBA Parties. It makes a second group of claims under US state laws for the tort of fraudulent misrepresentation and/or conspiracy and/or aiding and abetting.

25. I will say a bit more about the alleged representations since they feature in the arguments about the request for further information. They are pleaded thus:

> "10.1 each Panel Bank expressly, alternatively impliedly, represented that its honest and accurate assessment of its USD borrowing costs under the LIBOR Definition was represented by the number set out in its US dollar submission (the 'Own Number Representation');
>
> 10.2 the BBA Parties and each Panel Bank expressly, alternatively impliedly, represented in respect of each daily USD submission that, to the best of their knowledge and in good faith, the number representing the synthesised rate based on the Panel Banks' honest and accurate assessment of their USD borrowing costs in the London interbank loan market under the LIBOR Definition, was the number published as the daily USD LIBOR fix (the 'Collective Number Representation');
>
> 10.3 each of the BBA Parties and the Panel Banks expressly, alternatively impliedly, represented that it was not intentionally participating in the suppression of USD LIBOR, either individually or as part of the alleged Agreement or alleged Concerted Behaviour (the 'No Suppression Representation');
>
> 10.4 the BBA Parties and each Panel Bank expressly, alternatively impliedly, represented that, to the best of its knowledge, no Bank Defendant was intentionally participating in the Suppression of USD LIBOR, either individually or as part of the alleged Agreement or alleged Concerted Behaviour (the 'No Knowledge of Suppression Representation'); and/or
>
> 10.5 the BBA Parties and each member of the FXMMC (and through them the Panel Banks by whom the members of the FXMMC were employed) further represented that USD LIBOR was a robust and transparent benchmark which reflected the large majority of interbank lending activity in the London market; and/or that suggestions that USD LIBOR was unreliable were likely to be attributable to factors other than deliberate suppression; and/or that USD LIBOR was (or henceforth would be) subject to strong and independent governance; and/or that the BBA would in the future, and would have in the past, disciplined any Panel Bank making deliberately inaccurate submissions (the 'Robust Benchmark Representations', and, together with the other alleged representations set out in this paragraph 10.5 [*sc. should be 10*], the 'Representations')."

26. The Defendants have applied for certain further information. The requests fall under two broad heads. First, there are requests about the Claimant's case about reliance. These requests have been advanced by the First Defendant and the BBA Parties. The other banks have made requests, similar to those of the First Defendant. Secondly, the BBA Parties have made requests about aspects of the Claimant's case on loss and damage. I will first address the requests concerning reliance.

27. The First Defendant applies for answers to requests 6.1 to 6.4 of a request made on 12 January 2021. I shall return to the requests in a moment. The application is supported by a witness statement from the First Defendant's solicitor, Ms Bickerton, of 3 March 2021.

28. The starting point for assessing these requests is the pleadings. I have already summarised the representations pleaded in the particulars of claim. They are alleged to be either express or implied.

29. As to reliance, the Claimant pleads, at paragraph 119, as follows:

> "The Closed Banks justifiably relied upon and/or were influenced by the Representations in at least the following ways:
>
> (1) Using USD LIBOR in their risk management systems, which inter alia valued the banks' assets and liabilities.
>
> (2) In deciding whether and/or on what terms to enter into transactions including in the Lending Market(s); the On-Sale Lending Market(s); the Mortgage Market(s); and the On-Sale Mortgage Market(s).
>
> (3) For example, in relation to such transactions:
>
> (a) In incorporating USD LIBOR as a benchmark in adjustable/variable rate loans and mortgages.
>
> (b) In deciding whether or not to include or exercise clauses entitling the Closed Bank to vary the interest rate and/or the applicable benchmark.
>
> (c) In entering into IRDs, including interest rate swaps, forward rate agreements, and interest rate options, caps, floors and collars, and/or by agreeing to enter into such products on terms incorporating USD LIBOR.
>
> (d) In calculating the price of fixed rate loans and mortgages to customers, to the extent that the Closed Banks used USD LIBOR to determine the fixed interest rate.
>
> (e) In using USD LIBOR as a guide to pricing in the sale and purchase of USD LIBOR-linked loans, or portfolios thereof (including securitisations), and of derivatives in the secondary market.

(f) In calculating interest due on adjustable/variable rate loans and mortgages and other instruments or products linked to USD LIBOR from time-to-time during the Suppression Period, the Closed Banks used the daily published figures for USD LIBOR."

30. The BBA Parties made a Part 18 Request at an early stage after the service of the particulars of claim. There was, however, an informal stay of the proceedings from about November 2017, when UBS applied to strike out the competition claims on limitation grounds, until judgment was given on that application at the end of July 2020. In November 2020, the BBA Parties served a revised Part 18 request, including in relation to reliance. On 21 January 2021, the Claimant provided a partial response to that request. The answer included in relation to the request in relation to reliance a reference back to paragraph 119 of the particulars of claim.

31. The Claimant's answer also said that the executives of the Closed Banks were experienced professional bankers who understood the purported nature of LIBOR as a benchmark and who used it, believing the matters alleged in the pleading to have been represented by the Defendants.

32. The Claimant also said in that answer that it would rely on a presumption of inducement under US law.

33. As I have said, the First Defendant made its request on 12 January 2021. The relevant requests are set out in paragraph 6:

"6. For each of the (remaining) Closed Banks separately:

6.1 As regards paragraph 119(1) of the Particulars of Claim, how and when is it alleged that the Closed Bank gave consideration as to whether to use USD LIBOR in their risk management systems and relied on (some or all of) the Representations for that purpose? Please identify which natural persons(s) made that/those decision(s) and where they were made.

6.2 As regards paragraph 119(2) of the Particulars of Claim, is it alleged the Closed Banks relied on (some or all of) the Representations (a) when making a decision in principle to use terms incorporating USD LIBOR generally or for particular types of transaction, or (b) when making separate decisions in respect of each specific transaction to use terms incorporating USD LIBOR? In either case, please identify how, when, where and by which natural person(s) the relevant decision(s) were made.

6.3 Separately for each of (a) the Own Number Representation, (b) the Collective Number Representation, (c) the No Suppression Representation, and (d) the No Knowledge of Suppression Representation, insofar as the representation was allegedly made by Barclays:

(a) Did any, and if so which, natural persons(s) at the Closed Bank consciously understand that the representation had been made, at the time it was allegedly made and/or relied upon?

