Daniel John Brader and others *v* Commerzbank AG
[2013] SGHC 284

Case Number : Suit No 486 of 2011

Decision Date : 07 January 2014

Tribunal/Court : High Court

Coram : Lionel Yee JC

Counsel Name(s) : Kenneth Tan SC and Soh Wei Chi (Kenneth Tan Partnership) for the plaintiffs; Lee Eng Beng SC, Lai Yew Fei and Alec Tan (Rajah & Tann LLP) for the defendant.

Parties : Daniel John Brader and others — Commerzbank AG

Contract

7 January 2014 Judgment reserved.

Lionel Yee JC:

1 Are there circumstances in which an employee can have a legally enforceable right to a bonus? That was the question that arose for decision in this case. The Plaintiffs' former employer had promised its employees that they would be paid bonuses from a pool of funds that had been specifically set aside for that purpose. The bonus that was eventually paid out did not accord with that promise, and the Plaintiffs brought this action seeking to enforce it.

The Facts

The Parties

2 Dresdner Bank AG ("Dresdner Bank") was at all material times a bank incorporated in Germany. It had a Singapore branch ("DB Singapore") and a global investment banking division, which was not a separate legal entity, known as Dresdner Kleinwort or DKIB. The Plaintiffs are 10 employees who formerly worked in DB Singapore and within DKIB. Dresdner Bank was originally a wholly owned subsidiary of Allianz SE ("Allianz"). However, it was sold and became a wholly owned subsidiary of the Defendant, Commerzbank AG ("Commerzbank"), from 12 January 2009. By operation of German law, all the assets and liabilities of Dresdner Bank passed to Commerzbank. It is for that reason that Commerzbank is the named Defendant in this suit.

The Witnesses

3 All of the Plaintiffs gave evidence in court. In addition, they relied heavily on the evidence of Dr Stefan Jentzsch, who was formerly a member of the Management Board of Dresdner Bank ("the Management Board") and the Chief Executive Officer ("CEO") of DKIB.

4 The Defendant in turn put forward four witnesses:

(a) Michael Paul Reuther, a member of the Commerzbank's Board who took over as CEO of DKIB from 12 January 2009;

(b) Joerg Hessenmueller, formerly the Global Head of Financial Control of DKIB and the Head of the Finance Department of the Investment Banking Division of the Commerzbank Group from 12 January 2009;

(c) Helmut Merkel, General Counsel for Dresdner Bank until May 2009; and

(d) Lee Lay Hoon, an employee of DB Singapore working in the Human Resources ("HR") Department.

Background

The payment of discretionary bonuses by DKIB

5 Before going into the material events, it is useful to set out the usual process by which DKIB issued discretionary bonuses for context. The 1st to 9th Plaintiffs' respective employment contracts stated that, "The Bank pays a Performance Variable Bonus at its discretion." [note: 1] The 10th Plaintiff's employment contract stated, "As you are aware, the Bank makes discretionary bonus awards and you will be eligible for consideration in early 2009 and annually thereafter." [note: 2] All of the Plaintiffs' employment contracts provided that the terms of their employment would be governed by the terms and conditions in the prevailing Employee Handbook. [note: 3] The Employee Handbook included the following clause: [note: 4]

> **Variable Bonus**
>
> The Bank has a performance variable bonus plan to award bonuses to deserving employees at the end of each financial year. The bonuses are granted at the Bank's sole discretion and are subject to the Bank's financial performance and the individual's performance for the financial year. Bonus payment is usually made within the first quarter of the following year.

6 Accruals were made for a bonus pool in Dresdner Bank's accounts on a monthly basis from the start of the financial year. [note: 5] The amount accrued could be increased or decreased during the year and the final bonus pool could be a different amount from the sum of the 12 months' accrual. [note: 6] The fact that accruals for bonuses were made on a monthly basis in the accounts did not mean that there was a segregated pool of money set aside in a special account for bonus payments as these accruals were merely book entries. [note: 7] However, the bonus accruals would be communicated to staff members throughout the year, and they would therefore be aware of fluctuations in the bonus pool. [note: 8]

7 The CEO of DKIB would negotiate an overall bonus pool with the CEO of Dresdner Bank. These negotiations would be influenced by a parallel process between the CEO of DKIB and his direct subordinates as to how much of a bonus pool they were requesting for their respective divisions. A similar process would be repeated down the hierarchy, ending with that between line managers and the individuals in their teams. These figures would be added up and communicated up the line to the CEO's direct subordinates, who would then lobby the CEO for their division's share of the overall bonus pool. [note: 9] Once the overall bonus pool was approved by the CEO of Dresdner Bank, the CEO of DKIB would then decide how to allocate that pool among his direct subordinates, with the process again repeated down the line. [note: 10]

8 Even after the overall bonus pool had been decided and approved for DKIB and a pool had been allocated to each of the divisions, the CEO of DKIB could still reallocate the pool among the divisions if he wished to do so. This was to accommodate uncertainties in any of the businesses and the economy. Further, a contingent amount of about 3-5% of the overall pool was usually kept so that the CEO of DKIB could deal with *ad hoc* requests for bonuses without having to reallocate money among the divisions. If no such contingencies materialised, the unused amount would be retained by Dresdner Bank. [note: 11] During the time that Dr Jentzsch was the CEO of DKIB, the final bonus pool was usually decided in November or December and the day on which the bonus awarded to individual employees was made known to them (known colloquially as "Letter Day") was in December. [note: 12]

The material facts

9 I now turn to the background of these proceedings. I will set out as much of the facts as are necessary to enable the parties' cases to be understood. However, the details will be canvassed more extensively together with the discussion of the issues that arise for decision below.

