Neutral Citation Number: [2013] EWHC 1994 (Comm)

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

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

Date: 16 7 2013

Before :

MR JUSTICE EDER

- -

Between:

Case Nos: 2011 Folio 956; 2013 Folio 260

INTESA SANPAOLO S.p.A.

Claimant/ Respondent

- and -

REGIONE PIEMONTE

Defendant/ Applicant

And between:

Case Nos: 2011 Folio 957; 2013 Folio 194

DEXIA CREDIOP S.p.A.

Claimant/ Respondent

- and -

REGIONE PIEMONTE

Defendant/ Applicant

- -
- -

SONIA TOLANEY QC (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Claimants**
CATHERINE NEWMAN QC and **ALEC McCLUSKEY** (instructed by **Withers LLP**) for the **Defendant**

Hearing date: 5 July 2013

- -

Approved Judgment

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

.....

MR JUSTICE EDER

Mr Justice Eder:

Introduction

1. These proceedings concern various claims brought by Intesa Sanpaolo S.p.A. ("Intesa") (previously known as Banca Infrastrutture, Innovazione e Sviluppo S.p.A. ("BIIS")) and Dexia Crediop S.p.A ("Dexia") (together, the "Banks") against the defendant, Regione Piemonte ("Piedmont"), in relation to certain derivative transactions entered into on 16 November 2006 between Intesa and Dexia (two derivative transactions and one derivative transaction respectively) and Piedmont (the "Transactions") in connection with Piedmont's issuance of two bonds.

2. In very broad terms, the purposes of the Transactions were to manage the interest rate risk to which Piedmont is exposed under the bonds issued by Piedmont and to create an amortisation fund out of which Piedmont would repay the bonds upon their respective due dates in 2013 and 2036.

3. The Transactions were entered into by Piedmont pursuant to Resolution 136-3655 of the Piedmont Regional Council dated 2 August 2006; and were performed by both sides without incident until 2011.

4. However, it appears that sometime in 2010, the Italian Corte dei Conti (a body with oversight over Piedmont's financial affairs) produced a report calling for further investigation of the Transactions and their terms. This resulted in the production of a report in 2011 obtained by Piedmont from an Italian lawyer, Avvocato Tommasso Iaquinta with, it is said, the assistance of a financial expert which was, as I understand, subsequently provided to the Banks. In particular, that report analysed the Transactions and identified what Ms Newman QC described as "very substantial secret profits" which the Banks had "generated" from the Transactions and which she submitted amounted to "disgraceful conduct" on the part of the Banks. In particular, as summarised by Ms Newman QC in her skeleton, Avv Iaquinta's principal conclusions were as follows:

> "*(1) The Derivatives do not create a "containment of the costs of the debt" incurred by [Piedmont] in issuing the Bonds, contrary to requirements of Italian Law. Instead, they force [Piedmont] to pay out sums on account of its liabilities under the Bonds which are higher than those actually payable under the Bonds.*
>
> *(2) The amortising swaps had the effect of shifting [Piedmont's] payment commitments into the future (because the payments due under the amortising swaps increase greatly as time goes by), contrary to requirements of Italian Law.*
>
> *(3) The interest rate floors had a greater notional cost to [Piedmont] than the value of the interest rate caps (albeit that these values were not disclosed to [Piedmont] by the Banks or approved by Piedmont at any time), meaning that the interest rate collars were not "par" instruments, contrary to requirements of Italian Law.*

> *(4) The notional cost to [Piedmont] of the interest rate floors was in excess of market rates at the time of execution of the Derivatives, whereas the notional premium being received by [Piedmont] through entering into the interest rate caps was below market rates at the time.*
>
> *(5) The interest rate swaps had the effect in relation to the smaller Bond (for €56 million) of converting a liability to pay a fixed interest rate into a liability to pay a floating rate, such that they did not have the effect of "containing the exposure of the organisation to financial risks resulting from a rise in interest rates and therefore with the objective of containing the cost of the loan", again contrary to requirements of Italian Law.*
>
> *(6) The credit default swaps, which amount to the sale by [Piedmont] of insurance against the Italian state defaulting on its debts, are not instruments which [Piedmont] had capacity under Italian Law to enter into, and exposed [Piedmont] to a considerable financial risk.*
>
> *(7) Analysed as a whole, the Derivatives had hidden costs to [Piedmont] of €54,382,796 (and consequential hidden profits to Cs in the same amount), which violated various provisions of Italian Law.*"

5. In about 2011, reports began to appear in the Italian press that Piedmont was considering whether to take action against the Banks (and other banks) in relation to the Transactions.

6. On 10 August 2011, the Banks each commenced proceedings in this court seeking declaratory relief in respect of the Transactions, in Claim No: 2011 Folio 956 (the "Intesa Declaratory Action") and Claim No: 2011 Folio 957 (the "Dexia Declaratory Action") (together, the "Declaratory Actions"). In each claim, the relevant Bank sought declarations regarding, in summary, the validity of the relevant Transactions and the legal nature of its relationship with Piedmont. It is common ground that these claims were properly brought in England because, by the parties' express choice, the Transactions are governed by English law and disputes relating to them are to be submitted to the jurisdiction of the English Court. It is also common ground that the proceedings were duly served on Piedmont at its offices in Turin on 30 January 2012.

7. Meanwhile, on 23 January 2012, the Piedmont Regional Council promulgated *inter alia* Resolution 24-3305 which, in effect, purportedly cancelled its earlier Resolution 135-3655 and authorised the implementation of that Resolution 24-3305.

8. Piedmont did not file any acknowledgement of service in or otherwise engage with the Declaratory Actions. As now confirmed in the witness statement recently served by Piedmont from its current Head of Finance, Dott. Sergio Rolando, this was the result of a deliberate decision taken by Piedmont. As he states: "… *the Regione took the view that it was inappropriate to engage with litigation in England*". Instead, pursuant to a process under Italian Law known as *autotutela* (self redress) and in

accordance with the recommendations of Avv Iaquinta, Piedmont commenced its own proceedings in Italy (the "self-help proceedings"). As described by Ms Newman in her skeleton, this process was effectively a means of declaring the Transactions void without the need to obtain a declaration from the courts to that effect although the precise nature of such process was a matter of some debate before me. In any event, the Banks' position was that by exercising this purported power of self-redress, Piedmont had acted in violation of Italian law; and the Banks themselves then filed proceedings with the Turin Administrative Court challenging *inter alia* the validity of Piedmont's purported exercise of the self-help process.

