



Neutral Citation Number: [2022] EWHC 391 (Ch)

Case No: FL-2017-000002

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**FINANCIAL LIST (ChD)**

Royal Courts of Justice  
Rolls Building, 7 Rolls Buildings  
Fetter Lane  
London EC4A 1NL

Date: 25/02/2022

**Before :**

**SIR ANTHONY MANN**

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**Between:**

**Federal Deposit Insurance Corporation as Receiver  
of Amcore Bank NA and Others**

**Claimant**

**- and -**

- (1) Barclays Bank Plc  
(2) Bank of Scotland Plc  
(3) BBA Trent Limited  
(4) BBA Enterprises Limited  
(5) Coöperatieve Rabobank UA (formerly known as  
Coöperatieve Centrale Raiffeisen-Boerenleenbank  
BA)  
(6) Deutsche Bank AG  
(7) Lloyds Banking Group Plc  
(8) Lloyds Bank Plc  
(9) Natwest Group Plc  
(10) The Royal Bank of Scotland Group Plc  
(11) UBS AG

**Defendants**

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**Sue Prevezer QC and Alex Barden** (instructed by **Quinn Emanuel Urquhart & Sullivan UK  
LLP**) for the **Claimant**

**Adrian Beltrami QC and James Willan QC** (instructed by **Clifford Chance LLP**) for the  
**First Defendant**

**Charles Béar QC, Matthew Cook QC, and Duncan McCombe** (instructed by **Macfarlanes  
LLP**) for the **Third and Fourth Defendants**

**Conal Patton QC** (instructed by **Milbank LLP**) for the **Fifth Defendant**

**Slaughter and May** were in attendance for the **Sixth Defendant James Duffy** (instructed by **Hogan Lovells International LLP**) for the **Second, Seventh and Eighth Defendants**  
**Robert O'Donoghue QC** (instructed by **Clifford Chance LLP**) for the **Ninth and Tenth Defendants**  
**Gibson Dunn & Crutcher LLP** were in attendance for the **Eleventh Defendant**

Hearing dates: 8<sup>th</sup>-9<sup>th</sup> February 2022

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**Approved Judgment**

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

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10 am on Friday 25<sup>th</sup> February 2022.

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SIR ANTHONY MANN

**Mr Justice Mann :**

1. This is the occasion of the hearing of the second Case Management Conference in this matter. The main issue that arises is whether there should be a stay of these proceedings for a short while to allow for clarification of the position in parallel US proceedings (which is the position of all the parties except the third and fourth defendants), or whether there should be no stay, or at least a stay which allows certain aspects of the case to be pressed on with (the position of the third and fourth defendants, the “BBA defendants”).
2. The action is concerned with what is said to be improper LIBOR fixing. The claimant is a receiver representing (now) 19 failed US banks (“FDIC”). Originally the claim was made for 39 banks, but 20 have fallen away since the action started. The claim is that the first, second and fifth to eleventh defendants (the “bank defendants”), who were declaring banks in relation to LIBOR, were variously responsible for fixing LIBOR rates artificially low (“lowballing”) between 2007 and 2009, as a result of which the US banks are said to have suffered loss. The claim in this jurisdiction is based in deceit (actually US state law, which is broadly the same as the English law of deceit) and in (English) competition law. The claim against the BBA defendants is based on the alleged fact that the British Bankers Association (the “BBA”) was a party to alleged agreements and/or concerted behaviour or facilitated alleged agreements and/or concerted behaviour or facilitated agreements in support of lowballing. It is also said to have made various misrepresentations in doing so. The BBA itself is an unincorporated association; a representation order has been made whereby the BBA defendants represent the BBA. Further details of the claim appear from a judgment of Snowden J in this case ([2020] EWHC 2001 (Ch)), given on the occasion of his rejecting an attempt to strike out the claim against the 11<sup>th</sup> defendant (UBS) on limitation grounds.
3. In parallel with these proceedings there are proceedings in the United States, which had started earlier in March 2014. Those proceedings involve more bank and institutional claimants, and more defendants, and there is more than one set of proceedings, but FDIC and present defendants are all parties to one of those sets of proceedings. They involve claims based on fraud and US anti-trust legislation, and can for present purposes be regarded as more or less the same claims as are made in the present English proceedings.
4. The proceedings have been commenced in various US jurisdictions, but for case management purposes they are being managed together in a procedure known as the MDL (multi-district litigation) procedure in the Southern District of New York, under the supervision of Judge Naomi Reice Buchwald. The banks and the BBA (other than UBS in relation to the tort claim) mounted a jurisdiction challenge there and in December 2016 Judge Buchwald acceded to the challenge and held that the challenge

succeeded. The effective result was that the claims against the foreign defendants there (which included the present defendants, save for UBS on the tort claim) were dismissed. Those proceedings are colloquially known as LIBOR VI.

5. That led to the present proceedings being commenced in this jurisdiction in March 2017 where the same jurisdictional problems did not apply. It is apparent that the proceedings were started here because of the failure of the US proceedings. The proceedings were, apparently, issued as quickly as possible in order to avoid limitation issues. However, limitation issues were one of the first points to arise because UBS launched a strike-out application based on limitation in November 2017. The application was heard a year later, in November 2018 and was not finally disposed of until Snowden J's judgment delivered on 27<sup>th</sup> July 2020. He dismissed the challenge. During that period there was a de facto stay, in which no substantive steps were taken in the proceedings.
6. With that challenge out of the way there was a Case Management Conference (CMC) in March 2021 before Miles J in which he made various orders, some of which were pursued before me because it was said that they had not been complied with.
7. Meanwhile in the US the MDL court was hearing various other related matters. In 2018, in similar proceedings known as Schwab I, the Second Circuit Court of Appeals delivered a ruling which went to the question of jurisdiction in conspiracy cases and which was thought to ease the route of the claimant in establishing jurisdiction over foreign defendants. The details do not matter for these purposes. In March 2019 the MDL court considered whether Schwab I rescued cases such as the present from the jurisdictional challenge which had succeeded, and held that it did not (LIBOR VIII). However, on 30<sup>th</sup> December 2021 the Appeals Court handed down another judgment (Schwab II), which is said (by the claimant) to have reversed the effect of the decision in LIBOR VI as to what allegations could found a conspiracy claim made against foreign conspirators. The decision was not actually an appeal of LIBOR VI, but it is said by the claimant that this opens up the door to reviving the claim against the current defendants in the US. Furthermore, there is currently an outstanding appeal from the decision in LIBOR VIII. That may or may not further impact the course of the proceedings in the US.
8. There is a dispute as to whether and to what extent the US proceedings can be revived as a result of Schwab II, particularly as against the BBA defendants. A considerable body of evidence and explanation is given over in the papers to a debate on this topic. The BBA has its own separate reasons for saying that the proceedings cannot be revived; FDIC says that they can. I do not propose to rehearse the arguments here, because I cannot resolve the dispute. The matter will be one for the US court to resolve, and FDIC has indicated that it is minded to take steps there to resolve it there if the proceedings are not revived by another route. I shall approach the issues that arise at

this CMC on the footing that whether or not the proceedings can be revived is currently in dispute, and it is a dispute which I cannot resolve.