10 In March 2008, Michael Diekmann, the Chairman of the Dresdner Bank Supervisory Board ("the Supervisory Board") and the CEO of Allianz announced to the Supervisory Board that Allianz had decided to separate Dresdner Bank's investment banking and commercial banking businesses as a prelude to exiting the investment banking business, either by selling DKIB, dramatically reducing the size of DKIB's operations, or by winding DKIB down. This decision was subsequently made public. [note: 13] The Plaintiffs asserted that the employees of DKIB feared for the future of their careers at DKIB as new owners were not likely to retain existing personnel and there would be no work for them if DKIB were to be wound down. [note: 14] In his AEIC, Dr Jentzsch explained that employees were becoming increasingly restless in April and May 2008 given the uncertainty over their future and expected lay-offs, with morale and motivation deteriorating rapidly. [note: 15] On 16 May 2008, he received an email from Eddie Listorti, the Head of Fixed Income Currency and Commodities ("FICC"), which listed 10 individuals who had resigned and a further four who had resigned but who had been persuaded subsequently to stay. [note: 16] It also named the individuals in the foreign exchange options trading, interest rates and sales teams who were at risk of leaving DKIB. Eddie Listorti proposed the following solution:

> I strongly believe we need to stop the interviewing [between employees and prospective employers] and talent drain and keep staff focused on performance… The most obvious solution is securing a bonus pool at FICC Sales & Trading level, conditional on achieving a target (which is actually higher than the budget and higher than last year's revenues/residual income). This way it encourages staff to focus on producing and getting paid on production.

11 Dr Jentzsch in turn raised these concerns with Mr Diekmann, Dr Helmut Perlet (Chief Financial Officer ("CFO") of Allianz), Dr Herbert Walter, Wulf Meier and Klaus Rosenfeld (who were the CEO, Head of Human Resources and CFO of Dresdner Bank respectively). In an email dated 16 May 2008, he said: [note: 17]

> As I have already informed you in the past two weeks, there has been a growing wave of notices of termination, in particular in the Fixed Income, Currencies & Commodities Division, in all three areas (Trading, Sales and Quantitative Analysis/Modelling). Employees are moving either individually or in teams, above all to Goldman Sachs, Citigroup and Unicredit/HVB, lastly involving four out of the five employees of the Analysis Team. Furthermore, we know that a majority of the employees are going for interviews with competitors and a substantial number of employees have

requested a meeting under the key word "Resignation".

In the event of further notices of termination, *we will shortly no longer be in the position to manage the risks in the various accounts, let alone achieve trading revenues*. …

I am very aware that you have issued the "No Retention" motto. Strict adherence to this guideline, however, will lead to the *collapse of this business in just a few weeks* and it will be extremely difficult for us to reconstruct this. I don't need to point out the consequences on the current sales efforts, at least as far as evaluation issues are concerned.

…

In order to at least have a chance to prevent the threatening (employee) migrations, I would like to promise FICC on the whole, that for example, if they achieve revenues of €780 million, €40 million more than laid down in the budget, and €90 million more compared to last year's earnings, the bonus fund for FICC will amount to at least €110 million. By comparison: the bonus fund for FICC last year amounted to €102 million for revenues totalling €690 million. This will give the Employees at FICC the certainty of receiving an acceptable bonus at the end of the year if objectives are reached and will give us the flexibility of allocating individual bonuses based on performance and also of allocating less on the whole, if the target of €740 is not reached.

[emphasis added]

12 In July 2008, Dr Jentzsch was asked for an explanation for DKIB's poor performance in the second quarter of the year. One of the issues he cited was: [note: 18]

Morale is generally low given the prolonged speculation about DKIB's future, causing employees to spend more time with lawyers, headhunters and colleagues than clients. The effect is not quantifiable but deemed to be significant.

13 These were not merely internal concerns: the events at DKIB had attracted the attention of the Financial Services Authority ("FSA") in the United Kingdom. On 23 May 2008, the FSA wrote to Dr Jentzsch to notify him of its decision to place DKIB's UK-regulated entities on the FSA's Firm Watchlist, which was one step short of having its banking licence revoked. [note: 19] The FSA raised concerns about the planned restructuring of Dresdner Bank and the destabilising effect this had. It noted the "continuing uncertainty among management and staff could lead to a significant number of key individuals leaving or becoming disaffected, which may pose a heightened risk to [DKIB] where management acknowledge that resources are already stretched within support functions". The FSA said that it would consider removing DKIB from the Firm Watchlist when, among other things, an "assessment of the key risks to the UK operations has been completed, including the risk of the loss of key staff and the mitigation plans [DKIB] has in place". DKIB was required to provide the FSA with its plan to address these issues by the end of June 2008. Dr Jentzsch replied on 30 June 2008. He said: [note: 20]

With three months past since Allianz announced its intention to restructure Dresdner Bank and to seek new owners in particular for the investment banking business but aside from abundant press speculation no clarity about the future direction on ownership, structure and business model, the risk of defections has risen considerably. A retention program is therefore being discussed internally as well as with Allianz, and we expect its terms to be finalised shortly.

14 Dr Jentzsch explained that it was a broadly shared view among the senior executives of

Dresdner Bank and Allianz that the best way to keep employees from leaving the bank and keep them motivated to do the best job possible despite the fact that they had limited career prospects left at the bank was to provide them with a financial incentive. [note: 21] He therefore formulated a retention plan and cleared this with the Compensation Committees of Dresdner Bank and Allianz as well as the Management Board. [note: 22] He also informed key members of the senior management in Allianz and Dresdner Bank that he would formally announce the plan to DKIB employees at a Business Update (also known as a Town Hall Meeting) on 18 August 2008. By way of background, Business Updates were monthly meetings during which Dr Jentzsch would inform employees about DKIB's business and major decisions taken. [note: 23] They would usually be held in London or Frankfurt, with a live screening at the other location as well as in New York City. Employees watching the Business Update at any one of these locations could ask questions in real-time. In addition, Business Updates were broadcast on DKIB's intranet to allow any employee, including those in Singapore, to listen in. Such employees could send questions via email to a dedicated email address, and the questions would be read to Dr Jentzsch by a member of the Internal Communications Department. Employees were encouraged to attend Business Updates and they were publicised in advance by email and pop-up reminders on computer screens in the week leading up to the meeting.

15 As planned, Dr Jentzsch announced the retention plan to DKIB's employees at the Business Update on 18 August 2008 ("the 18 August Announcement"). The precise content and the correct understanding of his announcement were disputed by the parties and will be addressed below at [29]–[61]. However, it was not disputed that statements to the following effect were made: [note: 24]

(a) there would be a minimum bonus pool of €400 million for 2008;

(b) this represented a reduction of approximately 25% from the bonus pool in 2007;

(c) there was potential for the size of the pool to be increased if certain targets were exceeded; and

(d) the announcement did not give rise to individual guarantees and the pool would be allocated on a discretionary basis by reference to individual performance.