9. Meanwhile, in England, the Banks each applied for default judgment in the Declaratory Actions. In support of such applications, the Banks relied upon the evidence of Mr Kelly, a solicitor and partner in the firm of Cleary Gottlieb Steen & Hamilton LLP, who acts on behalf of the Banks. In accordance with the CPR, those applications were made without notice to Piedmont; and in the event, Piedmont did not appear and was not represented on the hearing of those applications which came before Cooke J. in July 2012.

10. In the course of the present hearing, Ms Newman has advanced certain criticisms against the Banks (although not, I should say, against Ms Tolaney QC) on the basis, as she submitted, that adequate attention was not drawn to the court concerning arguments which were available to Piedmont in particular with regard to Piedmont's capacity to enter into the Transactions, whether the Banks owed Piedmont a "fiduciary duty", the existence of a prior "advisory relationship" and the alleged "secret profits" made by the Banks out of the Transactions. I accept that certain of the specific points now sought to be raised by Ms Newman were not specifically drawn to the attention of the court at the original hearing of the applications for default judgment. However, I do not consider that this constituted any relevant "non-disclosure". On the contrary, it is important to note that in the witness statement from Mr Kelly, which was submitted on behalf of the Banks for the purpose of that original hearing, he referred specifically to *inter alia* Resolution 24-3305. In particular, at paragraphs 70.7 to 73 of his witness statement, Mr Kelly stated as follows:

> "*70.7 However, on 23 January 2012, Piedmont passed Resolution No 3 (pages 407 to 473, and pages 474 to 548 in English translation, of JPKK-1) and Resolution No 24-3305 (pages 549 to 550, and pages 551 to 552 in English translation, of JPKK-1) (the "Self Help Resolutions") resolving that the resolutions whereby it had approved its entry into the Transactions (among other things) were null and void. The power of Italian municipalities to declare resolutions null and void is known as a "power of self-help").*
>
> *70.8 Specifically, Piedmont purported to declare null and void:*
>
> *(a) Piedmont's Council Resolution No 135-3655;*
>
> *(b) Resolution No 61 of the Director of Piedmont's Budget and Finance Department relating to the 2036 Transaction with BIIS;*

> *(c) Resolution No 72 of the Director of Piedmont's Budget and Finance Department relating to the 2036 Transaction with Dexia; and*
>
> *(d) Resolution No 174 of the Director of Piedmont's Budget and Finance Department relating to the 2013 Transaction with BIIS.*
>
> *71. The reasons given by Piedmont for exercising its power of self-help in relation to the resolutions above are contained in the Self-Help Resolutions. Piedmont contends in summary, that the Transactions involved violations of Italian law and that terminating the Transactions is in the public interest.*
>
> *72. BIIS and Dexia believe that there is no basis in law for Piedmont to exercise its self-help procedure. Even if such basis existed, the Italian law limitation period for exercising the self-help procedure is three years from the date on which the resolutions took effect pursuant to Article 1, paragraph 136 of Italian Law No 311/2004, and therefore would have expired in 2010. By exercising its power of self-help in these circumstances, Piedmont has acted in violation of Italian law.*
>
> *73. Both BIIS and Dexia filed appeals with the Turin Administrative Court challenging the validity of Piedmont's purported exercise of its self-help procedure and the Self-Help Resolutions. It was necessary for BIIS and Dexia to file appeals with the administrative court because if they had not done so, they would have lost their ability to challenge Piedmont's actions under Italian law and a civil court might assume that the resolutions approving the Transactions had been legitimately annulled under Italian law. The hearing of the banks' appeals has been fixed for 8 November 2012.*"

11. Although this was not repeated in Ms Tolaney's skeleton argument, she did refer specifically to the self-help proceedings (see, for example, paras 46 and 49 of her skeleton at that hearing) being pursued by Piedmont; and the court was specifically invited to pre-read Mr Kelly's witness statement which Cooke J confirmed at the beginning of the hearing he had done. Further, it appears from p2/line20 to p3/line4 of the transcript that Cooke J was well aware of the proceedings that were taking place in Italy.

12. In the event, the declaratory relief sought by the Banks was granted by Cooke J for the reasons set out in a Judgment dated 24 July 2012. In effect, Cooke J made declarations that Piedmont's obligations under the Transactions constituted legal, valid and binding obligations, enforceable in accordance with their terms (the "Cooke J Judgment"). All but one of these declarations reflected representations made in the terms of the Transactions. The specific declarations made were as follows:

> "*(1) The Transactions Documents (as defined in Schedule A to this Order) and the terms contained therein, as well as all other*

written agreements and/or written notifications and/or documents entered into and/or executed by the parties prior or pursuant to or related to or in connection with the Transaction Documents and/or the Transactions (as defined in Schedule A to this Order) are and/or were at all material time valid, binding and enforceable.

(2) [D]'s obligations under the Transactions constitute its legal, valid and binding obligations, enforceable in accordance with their terms.

(3) The Transaction Documents constitute the entire agreement and understanding of the parties with respect to the Transactions and supersede all oral communications and prior writings with respect thereto.

(4) In entering into the Transactions, the Defendant acted on its own account, make its own independent decisions and judgments, did not rely and is estopped from contending that it did rely on any communication (written or oral) of the Claimant as investment advice or as a recommendation to enter into the Transactions, it being understood that (a) information and explanations relating to the terms and conditions of the Transactions would not be considered investment advice or as a recommendation to enter into the Transactions; and (b) no communication (written or oral) received from the Claimant would be deemed to be an assurance or guarantee as to the expected results of the Transactions.

(5) In entering into the Transactions, [D] was acting for the purposes of managing its borrowings or investments and not for the purposes of speculation, and that the Transactions was [sic] *suitable for the hedging purposes connected with the underlying debt.*

(6) Prior to and when entering into the Transactions, [D] was capable of assessing the merits of and understanding (on its own behalf or through independent professional advice) the terms of the Transactions, the relevant risk factors, the nature and extent of the risk of loss and the nature of the contractual relationship into which it was entering.

(7) The Claimant did not act, and [D] did not consider the Claimant to be acting, as a fiduciary or adviser in respect of the Transactions.

(8) [D] was, when entering into the Transactions, a qualified investor for the purposes of Article 31, second paragraph of CONSOB Regulation No 11522 of 1 July 1998, as amended and supplemented.