9. The point is relevant because the central issue on this CMC is the extent to which the current proceedings should be stayed pending its being determined whether or not Schwab II leads to a revival of the US proceedings against all defendants. On this CMC there is an application for what is described as a case management stay, brought by the claimant and supported by all the defendants except the BBA defendants. It is proposed that there should be a stay of these proceedings until July 31<sup>st</sup>, with a CMC to follow on the first available date on or after 1<sup>st</sup> October. The BBA opposes a stay generally, and particularly insofar as it would prevent the pursuit of certain steps in this action, to which I will come.

### **What has happened so far in this action**

10. These proceedings were started on 10<sup>th</sup> March 2017. Since then the following material steps have occurred:

- (a) The pleadings got as far as a Reply on 23<sup>rd</sup> March 2018, and a BBA request for further information on 3<sup>rd</sup> July 2018, at which point UBS's application brought about a cesser of activity.

- (b) 5<sup>th</sup> June 2020 - FDIC filed an application to withdraw the claims of 19 banks. (FDIC also sought to withdraw a further bank claim on 18<sup>th</sup> December 2020.) These withdrawals were subsequently recorded in a consent order. I am told by the bank defendants that this amounts to an abandonment of 71% of the claims by asset value.

- (c) Judgment on the UBS strike-out application was given on 27<sup>th</sup> July 2020.

- (d) 17<sup>th</sup>-19<sup>th</sup> March 2021 - first CMC before Miles J. He made orders which included orders for initial disclosure by the parties, amendments, and a further case management conference. In that last respect his order said:

“ 23. A further case management conference shall be listed in December 2021 or January 2022 (the “Second CMC”) with a time estimate of 3 days plus 2 days of judicial pre-reading. Matters to be considered at the Second CMC shall include:

- (a) Any outstanding issues relating to disclosure.

- (b) Further directions including the question of whether, and if so how, the issues in these proceedings could be separated into separate trials.”

(e) 11<sup>th</sup> May to 14<sup>th</sup> May 2021 - FDIC and the defendants other than the BBA defendants gave a first round of disclosure. FDIC subsequently gave further disclosure on various occasions throughout 2021.

(f) During 2021 there was further correspondence between the parties about disclosure and other matters of which complaint was made.

11. Thus the matter seemed to be progressing towards a further CMC and a trial, until the decision in Schwab II. That caused the claimant to propose a stay of these English proceedings so that the position in relation to the US proceedings could be clarified. It held out the carrot of a possibility that if the US proceedings were revived as against all the current defendants then these proceedings might not be necessary, though before Miles J leading counsel for the claimant (Ms Prevezer, who also appeared before me) indicated that the competition claim would be likely to continue here in any event. That is not a position she adopted at the hearing before me.
12. The question of whether to grant the stay was the first issue before me. There is also before me an application by the BBA defendants for various relief which I particularise below. One theme running throughout that application is what is said to be the desirability of making the claimant comply with the order of Miles J, which the BBA defendants say it has not done.
13. I shall deal with the stay first, and then the BBA applications.

### **The application for a stay and the response**

14. Ms Prevezer, who appeared for the claimant, put forward a reason for the stay which can be simply stated. She said there should be a stay until 31<sup>st</sup> July 2022 in order to allow the procedural position in the US to be resolved, so that it can be established whether or not the claims against the defendants will proceed there or whether they will still be barred on jurisdictional grounds. She says (on the basis of evidence provided as to the possibilities in the US proceedings) that there is a good possibility that the claims against all the defendants will be restored and allowed to proceed, and if that were to happen then it would be wasteful of time, money and other resources to proceed here because it may well be the case that the English proceedings (which were only started when it appeared that there was or might be a block on the US proceedings) are no longer needed. Staying until the end of July will give a reasonable chance for that resolution to occur and steps will be taken in the MDL court to produce that resolution. There is no guarantee that there will be a resolution by 31<sup>st</sup> July because that depends on progress in the US court, but the expert view is that there is a good chance of a resolution by then. She did not commit her client to a permanent stay or discontinuance

of the English proceedings, but she said it was likely that the English proceedings would go if the US proceedings were restored (though she did not abandon the possibility of the competition claim being still pursued here).

15. If there were no stay then she said there would be a risk of a serious waste of costs here, mainly on the disclosure process, if it transpired that the US proceedings were to continue and these proceedings were not. The bank defendants have given a first round of disclosure, so the next step would be likely to be some more request-driven disclosure. The claimant has given a large amount of disclosure already, but is working on further disclosure which it will have to give if the proceedings carry on here. It has already done 9 months work, and the current estimate is that it will take another 9 months, with commensurately very high costs. Those costs might well be wasted if there were no stay. The BBA defendants have not yet given disclosure, but they have given some details of the number of documents which have to be reviewed, and Ms Prevezer's estimate of those costs is in the region of £2.6m if not more (the BBA defendants have not themselves given a figure). There would also be the potential for other costs being incurred on things such as amended pleadings if an application by the BBA requiring an amendment to the Particulars of Claim were to succeed (as to which see below in the section on the BBA applications). If it be said (and it was said by the BBA defendants) that the disclosure and other work would not be wasted because its fruits would enure for the benefit of the US proceedings, where there would have to be disclosure anyway if they were restored, then the answer was that the US requirements on disclosure were different and the English disclosure could not just be ported into the US proceedings. Indeed, it is said that the defendants, including the BBA, actually rejected a proposal that all documents disclosed here (but not also in the US) could be used in the US proceedings without more.
16. As I have indicated, the stay is supported, with a degree of reluctance, by the defendants other than the two BBA defendants. It was made clear by Mr Beltrami, for Barclays Bank but presenting the views of the other bank defendants as well, that they agreed to a stay for a short period for clarification of the position in the US proceedings. They recognised the undesirability of proceeding in two jurisdictions at once and said that at some point the claimant would have to make an election as to what to do, though it was not said that that point had been reached yet. These defendants were not agreeing to any stay beyond 31<sup>st</sup> July, and unless there was an agreed fate for these proceedings by that stage, then these defendants took the view that there would then immediately be a lot of work to be done between then and the projected CMC in the Michaelmas term.
17. Mr Béar for the BBA defendants opposed the stay. He did not accept that these proceedings were appropriately treated as secondary to the US proceedings, as Ms Prevezer suggested. When, and after, they were started the claimant did not suggest that they were somehow protective proceedings, protecting against some ultimate possibility that the US proceedings might be revived. The most that was ever suggested in correspondence (in a pre-action letter) was that there be a discussion about the US proceedings and the UK proceedings, but those discussions never took place and these