16 Subsequently, further statements were made by Dr Jentzsch in later Business Updates and by the HR Department of DKIB in intranet postings that were consistent with the 18 August Announcement (see [40]–[42] and [99] below). Dr Jentzsch also initiated what he termed an "information cascade", directing employees in supervisory roles to ensure that their subordinates understood the 18 August Announcement and to reiterate that a minimum bonus pool had been set aside. He explained that the minimum bonus pool was unique and that he wanted to ensure that his announcement was "emphasized, understood and relied upon by everyone", so that the bonus pool's purpose of stabilising DKIB could be achieved. [note: 25] In the meantime, it was announced that the whole of Dresdner Bank would be sold to the Defendant by 1 January 2009. [note: 26]

17 On 21 October 2008, Mark Hindle, DKIB's Head of HR announced via email that Letter Day would be 19 December 2008 and that the bonuses announced would be paid in full with January salaries through the January payroll. [note: 27] Reference was also made to the bonus pool and the employees were reminded that individual bonus awards continued to be discretionary and determined by the relevant management.

18 On 19 December 2008, a letter was sent to all DKIB employees who were eligible to be

considered for discretionary bonuses, including the Plaintiffs ("the 19 December Letter"). This stated: [note: 28]

> Dear [employee],
>
> A discretionary bonus for 2008 under the arrangements given below has been provisionally awarded at
>
> EUR [amount] (gross)
>
> *The provisional bonus award stated above is subject to review in the event that additional material deviations in [DKIB's] revenue and earnings, as against the forecast for the months of November and December 2008, are identified during preparation of the annual financial statements for 2008 i.e. that [DKIB's] earnings position does not deteriorate materially in this period. This will be reviewed in January 2009 by Stefan Jentzsch. In the event that such additional material deviations are identified, the Company reserves the right to review the provisional award and, if necessary, to reduce the provisional award.*
>
> Bonuses are awarded subject to statutory withholding deductions as required by law.
>
> You will receive a detailed statement confirming your final bonus award in local currency in February 2009. This will be paid together with your salary in the February 2009 payroll.
>
> [emphasis added]

19 The parties referred to the italicised paragraph as the material adverse change ("MAC") clause. The inclusion of the MAC clause came as a surprise to the Plaintiffs and other DKIB employees as they had been expecting a final, rather than provisional, bonus award. [note: 29] On the same day, Dr Jentzsch explained the import of the MAC clause at a Business Update: [note: 30]

> … there's one deviation from the commitments that we've made before, and while the total bonus pool for [DKIB] has been kept at 400 million, the letters distributed today are not telling you what your bonus number will definitely be but what you can expect it to be, subject to the review of the financial performance by DKIB for the full year. A sentence has been added in the letters stating that the final calculation of the bonus numbers will be provisional upon no material deterioration in [DKIB's] financial performance for 2008 from that currently forecasted. …
>
> … as the letters say, the final review will be done by me or under my leadership in January 2009…
>
> … while the determination of the individual bonus number is a fully discretionary process, as you know, the calculation of any adjustment would have to be based upon a demonstrably material deterioration in [DKIB's] financial performance in 2008 from that as currently forecasted. In addition, any change in the individual award would have to take into account not only the deterioration but all the other factors determining individual compensation.

20 On 18 February 2009, Martin Blessing and Eric Strutz, the CEO and CFO of the Defendant respectively, sent an email to all Dresdner Bank employees noting the difficulties faced by both the Defendant and Dresdner Bank over the past year and announcing that no bonuses would be paid for 2008. [note: 31] This was followed shortly after by an email from Mr Reuther to all DKIB employees announcing that the provisional bonus awards issued on 19 December 2008 would be reduced by 90%

pro rata. [note: 32]

The Parties' Cases

21 The Plaintiffs brought this action seeking either the balance 90% of the bonuses declared in the 19 December Letter or, alternatively, damages. They also asked for interest on the aforementioned sums and for costs to be awarded to them. [note: 33] The Plaintiffs' brought their claim on three bases.

22 First, the Plaintiffs contended that Dr Jentzsch and other senior employees of the Defendant had made contractually binding promises between August 2008 and January 2009 that there was in existence a bonus pool with a guaranteed minimum of €400 million that would be paid out regardless of DKIB's financial performance. The Defendant was obliged to pay the Plaintiffs their bonus as declared in the 19 December Letter, and its failure to do so was a breach of its contractually binding promises to the Plaintiffs. [note: 34] In contrast, the Defendant asserted that none of the statements relied upon by the Plaintiffs were intended, or could reasonably be taken as intended, to create legal relations. [note: 35] Moreover, even if any of these statements constituted an offer capable of acceptance, the Defendant denied that there was acceptance, consideration or sufficient certainty to give rise to contractual rights. Further, the Defendant asserted that the 18 August Announcement stipulated that the minimum bonus pool of €400 million was conditional upon DKIB achieving revenues of €2,327.5 million in 2008. [note: 36] DKIB did not achieve revenues of €2,327.5 million in 2008.

23 Second, the Plaintiffs contended that the Defendant's failure to pay their 2008 bonuses in full in accordance with its promises to them was perverse, arbitrary, capricious or inequitable. [note: 37] Alternatively, they contend that it was a breach of the Defendant's implied duty to behave in a way that preserved the trust and confidence that an employee should have in his employer. [note: 38] As will be seen below, the Plaintiffs' emphasis was on the latter allegation, with the former receiving little attention in the submissions. The Defendant responded by noting that it and Dresdner Bank had acted reasonably and with proper cause in the light of the difficulties and losses they were facing at the time, which were communicated to the employees in Martin Blessing and Eric Strutz's email of 18 February 2009. [note: 39]

24 Third, the Plaintiffs contended that Dresdner Bank was bound by the MAC clause. As the requirements of the clause for altering the quantum of the provisional bonuses were not met, the Defendant was in breach in rescinding the declared bonuses. [note: 40] The Defendant denied that the 19 December Letter or the MAC clause gave rise to any legally enforceable obligations. [note: 41] In any event, the Defendant said that the MAC clause was complied with. [note: 42] The Defendant accordingly denied that the Plaintiffs were entitled to any compensation.