> *(9) The Claimant has to date fully complied with and/or discharged each and all its relevant obligations under the Transactions Documents.*"

13. The Cooke J Judgment and relevant Orders were then formally submitted in evidence as part of the Banks' defences in the Italian proceedings on 28 September 2012 and were provided to Piedmont at that time. They were also sent by registered post and fax to Piedmont in October 2012. Subsequently, the Judgment and Orders were then certified, sealed and served on Piedmont on 24 January 2013 in compliance with the Italian rules of service of foreign judgments.

14. Meanwhile, also back in Italy, on 21 December 2012, the Regional Administrative Court of Piedmont delivered its judgment in the self-help proceedings refusing jurisdiction in favour of the English Courts (the "RAC Judgment"). That judgment is being appealed by Piedmont. I was told that the hearing of that appeal is due to take place on 23 July 2013.

15. Following the Cooke J Judgment, the Banks continued to perform their obligations under the Transactions (which so far as they are concerned remain live). However, it is the Banks' case that Piedmont continued to fail to meet its obligations and that there are substantial sums due to the Banks from Piedmont pursuant to the Transactions which remain due and outstanding, as explained further below. Accordingly, Dexia and Intesa instituted new proceedings on 11 February 2013 and 22 February 2013 respectively (the "Money Actions") seeking payment of the sums which they assert had fallen due and remained outstanding which were served on 4 March 2013. The total sums now claimed are in excess of €36 million.

16. Although Piedmont acknowledged service to these new Money Actions, it has served no defence; and, on 5 April 2013, the Banks issued applications for summary judgment for sums allegedly due and owing. In particular, the Banks say that, as determined by Cooke J, the Transactions and Transaction Documents (as defined below) are valid, binding and enforceable (see paragraph 16 of the Cooke J Judgment); that the Cooke J Judgment was not appealed and is final and binding on Piedmont; that meanwhile the Banks have continued to perform their obligations under the Transactions; and that Piedmont has no real prospect of defending the present money claims.

17. As to Piedmont's position, it has still not served a defence even in draft form. However, shortly before the present hearing, i.e. on Friday 28 June 2013, Piedmont issued two application notices to set aside the Cooke J Judgment in the Declaratory Actions pursuant to CPR 13.3. Despite the fact that these applications were issued over 11 months after the Cooke J Judgment and almost 5 months after the commencement of the Money Actions, the application notices were served without any accompanying evidence in support. Thereafter, an unsigned and undated witness statement of Dott Sergio Rolando accompanied by a 613 page exhibit was received by the Banks on Monday 1 July 2013 – just three working days before this present hearing. That witness statement was, I was informed, subsequently signed on 4 July 2013. That witness statement is now relied upon in support of Piedmont's application to set aside the Cooke J Judgment and also in opposition to the Banks' application for summary judgment.

18. Thus, there are two main sets of applications before the court i.e. (i) the Banks' applications for summary judgment; and (ii) Piedmont's applications to set aside the Cooke J Judgment.

The Transactions

19. I have already referred briefly to the Transactions which are at the heart of these proceedings. However, it is necessary to explain the nature of the Transactions in more detail which I take from the summary in Ms Tolaney's skeleton argument and which was not in dispute.

20. On 2 August 2006, the Piedmont Regional Council issued a Resolution No 136-3655 in effect authorising the execution of various financial transactions including derivative contracts. It was pursuant to that resolution that on 16 November 2006 Piedmont established a Euro Medium Term Note programme (the "EMTN Programme") which provided for the issue of Notes in an aggregate amount of €2 billion. Specifically, Piedmont issued two bonds viz (i) the first in the amount €1.8 billion repayable in a single "bullet" payment in 2036 (the "2036 Bond"); and (ii) the second in the amount of €56 million repayable in a single "bullet" payment in 2013 (the "2013 Bond"). Also on 16 November 2006, the Banks and Piedmont entered into the Transactions viz (i) Dexia and Intesa each (respectively) entered into a derivative transaction in connection with the 2036 Bond (each a "2036 Transaction" and together the "2036 Transactions"); and (ii) Intesa also entered into a derivative transaction in connection with the 2013 Bond (the "2013 Transaction"). Dexia and Piedmont did not enter into any derivative transaction in connection with the 2013 Bond.

21. Each of the Transactions was concluded in the standard ISDA form. Accordingly, their terms are contained in the following documents (together, the "Transaction Documents"):

    i) As regards the Dexia 2036 Transaction: an ISDA Master Agreement dated as of 16 November 2006 and a Schedule thereto; the 2000 ISDA Definitions and the 2003 ISDA Credit Derivatives Definitions (as supplemented by the May 2003 Supplement); and a confirmation dated 2 May 2007 (the "Dexia 2036 Transaction Documents").

    ii) As regards the Intesa 2036 Transaction: an ISDA Master Agreement dated as of 16 November 2006 and a Schedule thereto; the 2000 ISDA Definitions and the 2003 ISDA Credit Derivatives Definitions (as supplemented by the May 2003 Supplement); and a confirmation dated 26 March 2007 (the "BIIS 2036 Transaction Documents").

    iii) As regards the 2013 Transaction: an ISDA Master Agreement and a Schedule thereto; the 2000 ISDA Definitions and the 2003 ISDA Credit Derivatives Definitions (as supplemented by the May 2003 Supplement); and a confirmation dated 2 May 2007 (the "2013 Transaction Documents").

22. The Transaction Documents contain clauses pursuant to which the parties expressly agreed that English law would govern each of the Transactions and that the English Court would have exclusive jurisdiction over disputes relating to each of the Transactions.

23. Each of the Transactions has three components, which can be described as the Interest Rate Component, the Amortisation Component, and the Investment Component.

24. First, the Interest Rate Component is in respect of each of the Transactions an interest rate derivative under which:

    i) In respect of the 2036 Transactions, Dexia and Intesa respectively exchange with Piedmont floating rate payments calculated by reference to EURIBOR on 27 May and 27 November each year until 2036. The floating rate payments to be made by Dexia and Intesa are equal to a total of two-thirds (one-third for each of Dexia and Intesa respectively) of the semi-annual interest coupons payable by Piedmont on the 2036 Bond, whereas the floating rate payments to be made by Piedmont are subject to a 'cap' above which they cannot rise and a 'floor' below which they cannot fall (the cap and the floor together constituting a 'collar').

    ii) In respect of the 2013 Transaction, Intesa and Piedmont exchange fixed and floating rate payments calculated by reference to EURIBOR yearly until 2013. Intesa pays to Piedmont an amount calculated by applying a fixed rate of 4.094% to a notional amount of €28 million – equal to half of the amount of the coupon payable by Piedmont to bondholders on the 2013 Bond. In return, the floating rate payments to be made by Piedmont are subject to a 'cap' above which they cannot rise and a 'floor' below which they cannot fall (the cap and the floor together constituting a 'collar').

    iii) Accordingly, the effect of the Interest Rate Component in respect of each Transaction is to limit the interest rate risk to which Piedmont is exposed under the 2036 Bond or 2013 Bond to the range between the floor and the cap.