(b) How, when and where did that/those person(s) receive the representation (including but not limited to any representation said to be contained in Barclays' daily LIBOR submissions)?

(c) What did that/those persons(s) understand to be the meaning of the representation?

(d) How and when were that/those person(s) influenced by the representation and what steps did that/those person(s) either take or refrain from taking in reliance upon and induced by the representation?

(e) Where was that/those person(s) at the time when they were influenced by and/or took or refrained from taking steps in reliance upon the representation?

6.4. Separately for each of the Robust Benchmark Representations set out in paragraphs 112(1), 112(2), 112(3) and 112(4) of the Particulars of Claim:

(a) Did any, and if so which, natural person(s) at the Closed Bank consciously understand that the representation had been made, at the time it was made?

(b) How, when and where did that/those person(s) receive the representation?

(c) What did that/those person(s) understand to be the meaning of the representation?

(d) How and when were that/those person(s) influenced by the representation and what steps did that/those person(s) either take or refrain from taking in reliance upon and induced by the representation?

(e) Where was that/those person(s) at the time when they were influenced by and/or took or refrained from taking steps in reliance upon the representation?

6.5 Was the Closed Bank aware that (as referred to in paragraphs 105(3) and/or 109(1) of the Reply) 'there were some doubts about [USD LIBOR's] accuracy' or that 'questions had been raised about USD LIBOR's accuracy'? If so, what precisely was the Closed Bank's state of knowledge as to the 'doubts' or 'questions' about USD LIBOR and when did the Closed Bank acquire that knowledge?

> 6.6 Did the relevant Closed Bank endeavour to investigate or assess whether any of the Representations was, in fact, true? If so, please provide particulars of what investigations or assessments were made."

34. After some further correspondence, the Claimant's solicitors responded on 22 February 2021. The Claimant explained that the request did not appear to:

> " ... take account of FDIC's position as a receiver which has come in after the closure of the Closed Banks and was not managing them at the relevant time. It cannot be assumed that FDIC or its lawyers have access to the sort of horse's mouth evidence or instructions which might ordinarily be obtained from a corporate client."

35. The letter also said that:

> "Request 6 appears to demand a degree of particularisation in relation to 19 separate Closed Banks which the Claimant considered unrealistic for any pleading, let alone one by a receiver who does not have horse's mouth instructions."

36. The letter of 22 February did say though that the Claimant would seek to provide a list of individuals at each of the Closed Banks who, on its current information, it believed were the relevant decision-makers. That offer appears to have been made by reference to those persons' roles within the Closed Banks, rather than on the basis of any specific information that they received the representations or were actually influenced by them.

37. Ms Vernon, the Claimant's solicitor, has made a fourth witness statement in which she has provided further evidence about the state of the documents held by the claimant as a receiver of the Closed Banks. She divides that documentation into a number of categories. I conclude on the basis of her evidence that the process of searching through the documents of all 19 banks is likely to be a complex and prolonged one. Counsel for the claimant said today, on instructions, that the Claimant now thought that the process of its own disclosure could well take up until the end of next year. Ms Vernon also described some of the difficulties of seeking to search through the documentary material, which include the fact that some of the data was originally held on proprietary structured search systems which are no longer operating and that work is having to be undertaken even to make the structured data usable.

38. The Bank Defendants submit, on the basis of Ms Vernon's evidence, that the Claimant does not appear yet to have had any substantial discussions with the probable decision-makers at the Closed Banks. The Defendants also say that it is unclear, on the basis of that evidence, whether anything has been done to determine the evidential basis for the plea of reliance set out in paragraph 119.

39. The Defendants also make a general complaint that the proceedings have already been on foot for some four years and, moreover, that there were closely similar proceedings started by the Claimant in the US, three years before that. On the timing point, which does have some bearing on the case

management decision, I have already explained that the period up until July 2020 was one in which the parties agreed an informal stay. In the first month after the proceedings were issued, the work was devoted to pleadings. In November 2017, as I have said, UBS applied to strike out the competition claim. Things were then put on ice until the end of July 2020.

40. So it seems to me that when considering the history, what is really telling is the period since the proceedings came back to life at the end of July 2020. The Claimant says that, since then, it has been preparing various case management steps needed for this hearing.

41. It does appear to me, looking at the evidence of Ms Vernon, that though some work has been done since the end of July 2020, not a great deal has been done to progress the case. I have gained the impression that more needs to be done for this case to progress. If it is a matter of resourcing, then it seems to me that more resources need to be devoted to the case. I accept that it is a very large case, but that is in part because the Claimant has chosen to bring proceedings on behalf of such a large number of Claimants. The Claimant necessarily has to accept that it will devote sufficient resources to the case to enable it to proceed properly. If one chooses to bring proceedings in this jurisdiction, one must abide by the rules of the jurisdiction. Part of the overriding objective is for cases to be conducted as expeditiously as possible, conforming to the other requirements of justice.

42. Returning from the timing issue to the meat of the application for further information, the First Defendant says in summary that the starting point is that the Claimant should already have pleaded the facts on which it intends to rely; see CPR 16.4(1). It says this is not a mere formality. Properly pleading the elements of the cause of action performs an important function of informing the other party of the case it is required to meet. The First Defendant says that this applies still more strongly in a case of fraud, where serious allegations are made, and the Claimant must properly plead all the elements of the case.

43. Secondly, the First Defendant submits that reliance is an essential element of the US tort claims in fraudulent misrepresentation. It points out that the Claimant has apparently pleaded actual reliance, in the sense of decision-makers considering and taking into account the alleged representations. It says that the potential for a presumption of inducement does not relieve the Claimant of the need to plead the underlying facts.

44. It says that, to the extent that the Claimant relies on principles of US law, the court on this hearing cannot begin to resolve any dispute about US law; and in any event, it says that the pleading of US law in the particulars of claim does not reveal any significant divergence from those of English law.

45. The First Defendant says, thirdly, that for the purposes of PD18 para 1.2 it is reasonably necessary and proportionate for the First Defendant to be provided with the information it seeks. It says that the information is needed for the purposes of various case management steps. First, in order for disclosure to be effective, it needs to know who is said to have relied, in order that properly tailored or targeted requests can be made. It also says that it will need to know

who is said to have relied for the purposes of preparing its evidence for trial. Counsel for the First Defendant accepted that this was really a point about expert evidence. The First Defendant also says that the information is important, as a case management tool, to enable it to decide whether it should be seeking to strike out the claims or for the purposes of any submissions that it may wish to make about preliminary issues or the splitting of issues into separate hearings.