My Decision

25 I will address each of the Plaintiffs' causes of action in turn. As an aside, I note that similar proceedings have been initiated against the Defendant by its former employees over the same subject matter in various other jurisdictions. Most pertinently, one such set of proceedings was heard before the High Court of England and Wales (*Attrill & Others v Dresdner Kleinwort Limited & Another* [2012] EWHC 1189 (QB) ("*Attrill (HC)*")) and the Court of Appeal (*Dresdner Kleinwort Limited & Another v Richard Attrill & Ors* [2013] EWCA Civ 394 ("*Attrill (CA)*")) (collectively, "the UK proceedings"). The claims advanced by the employees in those proceedings having been upheld. Mr Kenneth Tan SC, the

Plaintiffs' counsel, referred to the findings made in the English courts to buttress his arguments. However, the evidence before me was not identical to that raised elsewhere and Singapore law is solely a matter for our courts to decide. It was with that in mind that I heard such submissions.

The contractual effect of the 18 August Announcement and subsequent communications

26 The Plaintiffs' first argument was that their pre-existing contractual right to a discretionary bonus was augmented by the 18 August Announcement alone or in combination with the other statements made by DKIB after 18 August 2008. In this regard, their argument took two alternative forms. The first was that the 18 August Announcement was a unilateral but binding variation by Dresdner Bank of their terms of employment pursuant to the following clause in their Employee Handbook: [note: 43]

> **Variation of Terms and Conditions**
>
> The terms and conditions of this handbook may be amended at any time and from time to time, at the Bank's sole discretion.

27 However, I am not persuaded that this applies to the current facts. Without expressing a view on the precise contours of this clause, I note that it is unlikely to extend to such weighty matters as remuneration, having regard to the fact that it vests great discretion in Dresdner Bank and variations pursuant to this clause could be to the detriment as much as they could be to the benefit of employees. In my view, that clause is more likely to apply to routine matters of administration, with which the Employee Handbook is largely concerned. While a similar argument premised on a variation clause contained in the UK employee handbook found favour before the English courts, the provisions of that variation clause were not identical to that in the present case and it is unclear if the considerations I have articulated were fully canvassed before the English courts. This is yet another reason why the analysis in the decisions rendered there does not necessarily have a bearing on the case before me.

28 The second form of the Plaintiffs' argument, which I will consider in detail, was that the 18 August Announcement gave rise to a separate contract between themselves and Dresdner Bank. In contrast, the Defendant's case was that the 18 August Announcement communicated merely a management decision by the Dresdner Bank Board which could be reviewed or revised as circumstances required. It did not vary the Plaintiffs' contracts of employment or constitute a separate contract between the Defendant and the Plaintiffs. The Defendant denied that any of the elements necessary for a valid contract to arise existed. Accordingly, I will consider each of these elements in turn to determine whether the Plaintiffs have proven the existence of a valid contract arising from the 18 August Announcement. However, before addressing those issues, it is first necessary to ascertain what was said by Dr Jentzsch.

The contents of the 18 August Announcement

29 No recording or written transcript of Dr Jenzsch's 18 August Announcement was kept. This was DKIB's usual practice, as commercially sensitive information was often shared during Business Updates. [note: 44] The parties relied on several pieces of contemporaneous evidence:

(a) an email sent by Dr Jentzsch on 11 August 2008 setting out what he planned to say on 18 August 2008;

(b) slides used at a presentation during a meeting of the Management Board on 12 August

2008;

(c) minutes taken at the meeting on 12 August 2008; and

(d) brief handwritten notes taken by one Louise Beeson and one Emma Bryant at the Business Update itself.

30 The email on 11 August 2008 was addressed to Mr Diekmann, Dr Perlet, Dr Walter and Mr Rosenfeld. It read: [note: 45]

> Parallel to the publication of the half year figures, I would like to announce the agreement on the minimum bonus pool. It is my suggestion that (i) we formally decide on the granting of a minimum pool as well as the incentive pool with the Board of Dresdner Bank tomorrow and keep a record as discussed in PSD and (ii) that I only announce this decision within the framework of my next Business Update on 8/18. I would notify the members of ExCo shortly beforehand, so that they can put a positive spin on this decision through the information cascade after the Business Update. I would keep the information in the Business Update concise and present it in the following way:
>
> > "The Firm's and Allianz senior leadership have recognized the importance of providing certain financial assurances to the employees [of] Dresdner Kleinwort in these times of continued speculation over Dresdner Kleinwort's future. As a result it was decided that the minimum bonus pool payable to Dresdner Kleinwort employees will be € 400 million. This number is approx. 25% lower than the like-for-like bonus pool was in 2007, which in my view is a very generous gesture compared to both the performance of the business and the accrual rate of our competitors.
> >
> > Please note that this is not an individual guarantee and that the allocation of the pool to individuals is still discretionary and will be done according to individual performance.
> >
> > In addition we have agreed that there will be an incentive pool available to Dresdner Kleinwort employees. A baseline revenue number of € 2,327.5 million has been established which in effect is the sum of the revenue budgets of those businesses not affected by [the] subprime crises. Of any Euro of additional revenues over and above that baseline 40 Cents will be added to the revenue pool.
> >
> > The "Incentive Pool" however is subject to strict adherence to our risk guidelines. We will not tolerate any deviation from our target of significantly improving our risk-return-profile and our client franchise. The fact that we pegged the Incentive Pool to revenues instead of residual income is solely in order to keep the formula simple and transparent."
>
> I will certainly elaborate the last two points in the Update, but will remain within reasonable bounds.

31 The Defendant had admitted in the English proceedings that (save that it had to be proved that Dr Jentzsch had said that the amount of any bonuses would be dependent on individual performance) the content of the 18 August Announcement was as set out in this email. [note: 46] Mr Reuther confirmed that the Defendant made the same admission in the present proceedings. [note: 47] The Defendant can therefore be taken to be of the view that this email was reliable evidence of the content of the 18 August Announcement.