25. Second, the Amortisation Component of each of the Transactions provides:

    i) In respect of the 2036 Transactions, for Piedmont to make fixed payments to Dexia and Intesa respectively on 27 May and 27 November each year which, over the life of the 2036 Transactions total two-thirds of the principal amount of the 2036 Bond (€600 million). In return, upon the termination of the 2036 Transactions in 2036 Dexia and Intesa are each obliged to pay €600 million to Piedmont, which (it is envisaged) will be used by Piedmont partially to fund the repayment of the 2036 Bond.

    ii) In respect of the 2013 Transaction, for Piedmont to make a yearly fixed payment to Intesa which, over the life of the 2013 Transactions totals one half of the principal amount of the 2013 Bond (€28 million). In return, upon the termination of the 2013 Transaction in 2013 Intesa is obliged to pay €28 million to Piedmont, which (it is envisaged) will be used by Piedmont partially to fund the repayment of the 2013 Bond.

    iii) Accordingly, the effect of the Amortisation Component of each of the Transactions is to create an accreting fund from which Piedmont can meet part of its future debt obligations under the 2013 Bond and the 2036 Bond.

26. Third and finally, the Investment Component of each of the Transactions provides for Piedmont to make a derivative-based (or 'synthetic') investment in bonds issued by the Republic of Italy by selling credit protection in relation to such bonds to the Banks. The Banks do not make any payments in exchange for this protection, but the value of the protection is reflected in the amounts of the parties' respective payment obligations under the Interest Rate and Amortisation Components of the Transactions.

Performance of the Transactions

27. As stated above, the Transactions were performed by both sides without incident until 2011. However, Piedmont's payments stopped in January 2012. It is the Banks' case that pursuant to the Transaction Documents, payments were due from Piedmont to Intesa on the following dates and in the following amounts, and remain due and outstanding:

28/5/2012:	€6,984,662.30 on the Intesa 2036 Transaction
27/11/2012:	€4,011,772.33 on the 2013 Transaction and €9,323,175.85 on the Intesa 2036 Transaction.
Total (Intesa):	€20,319,610.48

28. In addition, it is the Banks' case that payments were due from Piedmont to Dexia on the following dates and in the following amounts, and which remain due and outstanding:

28 May 2012:	€6,984,662.30
27 November 2012:	€9,323,175.86
Total (Dexia):	€16,307,838.16

29. Although these figures were not admitted as such, Piedmont did not advance any positive case that they were incorrect as figures; and it is accepted by Piedmont that these amounts have not been paid.

The applications to set aside the Cooke J Judgment

30. CPR 13 provides in material part as follows: *"(1)…the court may set aside or vary a judgment entered under Part 12 if – (a) the defendant has a real prospect of successfully defending the claim; or (b) it appears to the court that there is some other good reason why – (i) the judgment should be set aside or varied; or (ii) the defendant should be allowed to defend the claim.(2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly."*

31. As to this, Ms Tolaney submitted that the applicable principles are, in summary, as follows:

    i) The court's power to set aside a default judgment pursuant to CPR 13.3 is discretionary.

ii) The burden rests upon the defendant to satisfy the court that there is good reason why a judgment regularly obtained should be set aside: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. Furthermore, depriving the claimant of a regular judgment which the claimant has validly obtained in accordance with CPR 12 is not something which the court will do lightly.

iii) In particular, CPR 13.3(2) gives added emphasis to the need for a defendant to show that it has acted "promptly" in seeking to set aside. More specifically:

a) "Promptly" in this context means "with alacrity" or "with all reasonable celerity in the circumstances": *Regency Rolls Ltd v Carnall* [2000] EWCA Civ 379.

b) Promptness will always be a factor of considerable significance and, if there has been a marked failure to make the application promptly, a court may well be justified in refusing relief, notwithstanding the possibility that the defendant may well succeed at trial: *Standard Bank plc v Agrinvest International Inc* [2010] EWCA Civ 1400 per Moore-Bick LJ at [22].

c) It follows that, by contrast with the test for summary judgment under CPR 24, under CPR 13.3 the merits of any proposed defence are just a factor which can be taken into account – and an unimportant or irrelevant factor where the failure to act promptly is particularly egregious.

d) Promptness is such an important factor because of the public interest in the finality of litigation, the need under the CPR to act expeditiously, and the requirement to have regard to the proper allocation of courts' resources: *Mullock v Price* [2009] EWCA Civ 1222, per Ward LJ at [28].

iv) As regards the time period in which applications have been deemed to be "prompt", the limit appears to be some way short of the 11 months that have elapsed in this case. Thus, 30 days has been deemed to be too long: *Khan v Edgbaston Holdings* [2007] EWHC 2444 (QB), per HHJ Coulson QC. It has been suggested that 59 days is "very much at the outer limit of what could possibly be acceptable": *Hart Investments v Fidler* [2006] EWHC 2857.

32. In broad terms, I accept this summary of the applicable principles, although I do not accept that there is some arbitrary time limit and, in my view, each case must ultimately turn on its own facts.

33. In addition, I should mention that it was common ground between the parties that the court should only make declarations in default where it can be sure that it is appropriate to grant that relief: see *Zamir & Woolf, The Declaratory Judgment*, 4th Ed. at para 7-27. On this basis, Ms Newman submitted that on their applications for judgment in default made without notice to Piedmont, the Banks were required to draw the court's attention to all matters which it was relevant for the court to take into account when considering whether the declarations should be made, including arguments available to Piedmont which it might have put before the court had those

applications been made on notice to it. In broad terms, I accept that submission subject to the qualifications that (i) any such requirement could only extend to those matters of which the Banks were aware or possibly ought reasonably to be aware; and (ii) any particular failure and any consequence of such failure would have to be weighed against the background of Piedmont's refusal to acknowledge service and to engage with the Declaratory Actions.

Failure to act promptly?