46. The First Defendant says, fourthly, that it has a real concern that the Claimant has commenced the proceedings speculatively and without properly considering the viability of the fraud claims. It says that these concerns are exacerbated by the evidence of Ms Vernon which suggests that to date there have not been substantial discussions with former employees of the Closed Banks, and that the interrogation of the Closed Banks' own documents has been limited.

47. The Claimant says in summary that on the basis of Ms Vernon's fourth statement, the Claimant as the receiver of the various Closed Banks does not have direct knowledge; that the former employees of the Closed Banks do not work for the Claimant or for those banks any longer; and that the Claimant has no control over them.

48. As far as the application for further information is concerned, the Claimant says, first, that it is not in a position to provide the information sought now or shortly. It says there will have to be a process of going through the documents for each of the Closed Banks. This will be a huge task. It is likely that there will be millions of documents. These are held on various systems, some of which are not readily searchable. I have already mentioned the evidence of Ms Vernon about the state of the records and documents of the banks. Though some criticisms were made of her evidence, I think it shows that the process of searching through that material is likely to take a good deal of time.

49. The Claimant says, secondly, that the requests are for evidence, not fact and that, in effect, the Defendants are seeking advance witness statements.

50. The Claimant submits, thirdly, that the Defendants do not require this information for the next stages of the litigation. The Claimant says that there is a clear demarcation in this case between issues about the Defendants' own conduct and that of the Closed Banks. It is not a case where there were direct communications between the parties. The Claimant submits that the First Defendant can therefore proceed with disclosure and witness statements, without being provided with this information. When it comes to expert evidence on loss, the position may be different, but the Claimant says that by then it will be in a far better position to provide the information.

51. The Claimant emphasises, fourthly, that Part 18 of the CPR is concerned with what is reasonably necessary and proportionate and that the application of that test must be sensitive to the stage of the litigation and the next steps to be taken in it. The question, the Claimant says, is whether the party really needs the information now.

52. The Claimant also says that answering the requests, because they relate to 19 separate Closed Banks, will require an enormous amount of work.

53. I come to my conclusions on the First Defendant's application. I consider that in principle, and subject to the timing points, the requests are generally proper ones and that the information would have to be provided at some stage. The requests, it seems to me, arise out of the pleaded case. The pleading is generic and conclusory and does not descend to the primary facts relied upon. It does not identify the relevant natural persons or their understanding or how they acted on that understanding.

54. I also think that there is force in the point that this is a case of fraud. The Claimant submitted that the rules about the stringency of the requirements concerning fraud have more to do with allegations about the Defendants' dishonest states of mind, but where serious allegations of this kind are made, it is important that all of the elements of the case are properly pleaded.

55. The real question appears to me to be one of timing; and whether, at this point, the test of reasonable necessity has been satisfied: is the information reasonably necessary now?

56. Here, there are a number of factors. First, I do not accept the Claimant's overarching submission that all should be left until after the Claimant has completed its own disclosure exercise. It seems to me that the Defendants are entitled to know before then more about the case they have to meet, in order (at least) to be able to make appropriate disclosure requests. I also agree with the First Defendant that being provided with further information now may be of utility in determining the split of issues, or whether there should be some sort of strike-out application. So I do not agree with the general submission that it would be appropriate to defer these requests until after the end of disclosure.

57. However, that is not the end of things. The Claimant has indicated that it is prepared to provide certain additional information concerning reliance. In the course of discussions today it became clear that the Claimant is prepared to provide further clarification of the nature of its case under US law, namely the basis of its case of reliance and/or causation and/or loss. This was expressed in argument, in somewhat perhaps stateside terms, as being concerned with "theories" of reliance, causation or loss. But I think it can be understood as the Claimant saying it will set out the bases on which the Claimant puts its case on these elements. The Claimant said that it is entitled to advance an inferential case, but I think it should be required to do so by setting out at least the nature and kinds of primary facts such a case would be based on.

58. The Claimant, as I said, has accepted that it would in fairly short order provide further clarification of the nature of its case under US law; and has suggested that it should be possible to do that within about eight weeks.

59. Beyond that, the Claimant has said that it will also provide, at some stage, further information about its contentions about the nature of US law, so far as relevant to those various matters; that is to say, reliance, causation and loss.

60. The Claimant says that the court should not require further information about the primary facts that might form the basis of its case under whatever theories of reliance that it will seek to advance. It repeats that the task is potentially an enormous one, given the state of the documents and the number of underlying Closed Banks.

61. The solution here, as with many case management decisions, is pragmatic rather than one of applied principle. It seems to me that there is room for a helpful sampling process, limited in the first instance to four banks. This will reduce the burden but still provide helpful information.

62. The Claimant should, it seems to me, be required to provide the kind of information that I have already indicated it said it was happy to supply. That will set out, as I say, the nature of its case. Second, the Claimant should provide details of the kind sought in the First Defendant's requests, in respect of four of the Closed Banks. That will have the additional merit of providing the Defendants with a reasonable understanding of the way that the Claimant will seek to advance and prove its case, in respect not only of those banks but also the other Closed Banks. If at that stage the Defendants wish to make an application for the summary disposal of the case, that sample should provide them with the basis for doing so (and that may have an impact on the other cases). On the other hand, the Defendants may decide, having seen that information, that there is no room for such an application and similar information will no doubt have to be provided in due course, in respect of the other Closed Banks.

63. The Bank Defendants said that the court ought also to order the provision of any underlying documents which have been relied on for the purpose of answering those questions. I am not persuaded at the moment it would be appropriate to do so. It seems to me that it is unlikely that there will be a limited or finite class of documents which the Claimant will be able to identify at this stage which it might wish to rely on at trial. I do not think it would be appropriate to seek to limit it from relying on further documentary material.

64. So it seems to me that the right way forward is, as I say, to require answers to be given for a sample of four banks. There are three obvious candidates, being the largest by reference to the volume of business, if I can put it in that broad sense, namely, IndyMac, Corus Bank and AmTrust. But I will listen to further submissions on that.

65. There is also a question of timing. It seems to me that it would be appropriate for the Claimants to provide the information about the nature of their cases within the eight-week period mentioned earlier and they should provide the information about the four banks by the end of September.