32 The material parts of the slides used at the meeting of the Management Board stated: [note: 48]

Formulation/Agreement and communication of the 2008 Bonus Pool for DKIB:

Formulating/Agreeing the Pool

- We propose that for 2008 a de minimus (sic) pool of €400m (75% of 2007) be set aside for DKIB

- This base case cash pool is set off of the base revenues of €2.327bn

- The revenues are "credit crunch neutral" and for ease of measurement and tracking, they are based off of the following business lines which are not impacted by the credit market crisis:

    - Global banking in its entirety (incl Principal Investments)

    - FICC, Global Equities, Equity Derivatives & Agency Lending only in Capital Markets

- In order to provide some incentivisation to DKIB over and above the base revenues a simple payout ratio of 40 cents for Euro 1 of revenue is proposed to be added to the bonus pool over and above the base case.

33 Minutes of this meeting were taken by Mr Merkel. The material parts read: [note: 49]

Stefan Jentzsch explains the need to define a 2008 bonus pool for DKIB. A minimum bonus pool, which should be announced in the coming week, is needed to ensure employee stability. All risk policies must be strictly observed in order to prevent the pool [from] being "generated" by taking excessive risks. The minimum pool should be guaranteed and allocated on a discretionary basis. Revenues of EUR 2,327.5 million formed the basis for a cash pool of EUR 400 million, with corresponding increases.

…

The Board approves the preparation and communication of the 2008 bonus pools for DKIB as presented by Stefan Jentzsch.

34 Ms Beeson's handwritten notes taken during the 18 August Announcement stated as follows: [note: 50]

3. Compensation – long debate already. We management committee of DK, Dresdner Bank, also Allianz approve

- minimum bonus pool guaranteed for DK – 400 m down 25% last year – quite generous vs competitors – it is minimum, upside to deliver more

-two caveats:

(i) it's not an individual guarantee – it will be allocated according to performance – not an invitation to put your feet up –it's a call to go out there and perform

(ii) Subject to us sticking to risk guidelines – undue risk taking will not be rewarded

35 In response to a question about whether the bonus pool would be affected by a sale of DKIB or in negotiations with a potential investor [note: 51], Ms Beeson's notes recorded Dr Jentzsch responding as follows:

> Bonus pool of – reason is to take away uncertainty – change of ownership should happen by year end – up to us to up the number accounts to perform but that number will remain no matter what – not a subject for negotiation.

36 Ms Bryant recorded the 18 August Announcement thus: [note: 52]

> This bonus pool 400m€ = 25% down on 2007
>
> - Another 40 cents for passing aggregate revenue
> - Not an individual guarantee of 25% reduction
> - Will allocate on discretionary basis according to performance
> - Subject to sticking to risk guidelines

37 As noted above at [15], it was not disputed that statements to the following effect were made: [note: 53]

> (a) there would be a minimum bonus pool of €400 million for 2008;
>
> (b) this represented a reduction of approximately 25% from the bonus pool in 2007;
>
> (c) there was potential for the size of the pool to be increased if certain targets were exceeded; and
>
> (d) the announcement did not give rise to individual guarantees and the pool would be allocated on a discretionary basis by reference to individual performance.

38 However, the parties joined issue on three points. First, the Plaintiffs claimed that Dr Jentzsch had made statements to the effect that the "minimum cash pool, of 400 million Euro, was guaranteed". [note: 54] In contrast the Defendant said that what was in fact announced was Allianz's agreement to guarantee to make available to DKIB a pool of €400 million from which bonuses would be paid had been secured. [note: 55] Second, the Defendant contended that Dr Jentzsch had said that the existence of the €400 million cash pool was conditional upon DKIB achieving baseline revenues of €2,327 billion for 2008. [note: 56] The Plaintiffs denied this. Third, the Plaintiffs contended that the allocations out of the bonus pool would be decided according to individual performance alone. [note: 57] However, the Defendant said that there was nothing to suggest that DKIB intended to waive its right to determine an individual's bonus award according to its financial performance as well as the individual's performance as provided for in the employment contracts. [note: 58]

39 As regards the first issue, I accept that there was some communication prior to 11 August 2008 about the bonus pool being guaranteed by Allianz. In his AEIC, Dr Jentzsch said that he had informed the FSA that he would shortly announce "a minimum bonus pool for DKIB to be guaranteed by Allianz, and that certain key individuals would also get guaranteed bonuses". [note: 59] The minutes of a

Management Board meeting held on 5 August 2008 also recorded Dr Jentzsch saying that the pool was to be "at the expense of … Allianz" and that he had told the FSA that the announcement was to be "a minimum bonus pool for DKIB to be guaranteed by Allianz". [note: 60] However, in my judgment, although the word "guaranteed" was likely to have been used by Dr Jentzsch in his 18 August Announcement, it is unlikely that he said that it was guaranteed by Allianz. First, this is because there is in fact no evidence of any guarantee by Allianz or any plan for Allianz to provide one by the time the minimum bonus pool was approved by the Management Board on 12 August 2008. At trial, Mr Merkel was referred to his 12 August 2008 minutes which recorded that Dr Jentzsch had explained that the "minimum pool should be guaranteed and allocated on a discretionary basis". [note: 61] When asked if he understood this to mean "guaranteed by Allianz", Mr Merkel responded: [note: 62]

> No I don't think so, because there was no guarantee given by Allianz, at least not a formal guarantee. I don't know what was behind, but I haven't seen an issued guarantee by Allianz at that time, and also not later.

40 Second, statements made subsequent to the 18 August Announcement also contradict the Defendant's position on the meaning of the word "guarantee". An FAQ posted on DKIB's intranet on 5 September 2008 stated: [note: 63]

> Allianz has said nothing to indicate a change of commitment to the bank and continues to show strong support for Dresdner Kleinwort. Recently Allianz has agreed and supported Dresdner Bank's Management Board decision to set a minimum bonus pool of €400m for Dresdner Kleinwort. This applies to the investment banking division in its existing form and therefore does not include corporate functions.

41 It would appear that Allianz's role was confined to agreeing to and supporting Dresdner Bank's decision to create a minimum bonus pool. Similarly, slides used at a presentation by Dr Jentzsch to Allianz on 19 September 2008 stated: [note: 64]

> A Guaranteed Minimum Bonus Pool of €400mn *irrespective of performance* has been agreed and communicated to staff in early August.
>
> [emphasis added]

42 No reference was made to an Allianz guarantee. On the contrary, this email indicates that the understanding between Dresdner Bank and Allianz was consistent with the Plaintiffs' case and not the Defendant's: the word "guarantee" was used in contradistinction to a conditional bonus contingent on performance.