34. In my judgment, Piedmont has failed to act promptly in seeking to set aside the Cooke J Judgment and such delay is a very strong factor for dismissing the applications to set aside. In particular, I bear in mind the following.

35. The Claim Forms in the Declaratory Actions were served in January 2012 i.e. some 17 months ago. During most of this period, it is now plain that Piedmont took a deliberate decision to ignore these proceedings.

36. Ms Newman submitted that this was a reasonable decision to take firstly because that was the view of the report it had received from Avv Iaquinta; secondly because the advice from the Corte dei Conti (formalised in 2013) is that Italian local authorities faced with Piedmont's predicament should seek to exercise their self redress powers; and thirdly because it was wholly understandable that Piedmont should consider that Italy was the appropriate forum for the determination of the validity of the self-redress procedure, since the ability to exercise self-redress is a question of Italian Law – a point recognised by the fact that Banks themselves subsequently issued proceedings in Italy concerning the effectiveness of the self redress procedure and the validity of the Transactions.

37. I reject that submission. In my view, any defendant who deliberately ignores proceedings duly instituted in this court and properly served does so at its peril particularly where, as here, the parties have expressly agreed English law and jurisdiction to govern their relationship; and whatever merits might exist in the self redress process instituted by Piedmont in Italy provide no justification whatsoever for the decision by Piedmont effectively to ignore the Declaratory Actions. In the context of her submissions in relation to substantive matters, Ms Newman submitted that Piedmont is not a "sophisticated entity". Be that as it may, at least in this context, it cannot be suggested that Piedmont is at any particular relevant disadvantage. On the contrary, it is a major regional authority in Italy with full access to legal advice.

38. The Cooke J Judgment was delivered in July 2012 i.e. almost 12 months ago. As stated above, it is plain that Piedmont had notice of that Judgment and Orders at the latest by the end of September 2012 i.e. over 9 months ago. They were sent by fax and registered post to Piedmont in October 2012; and sealed copies of the Judgment and Orders were formally served by the end of January 2013 i.e. over 5 months ago.

39. The very recent evidence from Dott Rolando asserts that it was following the unfavourable decision in the Italian proceedings made on 21 December 2012 and notified to Piedmont in January 2013 that Piedmont decided to engage with the English proceedings. Ms Tolaney submitted that, contrary to that assertion, it seemed that it was rather the prospect of the Banks obtaining summary judgment on the claims advanced in the Money Actions that finally got Piedmont's attention; and that

Piedmont's decision not to issue its application to set aside the Cooke J Judgment until 28 June 2013 suggests that the overarching motivation is to avoid the Banks obtaining a money judgment (rather than simply declaratory relief) which, of course, can be enforced. These suggested tactical shenanigans were hotly disputed by Ms Newman. In particular, she submitted that the delay since January 2013 was not the result of any deliberate tactical ploy by Piedmont but rather due to Piedmont's own bureaucratic processes and a delay in finalising its instructions to solicitors in England. Be that as it may, it seems to me that even taking Dott Rolando's assertion at face value, the fact is that Piedmont took until 28 June 2013, i.e. at least 5 months, to issue the present applications to set aside the Cooke J Judgment. Even this delay is, in my view, wholly unacceptable in the circumstances of the present case.

40. In the meantime, and relying on the Cooke J Judgment which, in the absence of any appeal, was final and binding, it is, in my view, important to note that the Banks have continued to perform their obligations, including the payment of sums over to Piedmont pursuant to the Transactions. Against that background, as submitted by Ms Tolaney, it seems to me that the issuance by the Banks of the Money Actions and their applications for summary judgment in light of the continued failure by Piedmont either to make the payments due or to engage with litigation in England cannot properly be criticised. The suggestion made by Ms Newman that there would be "grave consequences" for it and its officers were the Cooke J Judgment not set aside is without foundation. No evidence has been adduced on this point and, in any event, it seems to me that such considerations would be of little, if any, assistance.

No real prospect of success and no other good reason?

41. As to the merits of any possible defence, the difficulty is that even now Piedmont has not served a defence even in draft form. In that context, the observation by Sedley LJ in *First Discount Ltd v Cranston* [2002] EWCA Civ 71 [29] is worth repeating and emphasising: "*A defendant who seeks to erect a defence which he has not so far pleaded has an elementary obligation to come to court with a draft pleading.*" Of course, the absence of a defence even in draft form is not necessarily fatal; but without such a document, it is difficult, if not impossible, for the court to focus on the real issues – if any. Moreover, not only is there no defence, the evidence relied upon by Ms Newman is, at best, sketchy in the extreme. Thus, the statement from Dott Rolando identifies "*a number of points of concern to the Regione, which <u>may</u> well feature in its Defences in due course*" (emphasis added) which he says "*outline*" Piedmont's position. As submitted by Ms Tolaney, it seems to me that this approach is not satisfactory. Indeed, in my view, it is a most unsatisfactory approach particularly where these stated points allegedly relate to matters prior to the execution of the Transaction Documents i.e. well over 7 years ago.

42. The particular alleged points of concern are identified by Dott Rolando in paragraphs 67.1-67.9 of his statement as follows:

> "*(1) The Regione had next to no experience of bond issues and no experience of derivatives at the time when it executed the Derivatives. It had previously issued one bond for a relatively small amount (almost 445 million euros), but there were no derivatives associated with that bond.*

(2) In contrast, the Banks had considerable expertise in derivatives. The Regione treated the Banks as its advisors concerning the Bonds and the Derivatives. The Banks had a close relationship with individuals at the Regione.

(3) The Regione understood that the Banks regarded it as their client, rather than as an arms length party to a commercial transaction. That was reflected in the resolution of the Giunta appointing Merrill Lynch and Dexia as the Regione's Ratings Advisors. That was also reflected, the Regione believes, in the way in which the Regione's personnel were entertained at the expense of the Banks when the transaction documents relating to the Bonds and the Derivatives came to be signed. The Regione does not know how the Banks treated the Regione internally, i.e. whether they treated it as a client or a counterparty.

(4) The Regione is seeking to investigate how it was that Merrill Lynch and Dexia came to be appointed to act as rating advisors to the Regione, and why they agreed to act in this role without payment. In this context the Regione is also seeking to investigate the close relationship between individuals at the Banks and members of the Regione's Giunta at the time, with a view to ascertaining the extent to which the Regione relied on the Banks as advisors in executing the Derivatives.