proceedings were pursued as if they had a justifiable life of their own. Thus pleadings were exchanged (and amended), initial disclosure took place (as between the other parties), the BBA has been working on its own disclosure and there was a very substantial CMC apparently on the footing that the case was continuing, and during the course of which Ms Prevezer told Miles J that the competition claim, at least would be continuing in this jurisdiction. He pointed to correspondence from the claimant's solicitors which seemed to suggest that these proceedings continued to have a useful life of their own, and were not secondary to US proceedings which might be revived. The stay now pressed represented a volte face by the claimant which should not be allowed. He relied on authority which he said had the effect that it was only in rare circumstances that a claim would be stayed in favour of a similar claim in another jurisdiction, and this case did not qualify in all the circumstances. The costs of disclosure, and the exaggerated potential for waste, did not make this a sufficiently exceptional case to justify departing from the rule appearing in the authorities. Some of the claims made by the claimant that there was potential for wasted costs were not justified because disclosure exercises here would, at least to some extent, enure for the benefit of any US proceedings even if, to some extent, disclosure requirements were different. While he accepted that there was no clarity as to what the ultimate position in the US would be, the current position was that the claim against the BBA defendants stood struck out, and that lent force to the submission that the English proceedings should therefore be continuing.

18. Mr Béar also had a particular disclosure point affecting his clients. His clients have been carrying out their disclosure exercise for some time, and have set up a team, including paralegals, to do so. If that disclosure exercise had to be stopped now as a result of a stay, but had to be resumed at some point later in the year if the stay came to an end, then there would have to be a reconstitution of the team, which would involve re-briefing a number of new people, and then trying to take up where the exercise had left off. That would involve significant wasted cost and effort (details unspecified), and would hamper the overall exercise. His clients did not want to run the risk of that. Furthermore, if his clients carried on with their disclosure exercise but the claimant did not then his clients would lose the benefit of a quid pro quo exercise in the exchange of disclosure.
19. It seemed to be part of Mr Béar's submissions that the claimant was actually tactically manoeuvring for reasons other than those presented as the reason for the stay. He sought to say that they were playing a "long game" and trying to spin the proceedings out without incurring cost or expending too much effort. He pointed to remarks made by Miles J which he said supported the submission that the claimant had not really devoted enough resources to this litigation, and to a failure by the claimant to initiate procedures to get the US position sorted out. The appeal decision was handed down at the end of December, and it is not apparent that the claimant has yet taken any steps to get the matter restored before Judge Buchwald in order to resolve the uncertainties that have arisen. Even though the appeal court did not formally remit the matter to the MDL court until mid-January, the claimant has still done nothing. There is said to be scepticism as to the real attitude of the claimant to these proceedings. Nor is it apparent



that the claimant has really been pressing on with its disclosure. It has apparently not got farther than a scoping exercise (in 9 months) and has not yet started the actual searches and reviews that are necessary.

### **The present position in the US proceedings**

20. It was accepted by all parties that the present effect of the US proceedings is not so clear that I can proceed on the basis of an inevitable decision. The claim against all defendants has been dismissed or struck out (to use English terms). It has not yet been restored. There is a potential for the claims against all defendants to be restored as a result of Schwab II, but that has yet to be determined. Each side in the litigation before me expressed confidence that if/when Judge Buchwald comes to consider the effect of Schwab II then they will succeed in achieving/resisting respectively the restoration of the claims. The BBA defendants say that in fact one of the bases on which the claim against them has been struck out differs from the other defendants such that the claim against them is unaffected by Schwab II, but Mr Béar did not go so far as to say that I could and should determine that to be the case. All parties accept that there is an uncertainty about the future of the US proceedings which I cannot resolve.
21. I therefore have to proceed on the footing that there is the potential for all the claims (or some of them) to be restored in the US. Plainly, in the interests of these proceedings, it is necessary for that uncertainty to be resolved as soon as practicable so that the direction of travel of these proceedings (or whether they should continue their journey at all) can be determined. As I have indicated, even the claimant (which has refused to commit itself absolutely) has indicated that it is likely that it will accept there should not be proceedings on the same claims on the same subject matter, and some or all of these claims would be likely to go if and to the extent that the US proceedings are restored (though lurking in the background is Ms Prevezer's statement to Miles J to the effect that the English competition proceedings would proceed anyway).
22. Neither side put in actual evidence as to how the matter might be sorted out in the US, but they made statements on instructions as to what could happen and what the present situation was. Those statements were subsequently confirmed in witness statements. I was told that the defendants cannot raise the issue, because the current state of play is that there are no extant proceedings against them. The claimant is the only party which could raise the question, by motion, of the effect of Schwab II on the status of the claims against the defendants. As I have indicated it has presently taken no steps in that regard, but Ms Prevezer told me on instructions that Judge Buchwald was likely to raise the point of her own motion anyway, and that the matter would be restored in that way.

23. The effect of the stay I am asked to grant is therefore not one to stay the proceedings pending the final outcome of the US proceedings in a trial, but a stay so that the status of the US proceedings can be ascertained and so that a view can be taken as to the proper fate of the English proceedings in the light of that determination. I shall proceed on the footing that one way or another steps will be taken to resolve the position in the US.