43 Third, and more pertinently, whatever may have been the internal thinking of the higher management of DKIB, Dresdner Bank and Allianz, this would not be dispositive of what was in fact conveyed in the 18 August Announcement itself. Dr Jentzsch's email of 11 August 2008, which set out what he intended to say, made no reference to the word "guarantee" other than in connection with the fact that this was not an individual guarantee. The contemporaneous note by Ms Beeson, which I find to be a reasonably accurate record of exactly what Dr Jentzsch said, recorded that "minimum bonus pool guaranteed *for DK* [ie. DKIB]" [emphasis added], rather than *by Allianz*. Ms Beeson's reference to Allianz in her note was in the context of Allianz's approval, together with the management of DKIB and Dresdner Bank, of the decision taken regarding the employees' compensation.

44 From the foregoing analysis of the evidence, while it is likely that Dr Jentzsch in his 18 August Announcement did describe the minimum bonus pool as guaranteed, he did not say that it was guaranteed by Allianz.

45 What would an employee hearing the words to the effect that the pool was "guaranteed for DK" have understood them to mean? This has to be considered together with the fact that it was undisputed that Dr Jentzsch had in the 18 August Announcement also warned that "this is not an individual guarantee", which was only meaningful in contrast with the global sum set aside for all employees which, by implication *was* guaranteed. As noted at [35] above, Dr Jentzsch had also said that the bonus pool would remain "no matter what" happened in the negotiations over the ownership of Dresdner Bank or its eventual sale. This indicates that the guarantee was not merely a guarantee by Allianz to make available to DKIB a bonus pool and that it would remain whether or not a change of ownership occurred. Consequently, I am of the view that it is not likely that employees watching the 18 August Announcement would have understood the word "guaranteed" in the rather abstruse sense proposed by the Defendant. They would instead have reasonably concluded that the bonus pool was being guaranteed to them by their employer, with the approval of its sole shareholder, without which approval the guarantee would presumably not have been given.

46 I should add that, in my judgment, this would be the case even if Dr Jentzsch did in the 18 August Announcement say that the bonus pool was guaranteed by Allianz. The employees hearing this would still regard it as a representation by DKIB that the pool was guaranteed to them through DKIB with the reference to Allianz being an explanation as to how the pool was to be constituted internally.

47 I turn for a moment to consider the Defendant's assertion that the Plaintiffs had conceded that their understanding of the word "guaranteed" as used by Dr Jentzsch was the same as that which the Defendant proposed. [note: 65] It is not clear to me that this was the case. The Defendant cited the 2nd Plaintiff's AEIC, which stated: [note: 66]

> The financial performance of Dresdner Bank, and the outcome of the sale of Allianz's stake in Dresdner Bank to Commerzbank, and the entrance of Commerzbank as the majority shareholder in Dresdner Bank, would not affect our performance-based bonus for 2008, since the Pool was already guaranteed by Allianz and ring fenced.

48 At trial, the 2nd Plaintiff testified as follows: [note: 67]

> Q. … Now, can I take it that you understood the bonus pool as being guaranteed by Allianz as the sole shareholder of the bank? That was your understanding, correct?
>
> A. My understanding is that Stefan Jentzsch sought the approval from the board, of course, and Allianz. And that Allianz agreed to it and guaranteed it.
>
> Q. So that's what the last part of the sentence is intended to mean, Allianz has agreed to the pool, correct? That's what it means?
>
> A. Yes.
>
> Q. I put it to you that during the town hall meeting on 18 August, any references to the bonus pool being guaranteed was intended to refer to this situation, that it was guaranteed by Allianz. Would you agree?

A. It was guaranteed by the – with whoever Stefan Jentzsch discussed. And I assume in this case, it was discussed with the board member and Allianz, who was the shareholder.

49 In my view, the 2nd Plaintiff's rather ambivalent remarks regarding the guarantee suggest that she did not understand the bonus pool to be guaranteed by Allianz in the manner proposed by the Defendant. She did not appear to have clearly distinguished between the concepts of *agreeing to* and *guaranteeing* the bonus pool. Instead, she took it as a matter of course that the bonus pool would have been agreed to in discussions between Dr Jentzsch, the Dresdner Bank Board and the shareholder, Allianz.

50 The Defendant also relied on the following testimony by the 3rd Plaintiff: [note: 68]

Q. When Dr Jentzsch referred to a guaranteed pool, did you understand him to mean that it was a bonus pool that had been agreed by Allianz, the shareholder, in a sense guaranteed by Allianz?

A. I felt he was talking about a retention pool, and that it had been -- I took it that it had been approved by the board of Allianz.

51 I note that it is not at all clear that the question posed to the 3rd Plaintiff by the Defendant was consonant with the Defendant's own contentions regarding the meaning of the word "guaranteed". What is one to make of the words "agreed by Allianz … in a sense guaranteed by Allianz"? In contrast to the Defendant's precise submissions on the meaning of the term in its closing submissions, the question posed on its behalf at trial did not sufficiently elaborate upon its meaning, leaving there doubt about what was being referred to in cross-examination. In any case, it is reasonably clear to me that the 3rd Plaintiff understood Allianz to have merely approved of the minimum bonus pool, rather than having guaranteed it.

52 Finally, the Defendant relied on the following exchange involving the 7th Plaintiff: [note: 69]

Q. In other words, the announcement was "We will have this pool of money to pay your bonuses from"; correct?

A. Yes.

…

Q. Your understanding is that €400 million --

A. It's a pool.

Q. -- is coming from the bank to the employees.

A. Yes, that's -- yes, very -- right.

Q. But as far as you recall, there was no explicit or specific statement on that?

A. Yes.

53 Again, it is not clear that the 7th Plaintiff had conceded to the Defendant's argument. Rather, it

appears from the transcript that he was acknowledging that there was no explicit statement in the 18 August Announcement to the effect that the entirety of the bonus pool would be paid out. Finally, even if the employees may have understood that Allianz had agreed to or even guaranteed the bonus, that alone does not preclude their understanding that there was a separate guarantee coming from their employer to them.