(5) The Regione relied on the Banks, and believes that the Banks knew that and were content for the Regione to do so. The Regione believes that disclaimers to the contrary included in documents prepared by the Banks did not reflect reality.

(6) The true costs of the Derivatives were not disclosed to the Regione, and raise questions as to whether the Banks breached fiduciary duties owed to the Regione or whether the Regione lacked capacity to enter into the Derivatives as a matter of Italian Law.

(7) The derivative contracts were inappropriately complex for the Regione's purposes, and no serious attempt was made to ensure the Regione understood them. The documents were signed in English, by an Italian speaker.

(8) The Regione could have sourced finance at comparable rates from local lenders specialising in loans to public authorities. It is unclear why it did not do so. Even if a bond was beneficial in some way, the derivative contracts associated with the bond issues were entirely unnecessary. Italian legal requirements provide that a local authority issuing a bond repayable as a "bullet" must either establish a sinking fund or enter into an amortising swap. It appears that there was no benefit to the Regione of entering into an amortising swap, and

> *that it would have been better served by a sinking fund. The Banks, however, represented that an amortising swap was not just desirable but obligatory.*
>
> *(9) The Derivatives, taken as a package, had a significant negative value. Adopting market rates from the time, the Regione ought to have received a premium in the region of €54 million in return for entering into them. It may well be the case that the Banks entered into linked derivative contracts hedging against the risks of the derivative contracts which they had entered into with the Regione, and received significant premiums for so doing. No disclosure has been given of this, or of any bonus payments arising out of the transactions."*

43. Whilst I fully recognise that, on this type of application, the court should not engage in a "mini-trial", it seems to me that these alleged "points of concern" are advanced in a most unsatisfactory way. In particular, much of what Dott Rolando states is based on vague assertions as to his "perception" which, in my view, is again highly unsatisfactory even ignoring the fact that such statement has been produced so late and the Banks have had no proper opportunity to respond.

44. Ms Newman also dealt with what she says are – or may be – the substantive issues in her skeleton. That is, of course, very helpful. However, as she frankly admitted, Piedmont is not in a position to serve a defence at the moment – even in draft form – in particular, because various investigations are still continuing. It is for that reason that she submitted that the present applications should be adjourned. Alternatively, she submitted that the court should set aside the Cooke J Judgment and impose a tight timetable for service of the defence.

Real prospect of success or some other good reason?

45. It is against this very unsatisfactory background that I turn to consider the various "issues" which Ms Newman submitted arise and which call for determination at trial.

Capacity

46. In summary, Ms Newman submitted that, although the Transactions are based on ISDA Master Agreements containing English law and English choice of jurisdiction clauses, Piedmont is an Italian public authority and its capacity to enter into the transactions is determined by Italian law. Thus, she submitted, that if, as a matter of Italian law, Piedmont could not validly enter into the transactions, then no binding contracts were formed between the Banks and Piedmont – the parallel situation which arose in England in *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1. In that context, Ms Newman submitted that there is what she described as *"a number of grounds for thinking"* that Piedmont did *not* have the capacity to enter into the transactions with the result that they are void. These grounds are, she submitted, those summarised in the report of Avv Iaquinta.

47. For present purposes, I am prepared to assume in favour of Piedmont that if the position were indeed that it had no capacity as a matter of Italian law to enter into these Transactions, there would at least be a strong argument that it was not bound by

them. However, the suggestion that there are or might be a "*number of grounds for thinking*" that Piedmont did not have the relevant capacity to enter into the transactions with the result that they are void seems to me to fall far short of the necessary threshold for setting aside a judgment in default.

48. Notwithstanding, Ms Newman submitted that the evidence and arguments in relation to lack of capacity were well-founded so as give rise (at least) to a defence on the merits having regard, in particular, to the fact that the derivatives entered into by Dexia and Intesa were separate from each other, and those entered into in respect of the 2013 transaction were separate from those entered into in respect of the 2036 transaction; that the existence, relationship to the bonds and analysis of the nature of each class of derivative, namely the cap, the floor, the amortising swap and the credit default swap, present different features, not adequately set out by Mr Kelly in his evidence; and that it follows that it is not the case that all must stand or fall together. Further, Ms Newman submitted that what was required was a comparison of each type of derivative with the general principles of Italian law cited or the authorisation given so as to compare each type of derivative with the authorising provisions of law, an exercise which, she submitted, was particularly important in respect of the collars and the credit default swaps.

49. I have no doubt that Ms Newman is right in her submission that the question of capacity must be considered in relation to the particular transaction in question and its specific features. However, it seems to me that even putting Piedmont's case at its highest, the effect of the evidence does not establish any sufficiently arguable case on lack of capacity. As submitted by Ms Tolaney, the points raised by both Avv Iaquinta and Dott Rolando centre on alleged inequalities of bargaining powers between the parties, alleged reliance on the Banks' judgment (and alleged representations) and an alleged failure by Piedmont to understand properly the terms of the Transactions. However, it does not seem to me that any of these points go to "capacity" as such but rather, as described by Cooke J in the course of the hearing last year, to *internal* management corporate powers (see p2/line36 of the transcript). In my view, that conclusion is also consistent with the RAC Judgment.

50. A further submission advanced by Ms Newman is that the court should be particularly ready to reopen a judgment in default granting declaratory relief where the existence of that judgment would pose issues for the comity between the law and courts of England and Italy (because the judgment contains declarations of the English Court that the Transactions are valid and binding), in circumstances where, as Piedmont submits, it may be the case that under Italian Law Piedmont in fact lacked capacity to enter into the Transactions. In principle, I accept that general submission on the basis either that such circumstances might constitute a "good reason" of itself to set aside the judgment or more broadly in relation to the exercise of the court's discretion. However, for the reasons set out above, I do not consider that the evidence and arguments advanced in relation to alleged lack of capacity are such as to justify the setting aside of the existing judgments in default even bearing in mind this further general submission.