### **The stay - applicable law**

24. It was accepted that the overriding provision as to whether a stay should be granted is whether it would serve the Overriding Objective - saving expense, ensuring claims are dealt with fairly and expeditiously and reflecting the need to allot to a case an appropriate share of the Court's resources. Ms Prevezer said that this should be reflected in a balancing exercise, but Mr Béar submitted that authority indicated that a stay in these circumstances should only be given in rare or compelling circumstances, so that in effect the claimant has a difficult burden to fulfil.
25. His starting point for this was a paragraph in *Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd* [2021] 1 All ER 1141 at paragraph 99:

“99. We therefore turn to case management. The English courts have wide case management powers, and they include the power to impose a temporary stay on proceedings where to do so would serve the Overriding Objective: see CPR 1.2(a) and 3.1(2)(f). For example a temporary stay is frequently imposed (and even more frequently ordered by consent) in order to give the parties breathing space to attempt to settle the proceedings or narrow the issues by mediation or some other form of alternative dispute resolution. A temporary stay may be ordered where there are parallel proceedings in another jurisdiction, raising similar or related issues between the same or related parties, where the earlier resolution of those issues in the foreign proceedings would better serve the interests of justice than by allowing the English proceedings to continue without a temporary stay: see *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173. But this would be justified only in rare or compelling circumstances: see per Lord Bingham MR at pp 185-186, and *Klöckner Holdings GmbH v Klöckner Beteiligungs GmbH* [2005] EWHC 1453 (Comm).”

26. He also pointed to what Gloster J said in the *Klöckner* case:

“21. In my judgment, relevant factors which guide the court in the exercise of its discretion to stay proceedings include (in the circumstances of the present case) the following:

i) The court has a wide discretion to stay proceedings, but in circumstances where the claimant itself has voluntarily brought the two sets of proceedings, a stay should only be granted in very rare circumstances: see *Ledra Fishers v Turner* [2003] EWHC 1049 Ch, paragraphs 14 and 38; *Reichhold Norway ASA v Goldman Sachs* [2000] 1 WLR 173 at pp 179-180.

ii) Even where there are such reasons for a stay, a stay should only be granted if the benefits of doing so clearly outweigh any disadvantage to the other party (*Reichhold*, page 180).

iii) A particularly compelling case would be required for a stay to be granted to the Claimant years after he has brought the claim (*Ledra* para 39)”.

27. Mr Béar sought to apply the apparently stringent test in those cases (and what was said to be the reasoning in the *Reichhold* case cited in *Unwired Planet*) to set up his high hurdle.

28. While there is no doubt that the party applying for a stay (the claimant in this case) has a burden to fulfil, I do not consider that those dicta apply in their full rigour in this case. The main reason is that the claimant is not applying for a stay pending the resolution of the US proceedings (which is the situation contemplated in the *Unwired Planet* paragraph). It is applying for a stay so that the US position can be resolved, at which point decisions can (and will have to be) taken as to what happens in these proceedings. It may be that the claimant will be put to its election as to which proceedings to pursue (see *Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd* [1989] 3 All ER 65, a case which demonstrates circumstances in which a claimant will not be allowed to conduct concurrent proceedings). That seems to me to be a fundamental difference between this case and the authorities just referred to.

29. In considering those authorities one has to consider the vice at which the decisions are apparently aimed. In *Unwired Planet* and *Reichhold* the court was faced with an application by a defendant to stay proceedings. It would seem to me that the rationale behind the dicta was the firm stance that a claimant with a cause of action is prima facie entitled to sue in this jurisdiction if it wishes to do so. In *Unwired Planet* it was held that proceedings started in China by the defendant did not remove that right. In *Reichhold* it was again a defendant who applied for the stay, and the same right was asserted, though in that case, on the facts, the stay was granted. In *Klöckner* it was the claimant who was applying for a stay of its own action, and the defendant who was resisting it. For my part I am not so sure that the same apparently heavy burden should apply in that circumstance, because it does not seem to me that the defendant has the same right to be sued here as the claimant has to sue here, but in any event it is interesting to note that a partial stay was actually granted again.
30. The present case does not present a need to consider the right of a claimant to continue to sue here if it wishes, because that is not the issue. I do not consider that the same high hurdle is presented to a claimant in the present circumstances, though obviously there is still a burden to fulfil. I consider that I should consider whether, in all the circumstances, the Overriding Objective requires a stay or not without a particularly high hurdle being in the way. That requires a balancing exercise with no pre-conceptions other than a recognition that the claimant has its burden.

### **Decision on the stay**

31. Having considered the arguments of the parties, I consider that with certain qualifications it would be right to grant the stay in this matter, for the following reasons.
- (i) There is a real possibility that these proceedings, or at least part of them, will be rendered unnecessary as a result of a decision as to whether the claim against the defendants is restored in the US courts. To the extent that there is a restoration and these proceedings are rendered unnecessary, the resources and costs which would be devoted to the action would be, to a very significant extent, wasted.
- (ii) Those costs will be significant, and run to millions of pounds. The main burden will be on the continuing disclosure process, but there could be significant activity on the pleadings, and no doubt other matters. If one wants an indication of the willingness of the parties to incur large amounts of costs in this case, one only has to look at the levels of attendance in court at this hearing - even banks who did not propose to make representations (because Mr Beltrami spoke for all of them) attended court with 4 or 5 counsel/solicitors (or at least indicated that they wished to do so, subject to space being available).

(iii) It is true that some of those costs may not be totally wasted, because the effort put into disclosure exercises may be of some use in the US proceedings, but nonetheless the disclosure exercises are not going to be identical. It is also right that this disclosure point affects mainly the claimant and the BBA defendants, because the bank defendants have given a first round of disclosure by providing the documents that they have already disclosed in the MDL proceedings, and there was not a suggestion that in the next 6 months they would be embarking on further disclosure exercises; but nonetheless there will be very significant disclosure costs.

(iv) While this decision is not taken on a majority vote basis, it is significant that the bank defendants support the application for a stay, and appropriate weight needs to be given to that. A decision not to stay would be to force a continuation of litigation steps on not only the claimant, but also on all the other defendants.

(v) While it is true that the claimant has been proceeding for some years as if this case were going to trial, there are explanations for that. First, while technically this action has been ongoing since 2017, two and a half years of that intervening period were taken up with making and resolving the limitation challenge, during which time the action was not progressed (and I am not aware that anyone was pressing to progress it). Second, for procedural reasons FDIC did not have an appeal as of right from LIBOR VI, so its ability to challenge it has had to come from decisions in parallel proceedings. Those proceedings were not so much under their control, so pursuing the English proceedings was more understandable and justifiable in those circumstances. Now that later decisions in the US (similarly delayed, as it happens) have provided the possibility of a restoration of the US proceedings, it is not unreasonable to seek the stay now.