66. It seems to me that even answering the questions for those four banks is likely to be a fairly substantial exercise. And it seems to me that it is in everyone's interests that the Claimant has a reasonable time to answer those questions, so that its answer can be regarded as full and complete. In giving them that length of time, the court would expect the fullest possible answers and that it would not be satisfactory to be told at that stage, for example, that a good deal further

work needs to be carried out. It also seems to me that there needs then to be a gap between the provision of that information at the end of September and the next CMC, but that is something on which I will hear further submissions as this CMC proceeds.

67. I make the same orders in relation to request 9 by the BBA Parties. I do not need to say much more about that. But in summary, the starting point is the pleading in paragraph 78 of the particulars of claim, where a series of press releases, papers and other statements are referred to. These are said to give rise to the "robust benchmark representations" set out in paragraph 112. The same pleading of reliance is made in paragraph 119 and the pleading of the reasonableness of that reliance is made in paragraph 120.

68. The BBA's Request seeks information about the alleged reliance on the underlying statements set out in paragraph 78. I think this should be addressed in the same way as the First Defendant's requests. That is to say, first the nature of the Claimant's case would be explained in the information to be provided in eight weeks; and second the same sampling process would take place as regards the four banks with the same date.

69. There are then a number of requests in relation to quantum, nos. 4, 5, 12A(a) and 12A(c). The Claimant has given a generalised sensitivity calculation in response to earlier requests. In broad terms, it says that for all of the Closed Banks, a difference in LIBOR of one basis point would have led to losses of about $7 million. This is expressed to be a provisional and estimated calculation and the Claimant has made it clear that it reserves the right to revise this calculation, as further information arises.

70. The first two requests sought by the BBA Parties are set out in paragraphs 4 and 5.

> "Request 4:
>
> Please identify in relation to each of the Remaining Banks:
>
> > (a) As at August 2007, the total funding (both by value and in percentage terms) derived from: (i) retail deposits from commercial and individual customers; (ii) wholesale funding at variable rates (and the property linked to LIBOR); (iii) wholesale funding at fixed rates.
> >
> > (b) For each financial year ending after August 2007 until the end of the Claim Period, what new funding was obtained (both by value and in percentage terms) from: (i) retail deposits from commercial and individual customers; (ii) wholesale funding at variable rates (and the proportion linked to LIBOR); (iii) wholesale funding at fixed rates; (iv) the sale of commercial or residential loans or mortgages.
>
> Request 5:

> Please identify in relation to each of the Remaining Banks, how they set the rates they charged customers in each of the markets referred to, namely:
>
> (a) Lending Market(s);
>
> (b) Mortgage Market(s);
>
> (c) On-Sale Lending Market(s); and
>
> (d) On-Sale Mortgage Market(s)."

71. Hence request 4 is directed at the funding of the banks. Request 5 is directed at how they set their rates; that is to say, the rates of various products that they entered into or sold.

72. Request 12A concerns the overall loss for each bank. It seeks in particular to examine the extent to which the Claimant has taken account of such matters as the cost of funding to the Closed Banks and the non-performance of loans made by the banks to lenders.

73. The BBA Parties also make a request for documents underlying a schedule of information already provided (called schedule A), which breaks down information about loans and sales of products per bank.

74. The Claimant says that providing this information will again involve a great deal of work. It says that it is already under an enormous burden in the litigation, in collating and reviewing documentation. It says that these requests go essentially to questions of expert evidence and loss.

75. The Claimant also says that it has already provided helpful information about quantum to the Defendants, in the form of the schedule A information and the calculation of the sensitivity to variations in basis points.

76. In the course of the hearing, the Claimant also summarised the information in relation to quantum that it was prepared to provide as follows:

> "a. An exposure per basis point figure across the Closed Banks (i.e. the current $7m figure, or an updated version of that).
>
> b. The breakdown of that figure across the 19 Closed Banks.
>
> c. A summary (with numbers) of the calculations from which that is derived for each Closed Bank.
>
> d. A breakdown of the asset figures in each category which have been used for that purpose.
>
> e. An explanation of where those asset figures have been sourced from (which as explained is likely to be a mixture of sources, but which will in large part comprise parts of the Structured Data and the processed quarterly ledgers).

f. Explanation as to the approach to taking into: (i) cost of funds and (ii) non-performing loans in the calculation.

g. Estimated figures for cost of funds and non-performing loans and explanation of the sourcing."

77. In summary, the Claimant says that that information (which it is prepared to provide) will give helpful information to the Defendants, in the form of what counsel called a "quasi-expert document". That will explain the way that the sensitivity figure of $7 million is to be broken down across the various Closed Banks and will explain, with figures, the way that the sensitivity analysis has been performed. It will also explain the approach taken by the Claimant to the cost of funds and non-performing loans.

78. The BBA Parties welcomed that proposal but said that it did not go far enough. They said that they wanted all of the further information that they had sought. They said that the information arose out of the pleadings and that the Claimant must have the information available, as it could not otherwise have made those pleadings. And they also said that there must be certain documents readily available, which the Claimant should provide as soon as possible.

79. I am not persuaded that it is appropriate to make these further orders at this stage. I have no doubt that, as the case progresses, this information will need to be provided in some form. But it seems to me that the Claimant has already offered to give a reasonable amount of information about the quantum case in the quasi-expert document. That should provide the Defendants with useful information about the approach which is being taken by the Claimant to such matters as the cost of funding and non-performing and bad debts.

80. It also seems to me that some of the information which the BBA Parties are seeking is unlikely to be quite as readily to hand as they suggested in argument. Some of the information, such as the ALCO reports, is going to be provided in any case. But other parts of the information may well be much harder to locate. It seems from the evidence that the different Closed Banks had different systems for holding documents and may well have had different ways of dealing with the kind of issues which have been referred to.

81. These requests are also concerned with loss and damage. The information will not have the same case management utility as the information about reliance at this stage. I emphasise "at this stage," because it does seem to me that this is information which will have to be provided in some form at some stage. Moreover, to the extent that these kinds of documents do become readily available, the Claimant should give careful consideration to providing them. So, for example, if there are reports about the sales of the assets or reports about non-performing loans, then it seems to me they should be provided; rather than for everything to be held back until the end of the disclosure process.