54 I turn now to the Defendant's contention that the minimum bonus pool was conditional on a revenue target of €2,327.5 billion being met. This argument was introduced on the first day of trial via an amendment to the Defence. [note: 70] Mr Tan argued forcefully that this issue had not been raised in the UK proceedings and that the addition to the Defence was an afterthought and without basis. The matter nevertheless has to be considered on the merits.

55 As a starting point, I note that nothing in the 11 August 2008 email or the contemporaneous notes taken at the Business Update indicated that the minimum bonus pool was conditional on certain revenue targets being met. The €2,327.5 billion figure was not even recorded in Ms Beeson's or Ms Bryant's notes. It was mentioned in the 11 August 2008 email solely with reference to additional incentive payments of €0.40 to the minimum bonus pool for every Euro earned above that figure. As stated in the email, it was the incentive pool and not the minimum bonus pool that was "pegged" to revenues.

56 Some doubt may be introduced by the slides used at the Management Board meeting on 12 August 2008. However, these slides were merely a presentation aid to facilitate Dr Jentzsch's communication with the Board. It is not as reliable an indication of what he would and did say at the 18 August Announcement as the script in the email he sent the day before. Moreover, it is not even clear that the words used in the slides "This base case cash pool is set off of the base revenues of €2.327bn" suggest that bonus pool was conditional on such revenues being achieved. Dr Jentzsch testified that the revenue number was used to determine the size of the minimum bonus pool and the baseline for the incentive pool. He disagreed that the minimum bonus pool would not be applicable if the revenue number was not met. [note: 71]

57 For the reasons set out above, I am therefore unable to find that Dr Jentzsch had said at the Town Hall that the minimum bonus pool was conditional on a revenue target of €2,327.5 billion being met.

58 I note that it would have been odd in the circumstances for DKIB to have structured its retention system in the all or nothing fashion contended for by the Defendant (*ie*, should target revenues be met, a sizable minimum bonus pool of €400 million would be guaranteed, failing which the employees would have no assurance of any sort). The purpose of the scheme was unlikely to be achieved if DKIB's employees took the view that the revenue targets were difficult to meet. If, as the Defendant said, a minimum bonus pool were not to be guaranteed, it is more likely that DKIB would have introduced a graduated bonus system instead.

59 As for the third issue of whether DKIB was entitled to determine an individual's bonus award according to its financial performance as well as the individual's performance, this was really a moot point as far as the minimum bonus pool was concerned. This is because if DKIB was contractually bound to pay out the minimum bonus pool unconditionally, then this could not be conditioned upon its financial performance.

60 As an aside, it is striking that the Defendant was unable to produce any witnesses to support its contentions regarding the contents of the 18 August Announcement. There were in excess of

2,000 DKIB employees at the material time [note: 72] and most, if not all, of them would have been anxious to watch the Business Update given the uncertain period that Dresdner Bank was going through, and many of them did. Some of the Plaintiffs also testified that the management had taken efforts to ensure that the Business Update was watched by as many employees as possible. [note: 73] In contrast, although their recollections had been rendered imperfect by the passage of time, the evidence of Dr Jentzsch and all of the Plaintiffs was unwavering on their understanding of the essential message of the 18 August Announcement: if the employees remained in DKIB's employment until the bonuses were paid out, they would share in the minimum bonus pool. [note: 74]

61 Accordingly, I find that Dr Jentzsch, during the 18 August Announcement, informed DKIB's employees that:

(a) there would be a minimum bonus pool of €400 million for 2008;

(b) it was guaranteed in the sense that it was not contingent on any conditions being met, including the attainment of revenues of €2,327.5 million;

(c) there was potential for the size of the pool to be increased if certain targets were exceeded; and

(d) the announcement did not give rise to individual guarantees and the pool would continue to be allocated to those who remained in employment on a discretionary basis by reference to individual performance.

The elements of a contract

62 I now turn to the question of whether a valid contract was concluded between the parties.

(1) Acceptance

63 It is undisputed in this case that none of the Plaintiffs communicated their acceptance of the 18 August Announcement to Dresdner Bank. The requirement of acceptance is integral to the formation of a contract, and the general rule is that an acceptance has no effect until it is communicated to the offeror. However, there are exceptions to this rule. It is noted in *Treitel: The Law of Contract* (Edwin Peel, Sweet & Maxwell, 13th Ed, 2011) ("*Treitel*") that (paras 2-027 and 2-028):

> **Terms of offer.** An offer may expressly or impliedly waive the requirement that acceptance must be communicated. This is often the case where an offer invites acceptance by conduct. …
>
> **Unilateral contracts.** Communication of acceptance is scarcely ever required in the case of an offer of a unilateral contract.

64 A waiver of the requirement of acceptance is often part and parcel of a unilateral offer. In the seminal case regarding unilateral contracts, *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, it was observed that "as notification is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself".

65 In my judgment, these propositions are applicable to the present facts. There is no indication that Dr Jentzsch asked employees to indicate their acceptance of the minimum bonus pool or incentive targets, and I am of the view that the fact that no responses were required of the Plaintiffs

or any of DKIB's employees points to an implied waiver by the Defendant of the requirement for acceptance to be communicated. It is telling that there is no evidence that any of DKIB's employees had approached the HR department or management to register their acceptance. Having said that, I recognise that this observation hinges on the assumption that there was an intention to enter into legal relations (on which see [73]–[81] below). Were there no such intention, the lack of a required response would be more consistent with the fact that the supposed offer was not intended to be binding.

66 The 18 August Announcement was also a classic case of a unilateral contract. It was a promise on the part of DKIB to do *something* (*ie*, pay the relevant employees their bonuses from a minimum bonus pool (for the mechanics of this, see [82]–[94] below on the element of certainty)) in return for the Plaintiffs' continued employment and performance at DKIB. The Plaintiffs were not bound to continue their employment, and could resign at any time, subject to the giving of between one and three months' notice. However, should they commence performance (or, more accurately, continue in their employment and forbear from resigning), Dresdner Bank would come under an obligation not to revoke the offer: *Dickson Trading (S) Pte Ltd v Transmarco Ltd* [1987] SLR(R) 674 at [39].