(vi) There are good reasons to suppose that to the extent that the US proceedings are restored these proceedings will not be pursued. Ms Prevezer accepted that that was “likely”, though she did not commit her client, and her client has declined to provide clear confirmation of that in correspondence. It is very much on the cards that the claimant would finally take the view that these proceedings were not needed in that event. I note that in her skeleton argument Ms Prevezer said:

“But for the MDL Court’s decision to decline jurisdiction, these English proceedings would not have been commenced;”

It would follow logically that if and to the extent that that decision is reversed, these English proceedings would become otiose. That strongly supports the notion that there is a good chance that these proceedings can be ceased, or perhaps reduced, if the MDL Court allows the US proceedings to proceed.

(vii) There is, of course, the detrimental factor of delay to these proceedings if they have to be revived after the stay. That cannot be ignored, but by now a delay of another 6 months in pursuing these proceedings is less significant than it would

have been had these proceedings been started earlier and proceeded on a more conventional timetable.

(viii) I have taken into account the “stop/start” point relied on by the BBA defendants, but I do not think that that weighs particularly heavily in the consideration. The costs are not quantified but are merely said to be “substantial sums”. They are likely to be insignificant as against the overall costs of disclosure, and if appropriate can be compensated in costs if these proceedings resume. It may be necessary specifically to reserve those costs, but that can be sorted out at the consequential hearing when this judgment has been handed down.

(ix) If it is necessary to characterise the above reasons and circumstances as “rare or compelling”, I consider that I can do so. These proceedings were started when it was considered that the US proceedings were blocked. The possibility of unblocking has now arisen, and it was not suggested that that was readily foreseeable. However, the position is not yet clear and, now that the possibility has arisen, most of the parties want to have an opportunity to see what the effect of that is. They would wish to see if they can and will be put back to square one in the US proceedings, but do not want to devote more time, money and resources here while waiting to resolve that position. That is a reasonable view, and sufficiently compelling to justify a stay. Mr Béar said that the only real supporting factor is the costs, and that is not enough. I think that that analysis of the situation downplays the significance of the costs, and in any event it oversimplifies. Obviously the same result is arrived at by a balancing exercise without a rarity or compulsion element.

32. I shall therefore grant a stay, but with certain qualifications which I deal with in the following sections.

### **The nature of the stay**

33. Although I have decided that the proceedings should be stayed to provide an opportunity to ascertain the US position, it is not to be an unqualified one, and some things need to be said about its effect and its end.
34. First, a qualification. The BBA defendants are concerned about their own wasted costs in having to stop the exercise now, discharge their team, and reconstitute their team. I have already indicated that I do not regard those costs, and the re-briefing exercise, as being hugely significant in the context of the exercise as a whole, but of course if the BBA defendants wish to carry on with the disclosure exercise they can always do so notwithstanding the stay. Of course, if there is a stay without more then they would be

in difficulties in justifying the costs of that exercise if there was otherwise an opportunity to claim their costs of the proceedings. I shall make an order which qualifies the effect of that stay on those costs so that the door is left open to them to argue in due course that notwithstanding the stay they should nonetheless be entitled to their costs, or some of their costs, of the disclosure exercise if otherwise the stay would stand in the way of that. In other words, it would be open to them to argue that the costs were not all wasted and/or it was still reasonable for them to incur them, or some of them. I am by no means encouraging them to carry on and I can foresee substantial difficulties in any such argument; I am merely allowing them an opportunity to mount those arguments without their being automatically shut out by the existence of the stay.

35. Second, it is necessary to consider the duration of the stay and how it inter-relates to the future conduct of these proceedings. The order which I am invited to make is that there be a stay until 31<sup>st</sup> July 2022, with a further CMC to follow on or after 1<sup>st</sup> October 2022. If by 31<sup>st</sup> July the US position has been resolved in such a way that there is agreement between all parties that these proceedings are no longer necessary, then there is no problem. However, if, as is distinctly possible, there is no resolution of the US position by then, or if it is resolved in such a way that these proceedings nonetheless remain appropriate, then one has to consider what is to happen after 31<sup>st</sup> July.

36. That is a potential problem because if the next CMC is to be effective, and a proper use of court resources, the parties will have to pick up their respective batons again, and in particular be in a position to make proposals for the future conduct of the proceedings in a fairly short time. This case, as it stands, requires some management, probably in terms of partitioning, if it is to be triable. As it stands it is unlikely to be practicable to try all the issues at one trial. The method of partitioning it is not obvious. As appears above, one of the directions made by Miles J was that this CMC should consider:

“23 ... (b) Further directions including the question of whether, and if so how, the issues in these proceedings could be separated into separate trials.”

37. The process of getting here ought to have involved discussions between the parties so that proposals could be formed. It is not to be expected that the court will be able to give those directions merely by looking at the papers itself. The input of the parties is vital, as is their co-operation amongst themselves to find a practical solution. Unfortunately, and somewhat surprisingly (and despite the large resources apparently devoted to this case) it does not appear that the parties have embarked on that discussion. The lateness of the decision in Schwab II is not an excuse, because that has come rather late in the chronology, and until the end of December when it was delivered the parties ought to have been anticipating that the CMC I heard would deal with these important case management matters. If I had not granted a stay then one of the prime purposes of this CMC would not have been achieved, and another CMC would have

been necessary, with similar reading time (2 days) and hearing time (3 days was projected), and that is in fact what the parties now want.

38. The CMC in the Michaelmas term, which I am prepared to order, must not be wasted because it will require a number of days of the time of an assigned judge. Those resources must be properly used. To that end the parties must understand that if the stay period expires with no resolution of the US position, or no resolution of what the consequences of a US decision are, then they must immediately resume the conduct of the action and in particular must start to prepare their proposals for how the case is to be tried so that its shape can be determined at the next CMC on the footing that the case as a whole will go forward (save for those parts which the parties may have agreed should not go forward). This means, as Mr Beltrami correctly put it, that the parties would suddenly have a lot to do in a relatively short period of time; but that is the consequence of the interaction between the proposed stay period and the next CMC date. What must not be allowed to happen is a court-ordered stay until 31<sup>st</sup> July, and then a de facto stay between then and the next CMC while the parties debate what should happen next and try to work out how to sort themselves out. The order I propose to make will contain a provision similar to that of Miles J, making it clear that the next CMC must involve plotting the way forward.
39. There are other qualifications to, or carve-outs from, the stay, arising out of the BBA applications, to which I will now turn. I should add that the BBA applications were advanced as a reason not to have a stay at all, but I consider that so far as they are good applications representing things that need to be done they can be dealt with within the context of the stay rather than as reasons for not having one.
40. That leaves one last alteration which needs to be made to the duration of the stay. The date of 31<sup>st</sup> July has been chosen (as I understand it) as being the date by which it is hoped that the MDL court will provide its clarification. It seems to me that if the MDL court provides its clarification much earlier than that then the stay can come off earlier. I will order that the stay will end on 31<sup>st</sup> July 2022, or 4 weeks from the date when the MDL court provides its decision, whichever is the earlier. That will provide an incentive to the making of a decision (by the claimant) as to the fate of these proceedings within a reasonable period of time, and not to drag them out, and it enables these proceedings to get back on the rails sooner rather than later if and insofar as these proceedings are to be maintained.
41. There is one potential difficulty in this last proposal, which is a problem of definition of the relevant MDL court decision which caters for the possible variables of what the MDL court may decide. I accept that that might prove a difficulty, and if the parties cannot come up with a suitable definition, or if it turns out that there is no sensible or



effective one, then this 4 week factor will need to be reconsidered. This can be dealt with at the consequential hearing following on from this judgment.