82. More generally I am concerned about the Claimant's suggestion that its disclosure may not be completed until the end of next year. Careful thought

needs to be given to the provision of disclosure, where it is possible, on a rolling basis. There is no reason why it should be held back until a single, final, date. It needs, it seems to me, to be sensibly managed and provided to the Defendants as it sensibly becomes available. Equally, it may be that the analysis of documents, Closed Bank by Closed Bank, will enable disclosure to be given sooner than simply some final date well into next year. And so I urge the Claimant to take note of what I have said and to think of constructive and flexible ways of providing some of this information. It is going to have to be provided and the sooner it is provided, the better.

83. But having said that, in the light of the information which the Claimant has said it will provide, it seems to me that for the moment, it is better that it be provided in that way, rather than in response to the specific requests.

84. In relation to request 12, which is for the information underlying schedule A, I consider that to the extent that is based on primary documents, rather than work product or analysis which has been undertaken, that those documents should be provided now. I cannot see any reason why, to the extent that documents have been identified and used for the purposes of that schedule, they cannot be provided. It may be that the Claimant will need to explain to the Defendants that those documents do not tell the whole story. But I am not going to order the Claimant at this stage to reveal what I have called its work product. It seems to me that is likely to be privileged material.

(3) Information about non-performing loans

85. The BBA Parties apply here for certain information regarding non-performing loans. They have set out the categories of documents that they seek in paragraph 2(c) of the draft order attached to their application. The order now sought is that the Claimant use all reasonable endeavours to locate such documents for the four sample banks. They also seek an order that the Claimant should explain what steps it has taken thus far; and at the end of such period the court may allow, should be required to say what further steps it had taken in order to seek to locate these documents. The BBA Parties accepted that this was what they described as fast-track or advance disclosure. They say that it should be provided within a period (to be fixed) of around six months.

86. They refer to a report produced historically by FDIC which explains that the subprime debt market, in particular, was in a catastrophic state by about 2007. They say that if debtors were not paying off their loans, including mortgages, it does not matter what the interest rate was; and therefore differences in the rate of LIBOR would have made no difference to the fortunes of the Closed Banks.

87. The BBA Parties say that the utility of the production of this information is that it would assist in determining whether there is a real case of loss. They accept that not all of the claims concern the loan books, but they say that a substantial part of the claims must relate to interest received on such loans and mortgages.

88. They contend that the information must be reasonably easily accessible and point out that the Claimant itself has explained that it had what are called VDRs, a form of data room which it set up when it was selling the assets of the Closed Banks to potential acquirers. It says that it is likely that those VDRs would have contained information about non-performing loans; and that is an obvious place to look.

89. The Claimant makes a number of points. First, as I have already explained, it offers, as part of the further information it will provide, to give an explanation of its approach to non-performing loans, for the purposes of its sensitivity calculation. It says that there is no good basis for having fast-track disclosure of this specific category of documents. It says that, in fact, its calculation of loss is not in respect of non-performing loans, and in due course, when they get the further information, the Defendants will see this. It also says that the kind of documentation which is being sought is granular and concerns information about loans by loans; that there is no particular utility in providing it.

90. In the light of my approach in relation to the further information, it seems to me that this aspect should await the provision of the information which has been promised by the Claimant. I do not think that there is any particular reason to pick out this category of documents for fast-track treatment. I have also already explained, and the Claimant says it has taken due note, that there is no reason why disclosure should not be given in this case on a rolling basis. I was assured by counsel that if they came across such documents in the course of preparing the further information in relation to the sample banks, they would provide it. I expect a high degree of cooperation between the parties and I expect the Claimant to abide by the assurance it gave. I do not think it is necessary in those circumstances for there to be a specific order in relation to this category of documents.

(4) Known adverse documents

91. The BBA Parties seek an order that, as a condition of the application for permission to amend, the Claimant should be required to retain known adverse documents in relation to the 20 discontinuing Closed Banks.

92. The BBA says that there has been no explanation for the withdrawal of the 20 banks. It says that documents of those discontinuing banks could be relevant to the claims brought by the remaining Closed Banks. As I understood the submission, it was suggested that the documents of those banks might be relevant by analogy or as some form of similar fact evidence in respect of the claims brought by another Closed Bank. It was suggested, for example, that if there are documents concerning the non-performance of loans held by one bank, that might be relevant, in the absence of full material held by another bank, to the assessment of its loan book. Another example was that there might be documents relating to reliance held by one bank which could conceivably be relevant to the case of reliance brought by another bank.

93. I find that argument a difficult one and I was not persuaded by it. It is far more likely that the position of each Closed Bank, in relation both to the

quality of its own assets and the reliance element, will be assessed by reference to the documents and records of that particular bank. There is no reason to think that there is such a paucity of evidence about such a bank the court would need to resort to analogical arguments about the position of another bank (particularly one no longer involved in the case).

94. So the basis of this application is at best obscure. But in any event the Claimant has confirmed that it will retain all of the documents of the withdrawing banks and, therefore, it seems to me that there is no need for an order in respect of what might be considered a subset of those documents.

(5) Disclosure issues

95. The issues under this head arise from applications made by the BBA Parties. They helpfully crystallised the points in a draft order which they have provided today.

96. The first question concerns the identification of initial sample banks. As I have just indicated, I will not rule on this now as it seems to me that the parties would benefit from an opportunity to consider this. It is already agreed that three of the banks should be AmTrust, Corus and IndyMac Bank, but there is a question of the fourth and I will leave that to the parties to seek to agree. In default of agreement, they can apply to me on paper for a ruling.

97. The next question concerns the date for the provision of the documents underlying Schedule A to FDIC's response to request 12A of the BBA Parties. I ruled in principle on this point yesterday. The BBA Parties ask that these documents should be provided by 16 April 2021. The Claimant says that they should be provided at the same time as it provides the calculation and explanation outlined in their offer of points (a) to (g) (see [76] above).

98. It seems to me that the right date for the provision of this documentation is the end of May. There may be some work simply in gathering the documents. There is a lot of information in the schedule and I will allow the Claimant until the end of May to carry out that task. But it also seems to me there is merit in it being done before the answer to points (a) to (g) is provided.

99. The next point concerns the provision of the structured data and whether there should be some order for the data of the four sample banks to be provided by a date before then. The Claimant says it is not necessary to provide an earlier date. It says that it will prioritise the provision of the information in relation to the sample banks and will provide it as soon as possible. In the light of that indication and the existing back stop date of 11 June 2011, I do not think it is necessary to make a further order in that regard.