Fiduciary Duties

51. In summary, Ms Newman submitted that the Banks occupied the status of "trusted advisors" and thus owed fiduciary duties to Piedmont. In support of that submission,

Ms Newman relied on various matters as to what is said to have been the Banks' alleged behaviour including a particular presentation made on 28 September 2006; the fact that Merrill Lynch and Dexia entered into a written contract in 2005 agreeing to act as "Ratings Advisors" to Piedmont in connection with the preparation for the Bonds, and the role played by the Banks as arrangers of the Bonds. On this basis, Ms Newman submitted that the Banks' fiduciary duties extended, at the very least, to making full disclosure of the "secret profits" made by the Banks and obtaining Piedmont's informed consent to them; and that there is no evidence of any such disclosure being made nor of any attempt to obtain Piedmont's consent to the profits being made by the Banks. In addition, Ms Newman submitted that there is evidence that the banks advised Piedmont (incorrectly) that as a matter of Italian law it had no option but to enter into the Transactions if it wished to issue the Bonds; and that this raises further issues as to whether Piedmont executed the Transactions as a result of misrepresentation or undue influence exercised over it by the Banks. In consequence, Ms Newman submitted that the Transactions, if they are not void for reasons of capacity, are (at least) voidable; and in any event that Piedmont has a valuable and substantial counterclaim against Piedmont for equitable compensation for breach of fiduciary duty or damages for misrepresentation.

52. I do not accept these submissions. First, in my view, there is no proper evidence before the court to support the submission that the Banks undertook the role of "fiduciaries" in relation, at least, to the Transactions. Further, although not necessarily determinative, the fact that these Transactions involved the parties acting as principals in relation to the rights and obligations undertaken thereunder points strongly against the Banks undertaking such a role. Ms Newman submitted that, on the assumption that the Banks were fiduciaries, it is no answer for the Banks to assert a contractual estoppel of the kind analysed in *JP Morgan v Springwell* [2008] EWHC 1186 (Comm) and, in the Court of Appeal, *Springwell v JP Morgan* [2010] EWCA Civ 1221 ("*Springwell*"). In particular, she submitted that it cannot be open to a fiduciary to assert such an estoppel against its principal; or, put another way, it cannot be unconscionable for a client who reposes faith in the advice of its fiduciary to resile from representations made by it in transaction documents. In that context, Ms Newman relied, in particular, on *Armitage v Nurse* [1998] Ch 241 and the passage in *Snell's Equity,* 32nd Edition, paras 7.014, 7.015. Ms Tolaney submitted that this was not so, relying upon the decision of Hamblen J. in *Standard Chartered v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) in particular at paras 532-533. In the event, it is unnecessary to resolve this dispute.

53. Second, the suggestion that the Transactions were entered into as a result of some kind of oral misrepresentation by the Banks is based on paragraph 19 of the recent statement from Dott Rolando where he says that at one meeting which he attended, a manager from Merrill Lynch called Antonio Miele stated that the Banks were not prepared to go ahead with issuing the Bonds unless they provided for a "*bullet repayment*"; and that "*… the Banks were also saying that in addition to a bullet bond it was obligatory for the Regione to enter into an amortizing swap …*". In essence, Ms Newman submitted that this was a misrepresentation because, as a matter of Italian law, there was no obligation on Piedmont to enter an amoritizing swap. However, on its face, I do not read this evidence as suggesting that the Banks were in effect representing what Piedmont were obliged to do as a matter of Italian law (which seems to me inherently unlikely in any event) but rather stating the Bank's own

position as to what they were or were not prepared to do – although Ms Newman informed me that her understanding on instructions at least was the former not the latter. In any event, it seems to me that such alleged oral representation carries no real weight. As Ms Newman accepted, this is apparently the first time that this oral misrepresentation has been alleged; there is no contemporaneous material to support it; and there is no evidence of any reliance upon it. In any event, it seems to me that, in this context at least, the Banks are plainly entitled to rely upon the *Springwell* principle. Cooke J specifically considered this general point in paragraph 16 of his Judgment as follows:

> "*There is clear law to the effect that representations such as those made by Piedmont in the Master Agreement give rise to a contractual estoppel which prevents the representor from setting up in later proceedings a different version of the facts from those represented. The court is therefore entirely satisfied that when Piedmont entered into this transaction and made those representations it not only knew what it was doing, being a sophisticated entity, but is bound by the terms of what it represented and by the terms of the documents which it executed and for which approval was given by resolution at the time*."

54. I respectfully agree. However, Ms Newman submitted that this analysis is flawed for a number of reasons including the fact that, contrary to what Cooke J stated, Piedmont is not a "sophisticated entity". I do not accept that submission. Although I am prepared for present purposes to accept in Piedmont's favour that it had no previous experience of the particular type or nature of the present Transactions, I do not accept that it is not a sophisticated entity. It is, after all, a major regional authority and certainly had access to lawyers. In addition, as submitted by Ms Tolaney, it is noteworthy that the Transactions obliged Piedmont to deliver certain documents including an Opinion of Counsel substantially in a stipulated form confirming that the Transactions constituted legal, valid and binding obligations of Piedmont – which I assume was done and Ms Newman certainly did not suggest otherwise. Further, as submitted by Ms Tolaney, Piedmont's central suggestion that the representations do not reflect the underlying reality misses the point. As Cooke J made clear, the effect of a contractual estoppel such as this is to preclude Piedmont from even making that assertion. Again (absent fraud which is not alleged), I respectfully agree.

Secret Profits

55. In essence, Ms Newman submitted that when the various elements of the Transactions are looked at separately and their value analysed as at the date of execution, the Transactions had a very substantial negative overall cost to Piedmont, such that properly advised Piedmont either could not have entered into the Transactions at all (having no power to do so under Italian law), or should not have entered into them save in return for a very substantial premium of €54,382,796 from the Banks. This submission is based primarily on the evidence of Avv Iaquinta. As recognised by Ms Newman, the valuation of the Transactions is not straightforward. However, the suggestion that the Transactions generated "secret profits" for the Banks or otherwise involved "hidden costs" is, in my view, without any proper basis. Although I do not fully understand the calculations contained in the report by Avv Iaquinta, it seems to

me that, on their face, the calculations have been performed by reference to the terms of the Transactions themselves. Even on the assumption that these gave rise to a very substantial negative value as at the date of execution, it does not seem to me necessarily to follow that these constituted "hidden costs" to Piedmont or "secret profits" to the Banks. In order to get this argument off the ground, it seems to me that it would be necessary to consider the entire package including the risks involved both for the Banks and Piedmont going forward over the life of the Transactions; and there is no independent evidence to support the conclusion that properly advised, Piedmont could not have entered into the Transactions at all or should not have entered them save for a very substantial premium. In any event, this part of Piedmont's case depends at least in part on the premise that the Banks stood in the position of fiduciaries and that the Banks were in breach of their fiduciary duty which, on the evidence submitted, I do not accept for the reasons stated above. I should make plain that the position would be otherwise if it could be said that the Banks had acted fraudulently; but Ms Newman expressly disavowed any such suggestion.