42. Last, the stay will be conditional on receiving an undertaking from the claimant to take all reasonable steps open to it to obtain a speedy resolution of the position in the US proceedings. Ms Prevezer indicated she would not oppose a provision which required her client to do that.

### **The BBA defendants' applications**

43. The BBA defendants make a number of applications, some of which are said to stem from a failure to comply with Miles J's order, and some of which do not. I shall take them in turn. Most are not straightforward.

### **Unless order for particulars of reliance**

44. Paragraph 6 of the order of Miles J provided for the provision of a number of particulars of the claim in this case. They included the following:

“6 (e) by 4pm on 24 September 2021, substantive answers to:

...

(i) Requests 6.1 to 6.4 of Barclays' Request for Further Information dated 12<sup>th</sup> January 2021 (subject to the wording at the end of Request 6.3 being modified to cover each of the Defendants);”

45. Paragraph 6.3 of the Request reads (as appropriately modified):

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

(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 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 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?

for each of the four Sample Banks, being Amtrust Bank, Colonial Bank, Corus Bank NA, and IndyMac Bank FSB.”

46. The answer provided by the claimant was:

“The FDIC-R’s primary case will be that the question is not applicable. Each of the 4 Representations was constituted by and inherent in the provision to the Sample Banks of the USD LIBOR fix, based on submissions from the individual Panel Banks. The Sample Banks were within the class of persons whom the Defendants intended or expected would rely on the fix and did so as set out at paragraphs 5 and 6 above. The terms of the relevant assets and the payments themselves (as set forth in the transactional data provided by the FDIC-R) demonstrate that reliance. The FDIC-R is not required to prove the subjective

knowledge or belief of particular individuals within the Sample Banks.

Without prejudice to the above, the FDIC-R will advance the following alternative case. In relation to the 4 Representations, paragraphs 5 and 6 of the May Response are repeated. It follows that, in relation to Request 6.3:

a) Yes, the natural persons who used the USD LIBOR fix to set or accept payments and/or prices understood each of the representations to have been made, in that they reasonably believed that the USD LIBOR fix was what the BBA and the Panel Banks held it out to be – an interest-rate benchmark compiled according to its specific definition, and not manipulated or suppressed by the Panel Banks for their own benefit.

b) Via the LIBOR fix.

c) See sub-paragraph (a) above.

d) See paragraphs 5 and 6 above.

e) The FDIC-R's present understanding, based on the operational structures of the Closed Banks, is that the majority of the relevant individuals were located at the Head Office of each of the Closed Banks. For reasons of proportionality, as regards the Sample Banks, the FDIC-R will limit this alternative case to (a) termination payments in relation to USD LIBOR-linked derivatives held by IndyMac, in respect of which it claims losses presently estimated to be US\$71.4m as set out in Appendix C and (b) sales by AmTrust of USD LIBOR linked loans in respect of which it claims losses presently estimated to be US\$26.4m, as set out in Appendix C. *The FDIC-R will provide any such particulars as can be obtained as soon as reasonably practicable, noting that the FDIC-R does not believe that any of those specific individuals who dealt with the relevant transactions are within the FDIC-R's control.* [My emphasis]

6.4 Not applicable. The FDIC-R does not advance a case based on reliance on the Robust Benchmark Representation.”

47. The representations described there are types of representations said to have been impliedly made by the defendants in declaring and promulgating LIBOR every day. The details do not matter. The reference to Sample Banks is a reference to 4 banks being taken as samples for progressing the matter, something which Miles J considered necessary.

48. The pleading context of this request is paragraph 119 of the Particulars of Claim which pleads:

“119. The Closed Banks justifiably relied upon and/or were influenced by the Representations in at least the following ways:”

And there then follow a number of sorts of transactions and ways in which the representations are said to have operated. That generated the request and response as set out above.

49. Mr Béar’s point on this application is that the reliance question has simply not been answered, and it should have been, as is best exemplified by the words that I have italicised above. There has been enough time for the claimant to identify individuals who relied on the representations, and while the evidence of the claimant on this application refers to unparticularised activities in trying to provide details, that general evidence is not a sufficient explanation and the claimant has had enough time to answer a question that has to be answered. He invites me to make an unless order debarring the claimant from advancing any case on individual reliance unless it particularises the people who individually relied on the representations by 21<sup>st</sup> February 2022 (two weeks from this CMC and 4 weeks from the date of the BBA defendants’ application notice). It is important for the claimant to provide the particulars in procedural terms (the defendants are entitled to know the case they have to meet, and this is a fraud claim after all) and in case management terms because it is capable of affecting such matters as disclosure. He particularly drew attention to remarks made by Miles J in his ruling on the matter in which he indicated that he was giving a very significant amount of time for the response and:

“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 of further work needs to be carried out.”

50. Ms Prevezer did not dispute the need to provide these particulars if an individual’s reliance is to be relied on by the claimant, but she relied on evidence as to how difficult it was to be able to get the relevant details. She points out that the reliance case is now narrowed to two particular types of transaction (thereby abandoning a lot of other types) and narrowed to two Sample Banks’ claims out of the original 4. Furthermore, it was not clear that actual individual reliance was necessary in these claims which, while they look like English deceit cases, were in fact cases in which the relevant law was the law of the state where the individual bank was headquartered, and reliance might not be necessary in the same way as it would be under English law. Miles J is said to have been alive to this possibility, judging by exchanges with counsel.
  