100. The next question concerns the provision of certain further information by FDIC about, in essence, the documents or categories of documents that it holds. Mr Béar, on behalf of the BBA Parties, criticised the EDQ document provided by the Claimant. He said that it did not contain the prescribed details and that the information ought to be provided at the level of the underlying Closed Banks rather than the level of the Claimant as receiver. He said that

what has been provided so far is not compliant with the rules and that further information is required.

101. There is no contest that further information should be provided and, indeed, the Claimant explained that it had already agreed to provide the information sought in paragraphs 3(i) to 3(ii) of the draft order. As to 3(iii), the Claimant is prepared to identify the terms of any agreements with purchasers of assets of the Closed Banks, specifying any agreement it has to gain access to documents. As far as I understand it, that essentially provides the information sought by the BBA Parties, at least at this stage.

102. There is a dispute about paragraph 3(iv) of the draft order. This seeks an order that the Claimant shall specify, in respect of each sample bank, what document holdings or categories of documents it holds as regulator (rather than receiver).

103. There is a dispute about this between the parties which potentially engages two separate points. The first is whether the documents held by the Claimant in its capacity as regulator are within its control in relation to these proceedings. The second is whether there is a form of regulatory privilege which might be a ground for withholding inspection.

104. As to the nature of the documents, there is some evidence that, as regulator, the Claimant periodically carried out inspections into the banks which it regulated and that, in the process of doing so, it considered sensitivity to interest rate risks.

105. It appears that there may well be documents in the hands of the Claimant, as regulator, which are relevant to the proceedings. It is also possible that there are documents which were in the hands of the underlying Closed Banks relating to such inspections. Those documents may differ in certain respects, so that, for example, there may be inspection reports which the regulator produced and has retained which were not provided to the Closed Banks.

106. The Claimant says that, under the relevant US statute, it has separate legal identity in its capacity as receiver from its capacity as regulator. There is some evidence on this point, but there is no expert evidence which would enable the court to rule upon it.

107. The Claimant says that while this issue is still a live one, it should not in its capacity as regulator (the capacity in which it has brought these proceedings) be required to provide details of or list documents which it holds in its separate capacity as receiver.

108. The BBA Parties say that the court can nonetheless require the Claimant, in its capacity as receiver, to explain what documents the Claimant also holds in its capacity as regulator. The BBA Parties refer to the broad powers in CPR 31.5(7)(f), which state that the court may make "any other order in relation to disclosure that the court considers appropriate".

109. I do not consider it appropriate to make such an order even if I have the power to do so. It seems to me that if the Claimant is right in saying that, in its

capacity as receiver, it lacks control over documents held by it in its capacity as regulator, it would be wrong to require it to provide details of those documents or list them. That would, to a large extent, pre-empt the question whether it indeed has control over those documents. Such an order would require a party, at this stage, to provide details of documents which, ex hypothesi, may not fall within its disclosure obligations because that party does not have control over them. It seems to me likely that there is going to be a substantial debate about disclosure in this case and the right occasion to deal with this question is when the disclosure issues more generally are adjudicated upon.

110. The next point concerns a proposal that there should be a process in relation to disclosure of documents in relation to the sample banks which should take place in advance of the more general debate about disclosure (which as I have said may well be necessary in this case).

111. The background is that the parties had previously agreed, before coming into this CMC, that they should, by 1 October 2021, seek to agree the terms of an order providing for any further disclosure to be given in the proceedings, in addition to the various forms of advance disclosure which they have already agreed to give.

112. The BBA now proposes that there should be, in effect, a separate process relating to the documents for the sample banks. They propose that the parties should seek to agree the terms of an order providing for further disclosure in relation to those four banks by 30 June 2021 and that a one-day CMC should be held in October 2021 to resolve any matters not agreed pursuant to that earlier order, and that subject to any orders made at that CMC, disclosure pursuant to that proposal should be given by 17 December 2021. The BBA Parties say that it is important to try to resolve the disclosure issues as far as possible as early as possible, and to achieve the production of as much disclosure as possible as early as possible, and that their suggested way of dealing with it would assist that process.

113. I have some sympathy for that suggestion. There are some concerns which I raised yesterday about the possibility that disclosure may not be complete until the end of next year, and the BBA Parties' proposal would have the merit of speeding things up.

114. The Claimant says that it would be inappropriate to have a separate hearing and exercise in relation to disclosure concerning the sample banks. It says that the parties have already agreed that disclosure should be dealt with at a substantial CMC and that the parties should be seeking to reach agreement about the scope of disclosure by 1 October 2021. It says that there is an enormous amount of other work to carry out and that it is not going to be helpful to deal with only some of the issues at a shorter CMC in October.

115. It also says that the effect of this proposal is that the court will be ruling on much of their disclosure, because it is very unlikely that different decisions will be reached in relation to the sample banks, compared to the other banks, and that the effect of this proposal is thus to accelerate one part of the

disclosure debate (that to be given by the Claimant) ahead of the other issues which may later need to be resolved.

116. On balance I have decided not to adopt the approach suggested by the BBA Parties. It does seem to me that it would be more efficient case management for all questions of disclosure to be addressed at the CMC which it has already been agreed should take place at the end of this year or early next year. It seems to me the court should be considering all disclosure issues for both sets of parties and should not separate out the issues concerning the Claimant's disclosure which is, I think, the ultimate consequence of the way that the BBA Parties' proposals would operate. It also seems to me that the 1 October date is one that the parties have agreed to work towards and is a date which should enable a large measure of agreement to be reached. I expect and urge the parties to cooperate to reach that agreement. I earlier gave an indication that I did not expect at this stage the parties to incorporate the full terms of PD51U, but nonetheless the parties should have regard to the specific requirements for cooperation in that practice direction, and they should treat those obligations of cooperation as binding upon them.

117. I think that overall it would be better, as I say, for all issues of disclosure to be the subject of the requirement to seek agreement by 1 October and for all issues to be dealt with at the next CMC, to the extent that the parties have not been able to reach agreement.

(6) Costs relating to the withdrawing Closed Banks

118. The proceedings were commenced in March 2017 by the Claimant in its capacity as receiver of 39 Closed Banks. It applied on 5 June 2020 for permission to amend, to remove the claims in respect of 19 of those 39 banks. That was supported by a second witness statement of Ms Vernon dated 5 June. She explained that the Claimants acted as a receiver, pursuant to a statutory mandate, and that in the exercise of its aforementioned duties and in furtherance of the overriding objective, the FDIC-R has determined that it is no longer necessary or desirable to continue to pursue these proceedings in respect of 19 of the Closed Banks.