Misselling

56. Under this head, Ms Newman relied upon the evidence of Dott Rolando that a representative of one of the Banks told Piedmont that it was obligatory for Piedmont to enter into an amortizing swap if it wished to issue the Bonds; and that such representation was simply wrong. I have already dealt with this allegation above; and, in my view, it does not assist Piedmont for the reasons already stated. In addition, under this head, Ms Newman advanced a broader case alleging that the Transactions had been "missold" to Piedmont as summarised in paragraphs 90-98 of her skeleton. However, the basis of this allegation was vague and obscure. In effect, the case advanced involved an amalgam of other parts of her submissions including allegations that Piedmont was under no obligation to enter into an amortizing swap; that Piedmont could simply have created a sinking fund at no cost to Piedmont and without the risks associated with the Transactions; that it is *"difficult to see"* what benefits the Transactions could have provided to Piedmont certainly when contrasted with the cost free and less risky alternatives of a sinking fund; that even leaving aside the secret profits, the Banks generated substantial fees as a result of Piedmont entering into the Transactions; and that, at the very least, Piedmont has a substantial counterclaim for damages. I have already dealt with most of these points; but to the extent that they go beyond what I have already addressed, I do not consider that they provide Piedmont with any defence which has any real prospect of success.

Not a qualified investor

57. Under this head, Ms Newman submitted that the Transactions were only suitable for a "qualified investor". In that context, she produced in the course of her oral submissions, a copy of Article 31.2 of the CONSOB Regulation No. 11522 of 1 July 2008 as amended. Further, Ms Newman submitted that no evidence was placed before the court on the applications for judgment in default addressing the question of whether Piedmont was in fact a qualified investor for these purposes; that the court was simply invited to proceed on the basis of contractual provisions drafted by the Banks representing that this was the case; and that in fact the evidence is that Piedmont had no experience of derivatives, and far from being a qualified investor negotiating on an equal footing with the Banks, it relied on the Banks for advice concerning the Transactions.

58. On this basis, Ms Newman submitted that should this matter proceed to trial, Piedmont anticipates calling evidence from its former Head of Finance, Dr Lesca, to the effect that he was told by a representative of the Banks not to worry about this requirement, since by entering into the Transactions, Piedmont would automatically become a "qualified investor". However, she submitted that is, on its face, an absurd argument: if the term "qualified investor" is to have any meaning or purpose, it must be a pre-condition to entry into a derivative contract that one is such an investor.

59. As to these submissions, it is again unsatisfactory that there was no proper evidence served by Piedmont; nor any properly formulated defence signed with a statement of truth nor even a draft defence setting out Piedmont's case. In particular, there was no evidence from Dr Lesca with regard to the matters referred to by Ms Newman; and it seems to me inadequate on an application of this kind to seek to rely upon what is said to be evidence which Piedmont "anticipates" calling – particularly where the relevant events are said to have occurred so long ago and having regard to the delays referred to above.

60. As to the substantive issue raised by Ms Newman, it is correct that the Banks obtained a declaration in default to the effect that Piedmont was, in effect, a "qualified investor" within Article 31.2 of the CONSOB Regulation in accordance with the representation contained in Part 4(4)(B)(c) of the Confirmation dated 26 March 2007 and 2 May 2007. Absent any positive evidence to the contrary, I am not persuaded that Piedmont does not fall within the scope of that Article. For example, Article 31.2 includes *"…entities that issue financial instruments traded in regulated markets…"* and it seems to me at least possible that the Transactions are of such kind – although I accept that that is entirely speculative. In any event, in accordance with *Springwell*, I see no reason why the relevant terms of the Transactions do not give rise to a contractual estoppel as between the Banks and Piedmont.

Conclusion with regard to applications to set aside Cooke J Judgment

61. In my view, the delay in making the present applications to set aside the Cooke J Judgment is, of itself, sufficient to justify their dismissal. However, in any event, I am not persuaded that Piedmont has any real prospect of success; nor am I persuaded that there is any other good reason for setting aside the Cooke J Judgment.

62. Under this general head, I should mention that Ms Newman raised a number of specific points with regard to the wording of the declarations granted by Cooke J. However, in my judgment, these points are of no real substance.

63. It follows that it is my conclusion that Piedmont's applications to set aside the Cooke J Judgment should be dismissed.

Summary Judgment

64. Given my conclusion that the applications to set aside should be dismissed, I can deal with the applications for summary judgment quite shortly. In essence, there are two main points which arise.

65. First, as to quantum, Ms Newman submitted that Piedmont wishes to obtain technical financial advice as to the calculation of the sums said to be owing under the

Transactions. In that context, she submitted that, at least at the time of serving her skeleton argument, the Banks had failed to serve on Piedmont the affidavit of Mr Kelly explaining how the sums are claimed in the Money Actions. In my view, this expressed wish provides no sound basis for refusing to grant summary judgment. The figures which form the basis of the Money Actions were set out in the Particulars of Claim which were signed with a statement of truth and served as long ago as 25 March 2013 i.e. almost 5 months ago. If Piedmont wished to challenge those figures, they have had ample – indeed more than ample – time to do so.

66. Second, Ms Newman submitted that Piedmont has counterclaims against the Banks which it would wish to pursue and which, submitted Ms Newman, may mean that properly analysed it is the Banks who owe monies to Piedmont. Further, even if the judgments in default were not set aside, Ms Newman submitted that Piedmont would wish to have the question of whether those counterclaims (or some of them) were *res judicata* determined on the basis of full pleadings. In that context, she submitted that it is well established that a court will be reluctant to hold that issues are *res judicata* where they have been the subject merely of a judgment in default, and will only make such a finding where those matters have been determined *"necessarily and with complete precision"*; *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 at 1012. It seems to me that these points might have had some value if I had come to the conclusion that the suggested underlying claims had any sufficient merit or cogency; but, for the reasons already stated, it is my conclusion that this is not the case.

67. It follows, in my judgment, that the Banks are entitled to summary judgment in the amounts claimed plus interest.

68. Accordingly, Counsel are requested to seek to agree an order reflecting this Judgment and any consequential matters (including costs) failing which I will deal with any outstanding issues. In the meantime, absent agreement, I confirm that the determination of any consequential matters, including any question of the grant of permission to appeal, is adjourned until a further hearing; and I extend the period for filing any appellant's notice until 21 days after that hearing takes place with liberty to apply for a further extension.