51. However, in the end Ms Prevezer did not really dispute that these particulars needed to be provided if she was to run an ‘individual reliance’ case, though she disputed that it needed to be done now, and relied on the difficulties that her client had had in this respect. It has long since lost contact with any relevant individuals, and it lacks the power of an English insolvency practitioner to compel co-operation (though in US proceedings a sub-poena power is available). It has not yet proved possible to contact and identify those who would have to be named. The information was not required at the moment (because of the stay), and might never be required if the US proceedings were restored and the English proceedings not proceeded with. In those circumstances any time limit for the production of the particulars should be 12 weeks from the expiry of the stay. An unless order was unnecessary and inappropriate. If it were to operate so as to exclude the claims of the two Sample Banks in question then it would remove \$97.8m of a \$214.1m claim, which would be an extreme sanction.
  
52. Since it is common ground that these details would have to be provided to support the actual reliance alternative case, the significant questions are whether an order should be made now, what any time limit should be, and whether it should contain an “unless order” element.
  
53. I am satisfied that I should make an order now, and that the activity of answering it should go on now despite the stay of other activities. This is because:
  - (i) As pleaded, and although the causes of action to which the particulars relate are US state claims, this is still a fraud claim of which proper particulars should be given, and indeed should have been given from the outset. If the

receiver is unable to identify those who actually relied on the representations then there is a case for saying that the claim should not have been pleaded at the outset, but that point is not taken and I do not have to consider it further. It is somewhat surprising that in the period of time since the US proceedings were launched, and in the period since the UK proceedings were launched, the receiver has still not been able to identify those whom it would wish to say actually relied on the representations. It is time that it did.

(ii) I am not satisfied that FDIC has done all that it can to identify and or contact relevant personnel. The statements about its activities are general and unparticularised, and do not give the impression of a great deal of activity. The failure to come up with any names after 5 or 6 years of litigation (plus a preceding preparatory period), and then when ordered to do so by this court, does not suggest that any necessary steps have been vigorously pursued. It is time that they were properly pursued.

(iii) While it is true that the names are not needed actually to pursue the action during the stay period, it is not right to allow an already serious lapse to continue during that period.

(iv) The orders of this court should be obeyed by a claimant who chooses to pursue litigation in this jurisdiction. When ordered to identify individuals it is not good enough to say they will be identified as soon as practicable. That was not the order. Again, the claimant has not given the impression that it was particularly responsive to the requirements of the order. This factor, together with historic failures, gives the impression that the claimant may not be able to satisfy the pleaded aspects of this part of its case. If it cannot then that needs to be made apparent sooner rather than later.

(v) A requirement to address the point may well have a useful effect in terms of the future shape of this action. Various parts have fallen off this claim, most of them in response to the Requests for Further Information. 20 banks have departed the fray; a case on the use of LIBOR in risk management systems has been abandoned; the reliance case, at least in the case of the 4 Sample Banks (presumably chosen to represent the reality of the other banks) has been limited to two of those banks and only two types of transactions. That last is a very significant reduction. The case based on the Robust Benchmark Representation has been abandoned. All this gives the impression that when pressed the claimant realises, for whatever reason, that parts of its case cannot or should not be pursued. The Request for Further Information has flushed much of this out. Since the reliance case has already been significantly reduced, it would be very useful to force a proper consideration of the extent to which it remains appropriate to run any of it, whether in terms of its merit, in terms of whether material can be presented to support it, or for other reasons. Being forced to answer the question properly, by identifying individuals, will be a very good discipline in the circumstances of this case.

(vi) I accept it is right that this activity should go on at this stage, rather than after the stay, because if other parts of the case are to fall away then that should happen sooner rather than later. Furthermore, Ms Prevezer's proposed timing (12

weeks after the removal of the stay) would run the risk that the particulars would not be available for the next CMC were it to take place in October (which might well be the case), and that is fundamentally undesirable. If a requirement to provide the particulars results in another change in the shape of the case, that needs to be apparent well before the stay comes off; and if it does not then by the same token the parties need to know that well before the next CMC.

54. For those reasons I consider that it is appropriate that the claimant be required to address the point now rather than later. That leaves the question of timing. Two weeks is not sensible in these circumstances. Ms Prevezer's suggestion of 12 weeks after the stay comes off suggests that 12 weeks (or 3 months) is adequate from her client's point of view. I shall therefore allow a period of three months from the date of the hand-down of this judgment. If FDIC has done a lot of groundwork already then three months ought to be enough. If that work has not been done, then it ought to have been and the receiver now needs to get on with it.
55. Last there is the question of whether the order should be backed by an unless order. I consider it should, in the form suggested by Mr Béar at the hearing, namely an order that if particulars of individuals are not given in accordance with the request then the claimant will be debarred from advancing any case based on individual reliance. That is an entirely appropriate sanction in the circumstances of this case.

### **The application for an order for amended Particulars of Claim**

56. As will have been apparent from the last section of this judgment, the request for further information triggered further limitations of the claim (beyond the abandonment of 20 bank claims which had taken place previously). The BBA defendants now press for those limitations to be incorporated into properly amended Particulars of Claim so that the principal pleading can be seen properly to reflect what the claim now is and so that it is appropriately limited. An amendment will also make it clear whether and to what extent the limitation of claims to two Sample Banks and two types of transactions means that claims in respect of other banks are similarly limited. Ms Prevezer accepts that the Particulars of Claim need to be brought into line with the further information, but disputes the need to do that at the moment given that there is to be a stay. She says that if this action is not revived because of the revival of the US proceedings then the amendment will be otiose and the effort and expenditure involved pointless.
57. Again I consider that this is an activity which should be done now notwithstanding the stay. It should be done so that the position is clear if the stay comes off even though the contrary possibility is that the amendments will be otiose if the action is never

revived. Reasonable and proportionate steps should be taken to anticipate and ease the flurry of activity that will take place after the stay is lifted should the hopes of the claimant not be realised in relation to the effect of the US proceedings. The amendment of the Particulars of Claim is one of those steps, so that the shape of the action is better defined in the event of these proceedings being revived.

58. There is a further reason for the amendment to happen now, which is a reason that was given under the previous section. If and insofar as it turns out that the claimant cannot or does not wish to sustain parts of the claim in the present circumstances then it is important that be done sooner rather than later. It may be no bad thing to force a reconsideration of the shape of the claim, and a very good thing that any such reconsideration should become apparent before the stay is lifted. The extent to, and rate at, which parts of the claim have been abandoned demonstrates that this claim may still not be in its final form.
59. I shall therefore grant this relief. The sensible course is to provide for the Amended Particulars of Claim to be served at the same time as the Further Information that I have ordered under the preceding section, to avoid the prospect of a further dislocation if the Further Information exercise throws up something else that needs to be catered for by an amendment. A discrepancy in dates risks a further misalignment of further information and the amended Particulars. The defendants need take no particular steps when served - I am not providing for the service of amended Defences in the stay period (which meets a particular concern expressed by Mr Beltrami). Those will have to come after the stay comes to an end. I am merely providing for the claim to be properly pleaded so that if or when the stay is removed the position on the claim is clear by that time. The defendants know enough about the current state of the claim for present purposes, bearing in mind the stay that is now going to operate. Were the shape to change yet again in the amended pleading the defendants are not particularly prejudiced in knowing that in three months' time as opposed to (say) 28 days' time.