119. After that witness statement, and indeed after the application, a further bank was sought to be removed, so that of the initial 39 subject to this part of the application, 19 are left. I will refer to the 20 banks as "the withdrawing banks", a neutral term. The application was made under CPR 17.1 and 19.4 to amend the claim form and the particulars of claim.

120. The Claimant's intention to remove 19 of the banks was first notified to the Defendants by a letter of 9 September 2019, which enclosed a consent order. At that stage the Claimant proposed there should be no order as to costs. The BBA Parties and some of the Bank Defendants responded. As I will explain below, the fifth Defendant, Rabobank, has taken the lead in dealing with this aspect of the case, both in the correspondence and at this hearing.

121. In the correspondence the BBA Parties said that, in substance, this was a discontinuance under CPR 38 and that the Claimant should therefore be

responsible for the Defendants' costs in respect of 19/39ths of the costs it had incurred up to the date when notice of discontinuance was given. That position was also mentioned in the witness statement of Mr Stait for Rabobank when the application was eventually made, but the Bank Defendants had by then also been involved in lengthy discussions and negotiations with the Claimant, seeking a way of reaching agreement, essentially in respect of the non-common costs wasted by them by reason of the withdrawal of the 19 banks' claims. I will say a bit more about this in a moment.

122. After September 2019, the Claimant contended in correspondence that the claims were entirely generic and that all that was happening was that the overall amount of the claims would be reduced. The Bank Defendants contended that there were separate and distinct costs in relation to the investigation and pleading of foreign law for certain states for the tort claims which were no longer going to be in play. The Defendants, therefore, sought the costs of and occasioned by the amendments.

123. The Claimant, in the course of correspondence, agreed to pay the costs of consequential amendments and also sought details from the Bank Defendants of the costs of investigating the laws of the now irrelevant US states. Some information was provided. Rabobank provided details of those amounts and the other banks said that they would provide such details.

124. There remained, therefore, a dispute before the application was issued as to whether the Claimant would indeed pay the costs of investigating the US law, as opposed to pleading that law.

125. The Bank Defendants say that it was always open to the Claimant to concede that point in principle but that it refused to do so. The Claimant says that it should have been provided with the information about the actual amount of those costs before the application was issued. I will come back to this point, but it seems to me that the Bank Defendants are right in principle about this. There is no reason why a party should not concede the principle of costs, to be assessed in the case of a dispute.

126. There was another aspect of the costs which remained in dispute by the time the application was issued, namely, the costs of corresponding about the issue of withdrawal of the 19 banks. By the time the application was launched, the Bank Defendants were saying that the costs of that correspondence should be paid because they were part and parcel of the costs occasioned by the amendment process. The Claimant said that it should not be required to pay those costs on the footing that the correspondence had been unreasonable and unnecessary.

127. There was a third potential issue between the Claimant and the Bank Defendants at the time the application was issued which concerns the possible liability of the remaining Closed Banks for any costs that might be paid, including in respect of the period before the withdrawing banks were allowed to withdraw.

128. The Bank Defendants sought certain assurances in relation to the possible liability of the remaining Closed Banks. The Claimant said (in summary) that the remaining banks would be liable for the costs of the proceedings and also provided some information about the assets of the remaining banks. It said that the assets available were in excess of US$1 billion and that the costs would be payable as an expense of the administrations.

129. Rabobank sought clarification of what was offered by a letter of 27 March 2020, asking for confirmation, amongst other things, that any liability of the remaining Closed Banks would be joint and several; and of the legal basis upon it was said that one estate's assets might be answerable for a costs order made against another insolvent estate.

130. That clarification was not provided. Instead, in correspondence, the Claimant said that it had already given assurances and that ought to suffice. Nor was the position made any clearer in the evidence provided in support of the application.

131. On 5 May 2020 the Claimant wrote, saying that it wished to bring the matter to a close. It wanted the position of the withdrawing banks to be crystallised and it said that it also wished the Defendants to agree that the withdrawing banks would no longer be liable in respect of any costs order that might be made in these proceedings against it. The application was then made.

132. Ultimately the Claimant and the Bank Defendants continued to negotiate after the application had been issued and ultimately reached agreement in the form of a consent order which has recently been signed, but was agreed some time ago. In that consent order the Claimant agreed to bear the costs of and occasioned by the amendments, that these would include the costs of investigating the foreign state law and the costs of the correspondence in relation to these matters up to the date of the application.

133. In the same order the Claimant agreed to create a reserve from the assets of the remaining banks of some US$100 million which would be available only for any costs payable to the Defendants in these proceedings. The order also contained an assurance or representation by the Claimant that the Claimant had the legal power to ensure that the remaining banks would be answerable for all costs, including those incurred before the date of the withdrawal of the 20 withdrawing banks.

134. The only issue remaining between the parties is the costs of the application itself.

135. The Bank Defendants make three overarching submissions. They say that there was no need for the Claimant to issue the application in June 2020. There was already a process of negotiation and the Claimant ought to have continued it through correspondence. Second, they say that, in the event, the Claimant has conceded the matters which remained in dispute at the time the application was made. Third, they say that it would be normal for a party seeking to amend to pay the costs of applying for the amendment and it would

only be if the other party had acted unreasonably in response to the amendment that any other order ought to be made.

136. The Bank Defendants emphasise that at the time that the application was issued there remained outstanding disputes about the costs of the correspondence, the scope of the agreement of the Claimant to pay the costs in respect of the investigation of US law, and the legal basis on which the remaining banks would be liable for the costs incurred in the period when the withdrawing banks were still part of the case. They say that each of these matters has been resolved in their favour. The first two speak for themselves. As to the third, they say that this was resolved, in effect, by the assurances given in the consent order and the setting aside of a reserve.

137. The Claimant says that an order for the costs of the application in favour of the Bank Defendants would be wrong. It says that it has agreed to pay all of the costs the Bank Defendants are entitled to and that the additional costs of the application arise, not from the amendments, but from the unreasonable position taken by the Bank Defendants.

138. It also says that, to the extent that matters have been resolved since the issue of the application, on balance, the compromises have been in favour of the Claimant. It also says that it was right and indeed necessary to issue the application because it was the way of bringing things to a head.

139. On that final point, the Bank Defendants say that there was no need for the application, that there were effective negotiations taking place, that nothing substantive was happening in the litigation at that stage, that there is no evidence that there was any other extraneous factor outside the litigation favouring an urgent resolution of the matter, and that the Bank Defendants had by that date agreed to provide further information about the actual amount of their costs or, in some cases, or at least in the case of Rabobank, had already provided it.

140. I come to my conclusions. I consider that the Claimant should pay the Bank Defendants' costs of the application, essentially for the reasons given by Mr Patton on behalf of the Bank Defendants. First, there were outstanding matters before the application was issued in relation to the principle of costs that the Claimant would pay and the legal mechanism by which the remaining banks would become liable for the costs of the other banks in the period before they withdrew.

141. Secondly, it seems to me that there was no particular need for the application to be issued at the moment it was. The Bank Defendants had been in effective discussions with the Claimant, trying to seek a way of resolving this matter without recourse to the court, and as at the date when the application was issued in 2020, they had promised to provide further information. As I have said, it was not necessary for them to reach agreement on an actual amount. It was always open to the Claimant to agree the principle of payment of costs and for those costs to be assessed if they could not be agreed.

142. The next point is that it does seem to me that since the application was issued further concessions have been made in favour of the Bank Defendants in relation to the costs of the correspondence and the scope of the costs which it is agreed will be payable in respect of the foreign law, and in respect of the legal mechanism for providing the Defendants with protection in respect of the costs, including through the mechanism of the reserve.

143. Moreover, I agree with the Defendants that the general rule is that a party seeking to amend pays the costs of the amendment process, including the application, unless the opposing party can be said to have acted unreasonably in some way. The only reason the application to amend has arisen is because 20 of the banks have decided, for reasons which are not fully explained, that they no longer wish to continue the proceedings. That is not something for which the Defendants can in any way be held responsible. Had I concluded that the Defendants had taken an unreasonable position and that their position had been inappropriate, then I would have taken a different view. But I conclude that the position taken by the Defendants was not unreasonable, indeed was reasonable, and I conclude that the Claimant should bear these costs.

144. There is then a separate question as between the BBA Parties and the Claimant. The BBA Parties contend that what has happened here is, both in substance and technically, a discontinuance by 20 banks. They say that it is a happenstance that there is one named Claimant who can bring the claims on behalf of a large number of separate banks and that, in substance, this is a group claim. It was a group claim by 39 entities; it is now a claim by 19 entities, each of which has separate causes of action. They say that under CPR 38 there is a presumptive rule, at least a default rule, that in those circumstances the discontinuing parties will bear the costs of the proceedings up to the date when they gave notice of discontinuance.

145. They also rely on an analogy with group litigation. They accept, of course, no Group Litigation Order has been made, but point out that where such an order is made, the default position is that each of the Claimants will be severally liable for an equal proportion of the common costs.

146. They say that no explanation has been given for the withdrawal of the 20 banks; that all that has been said is that a decision has been taken that they will no longer pursue the claims. They say that each of the 20 banks must be taken to have made a decision to bring serious claims and that, absent any other explanation, the reasonable inference is that those claims were brought without a proper basis.

147. They say that the fair order in those circumstances is that some 20/39ths of their costs to date, or at least to the date of the relevant notices of withdrawal or discontinuance, should be borne by the discontinuing parties.

148. The Claimant says that that would be a surprising order, that it ignores the reality of this case, which is that there is a large number of Claimants and that they are continuing to make claims which raise just the same issues as were raised by the cases of the withdrawing banks. It accepts that, of course, the

withdrawing banks had specific issues on such matters as reliance, causation and loss, but that most of the work done by the BBA Parties so far - indeed the great bulk of it - has been on the common issues.

149. The Claimant says, second, that in principle it was not required to issue a notice of discontinuance. That might have been one procedural route available to it, but it does not follow that that was the only way in which it was able to withdraw the claims. It had a choice of procedural remedies and it has decided to follow the route of amendment.

150. It says, third, that the cost rules referred to by the BBA Parties do not assist their argument in any event.

151. To start with, it probably does not matter greatly whether one considers this question through the prism of CPR 38 or through that of the rules on amendment and the cost consequences of that. CPR 38 says that the default rule is that the discontinuing party will bear the costs, but that is always subject to the alternative or different order of the court. Ultimately, the court is driven back to the rules about costs and to reaching an order for costs that it considers to be fair and just in all of the circumstances.

152. Next, it does not seem to me that, even if this is in substance a discontinuance, the Claimant was required to follow that procedural route. I agree with the submissions of the Claimant that it was entitled to take the course it has of bringing these claims to an end through the mechanism of amendment.

153. As to what is the fair and just order, it seems to me overall that it is important to look at the realities of this case, to see that the common issues are going to continue and that they remain in play in this litigation. Most of the pleading was about the common issues. The BBA Parties had to plead to all of those points and the inclusion of more or less Closed Banks made no difference in relation to those common issues.

154. Moreover, if, at the conclusion of this case, it is found that the BBA Parties are liable for the serious conduct of which they are accused, I agree with the Claimant that it would be counterintuitive that the BBA Parties should nonetheless get their costs of pleading in relation to those issues from the discontinuing banks in circumstances where, at the moment at least, there seems to be full protection for their costs. (I add that caveat because provision about the reserve is without prejudice to the Defendants' right to apply for security for costs, and I say nothing more about that.)

155. I also think that the Claimant is right to say that the analogy with group actions is in this case not a powerful point. The general rule is, as I have said, that in group actions the liability of the Claimants is to be treated as several. But in the light of the various assurances that have been given and the reserve of US$100 million, in practice here the liability of the remaining banks is joint and several and, as I have said, it appears to me that there is (at least as things stand) protection for the costs of the BBA Parties in the light of the arrangements that have been offered and embodied in the consent order. The

Claimant specifically said that those arrangements were offered to, and available to, the BBA Parties as well as the Bank Defendants.

156. In these circumstances I think that the fair order overall to make as between the BBA Parties and the Claimant is in the same terms as the consent order which has been reached between the Claimant and the Bank Defendants. It will be a matter for the BBA Parties to provide information to the Claimant and any disputes about assessment to be resolved. But I would hope that those questions can be resolved by agreement between the parties.