### **The BBA defendants' Further Information application**

60. Appendix C to the Further Information which has been provided by the claimant provides a breakdown of losses said to have been suffered by the surviving claimant banks on an individual asset basis. It breaks down losses into various categories of types of transactions and comes up with an aggregate of \$214.1m. Appendix B gives breakdowns for four example transactions - two swaps, a cashflow loss claim and a security sale loss.



61. The BBA defendants raised various questions about this loss, and accepts that two of them have been answered in the evidence filed on the application made to me. That leaves two more - first, a breakdown of the losses by relevant assets, and second, an explanation of the steps that FDIC has taken to review the accuracy of the internal information from the closed banks in relation to non-performing loans. The first is said to be necessary to understand the claim properly, and the second is said to be necessary to check the claims as currently formulated are properly arguable, and to facilitate settlement negotiations (if any take place).
  
62. As to the first, that is said to be required so that the claims can be checked and so that the experts can start their work. Mr Béar pointed out that the size of the claim had changed if one uses the touchstone of an assessment of the claim using a valuation per basis point difference between declared LIBOR and what it ought to have been (which is said by him, but not by the claimant, to be a useful touchstone of quantum, not an actual measure of damages). The claimant has shifted it from \$7m per basis point to just under \$2.7m per basis point. There must be some underlying calculations of the nature of the calculations underpinning the four instances that have been produced as examples, and his client should see all of them. During the course of argument Mr Béar indicated that he would be satisfied with outlines in the form of the Appendix B breakdowns, and he was particularly interested in the larger items which seemed to be swaps transactions (which would also be fewer in number than other types of claim).
  
63. The claimant (who argued this point through Mr Barden, who put his points impressively clearly and cogently) resists this further provision of information on the footing that the defendants have had a lot of information already - essentially the raw data underlying the whole calculation. They have also had an extensive description of the information gathering exercise. It is unnecessary and inappropriate to order the disclosure of further calculations because Miles J declined to order the provision of the claimant's work product, disclosure of raw data has been provided and the methodology has been explained. If the claimant were to justify every element (product) within the overall table there would be millions of transactions (particularly loans) to be itemised and worked through – it has disclosed data on 4m loans and several thousand securities and derivatives. An enormous amount of work would be involved, which is inappropriate at this stage. It would be better to have the experts deal with this matter in due course, and the BBA defendants have apparently not yet appointed an expert.
  
64. I do not consider that it is appropriate to order this first head of further information at this stage. I have decided that there is to be a stay to save costs, and I am satisfied that producing what the BBA defendants seek to require at this stage would be inimical to that objective to an extent which is inappropriate and unnecessary. I confess that some of the claimant's protestations as to the level of the work involved struck me as being likely to be somewhat exaggerated, because if the claimant has put forward bona fide figures in its Appendix C then there must be underlying figures. Mr Barden confirmed that they would be in a spreadsheet or spreadsheets. That being the case it would be

likely to mean that the information is extractable in some way which is easier than Mr Barden made it sound, but nonetheless I accept there would be a large amount of work likely to be involved. I do not consider that the BBA defendants really need that information at this stage in the face of the stay I have ordered.

65. It seems to me that the information sought, or some of it, is likely to be required at some point because a claimant cannot simply claim a figure and refuse to disclose the workings behind it. The method of arriving at that figure is likely to be in issue in the proceedings, and that method is not itself privileged work product, though the current actual spreadsheets and workings themselves obviously are. So privileged work product is not, in my view, going to be a reason for not showing the workings. But it may be that as part of future case management there will be an approach to the litigation which does not require the entire loss rationale for every transaction/asset to be disclosed. That will be a matter for the assigned judge in due course. And that, of course, assumes that the action will continue, which it might not. It is not necessary for the information to be produced at this stage and in the light of the stay.
66. The non-performing loan point is a small one. The BBA defendants wished to understand whether non-performing loans were taken into account in the calculation and wanted to understand what approach had been taken to them. The Further Information (provided pursuant to Miles J's order) provided:
- “21(a) Information as to delinquencies, defaults and charge-offs for USD LIBOR-indexed loans has been located at loan level for all Closed Banks except Amcore, RG Premier and United Commercial. In relation to all Closed Banks except those three, the figures used reflect the actual non-performance at loan level.”
67. Mr Béar complains that that is not a clear explanation. I agree with him. Mr Barden said that the position was that, in relation to those banks, interest was not taken into account in respect of loans where interest was not being paid. That is a much clearer explanation. Similar clarity ought to have been achieved before. Despite the stay, I consider that the explanation should be put on the record now, either in the form of an amended Further Information document or in a separate document, it matters not which. It ought to have been provided last September under the order, and I do not consider that the stay should stand in the way of getting a clear answer on the record now. It will not be a costly step; I would guess the new wording will be slightly longer than the short statement I have just recorded, but not much.
68. There was also a similar point about how troubled debt restructuring has been dealt with. That was not dealt with in the Further Information because the point had not arisen then. It has arisen only relatively recently in correspondence. An answer has

been given in the evidence. Mr Béar said it should be incorporated into a document with a statement of truth. I do not think that this CMC, with its other issues, is the occasion to raise this point. The answer can, for the time being at least, stay in the evidence. If it turns out to be a real point of dispute in the future it can be dealt with then.

### **The next CMC**

69. Last, I will order a further CMC to take place as soon as practicable after 1<sup>st</sup> October 2022. I can see that if the court's listing requirements allow it would be better not to have it immediately at the beginning of term in order to allow a little more time across the summer to prepare for it properly. The end of October would be better. It is undesirable to get much later than that. When it comes to listing there will only be limited flexibility to accommodate the availability of counsel. I can well imagine that with so many parties involved fixing a date which is convenient for all counsel and the court could lead to the CMC taking place well beyond October/November. The priority must be to get the CMC heard, so counsel's availability is likely to have to give way to that need. Any difficulties that arise in this respect will doubtless be dealt with by the assigned judge hearing the CMC.