67 Accordingly, I find that the element of acceptance is waived.

68 For completeness, I will briefly address the Plaintiffs' alternative argument that the 18 August Announcement was an offer that could be accepted by conduct. I am of the view that this argument is unsustainable on the facts of the case because the Plaintiffs' conduct was to *continue* with their employment. Although Dresdner Bank was facing problems retaining staff in view of its impending purchase, in the absence of more specific knowledge that the Plaintiffs had other opportunities elsewhere, Dresdner Bank would not have been able to infer acceptance from their omission to resign. The position might be different had evidence been led to show that such opportunities did in fact exist and Dresdner Bank was aware of them. While the 10th Plaintiff gave evidence that he postponed his employment with a rival bank because of the announcement, [note: 75] he did not stand in a different position from his fellow Plaintiffs as such information would not have been known to Dresdner Bank.

(2) Consideration

69 I turn now to the consideration. Although the doctrine of consideration has been heavily criticised, it remains a standard requirement for the formation of a valid contract: see *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*") at [64]. The traditional definition of consideration is the benefit-detriment analysis set out in the *Currie and others v Misa* (1875) LR 10 Exch 153 (affirmed in *Manuel Misa v Raikes Currie, G Grenfell Glyn, and Others* (1876) 1 App Cas 554) (at 162):

> A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other …

70 Applied to the present case, the consideration sought in the 18 August Announcement was the Plaintiffs' continued employment and forbearance from resigning. Each of the Plaintiffs remained in employment past Letter Day to the end of 2008. Accordingly, I find that the requirement of consideration was satisfied in the form of forbearance on the part of the Plaintiffs. I note that any inconsistency between this analysis and my finding on acceptance by conduct is more apparent than real as the concepts of consideration and communication of acceptance are distinct.

71 The requirement of consideration is also satisfied on the more modern analysis set out in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 ("*Williams*"). The facts and holdings of that case are summarised in the Court of Appeal decision in *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR(R) 250 as follows (at [9] and [10]):

> The defendants were the main contractors for a building contract. The plaintiff entered into a subcontract with the defendants for carpentry work. The plaintiff got into financial difficulties because the agreed price for the subcontract was too low for him to operate satisfactorily and at a profit. As the main contract contained a time penalty clause and the defendants were worried that the plaintiff might not be able to complete the subcontract on time, they made an oral agreement to pay the plaintiff an additional sum to fulfil his obligations under the subcontract. Eventually, the plaintiff was able to substantially complete the carpentry work. However, the defendants failed to honour their oral promise. The plaintiff then sued the defendants for the additional sum promised. One of the main issues before the court was whether there was consideration for the agreement as the plaintiff's promise under the agreement was merely to perform his existing contractual obligations under the subcontract.
>
> The Court of Appeal distinguished the established rule in *Stilk v Meyrick* (1809) 2 Camp 317; 170 ER 1168 and held that there was valid consideration for the agreement to pay the additional sums. The rule in *Stilk v Meyrick* states that a promise to perform an existing contractual obligation is not sufficient consideration since the promisee derives no additional benefit in law. The Court of Appeal in *Williams v Roffey Brothers* identified the special circumstances that were present in that case and on 15 Glidewell LJ was of the opinion that the present state of the law on this subject could be expressed in the following proposition:
>
> > (a) if A has entered into a contract with B to do work for B, in return for payment by B; and
> >
> > (b) at some stage before A has completely performed his obligations under the contract, B has reason to think or doubt whether A will or will not be able to complete his side of the bargain; and
> >
> > (c) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and
> >
> > (d) as a result of giving his promise, B obtains in practice a benefit, or avoids a detriment; and
> >
> > (e) B's promise is not given as a result of economic duress or fraud on the part of A; then
> >
> > (f) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.

72 *Williams* represented an extension of the doctrine of consideration as it recognised the concept of factual or practical benefit to the promisor and held that this constituted sufficient consideration. *Williams* was a case in which the plaintiff was under an existing contractual obligation to perform the subcontract works. The otherwise gratuitous promise of additional payments by the defendants in exchange for the plaintiff doing what he was already obliged to do was given contractual effect by the practical benefit that the defendants gained in avoiding time penalties with their employer. This analysis applies with greater force in the present case since the Plaintiffs were not obliged to continue in their employment in the first place. By remaining employed, the Plaintiffs conferred on

Dresdner Bank a practical benefit in the form of employee stability and the ability to continue operating as a going concern during a period of uncertainty, which was what the bank sought to achieve by introducing the minimum bonus pool.

(3) Intention to create legal relations

73 The intention to create legal relations has come to be seen as the very marrow of contractual relationships: see *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 at [139]. This must be correct as a matter of principle, for although the other elements of a valid contract are *indicia* of a contractual relationship, the intention to be legally bound is *definitive* of such a relationship.

74 I note as a preliminary matter that the Plaintiffs assert that the onus is on the Defendant to prove that there was no intention to create legal relations. [note: 76] The Plaintiffs relied on the cases of *Edwards v Skyways Ltd* [1964] 1 WLR 349 and *Mamidoil-Jetoil Greek Petroleum Company SA and another v Okta Crude Oil Refinery AD* [2003] 1 Lloyd's Rep 1 ("*Mamidoil*"). I do not regard either of these cases as standing for that proposition. In the first case, Megaw J was merely saying that a party who took the position that there was no such intention would have a heavy onus where the context of the agreement was business relations and not social or domestic matters. It goes without saying that in many situations, the context alone would have given rise to a strong inference of an intention to be bound. *Mamidoil* was simply a case in which a party had previously taken the position that a contract was binding, only to change its position subsequently. In any event, the position under Singapore law is uncontroversial: an intention to create legal relations is *sine qua non* for a valid contract to arise. The burden of proof therefore lies on the Plaintiffs, for their case would fail if no evidence were given on either side: s 104 Evidence Act (Cap 97, 1997 Rev Ed).

75 In my judgment, an inference of an intention to be bound can be drawn from the subject matter of the announcement in this case: the remuneration of an employee by the employer. Assurances would be unlikely to be lightly made regarding such an important matter. This is reinforced by the circumstances that the parties found themselves in in August 2008. Dresdner Bank was looking for a buyer of its investment bank business, but the value of that business would have been dramatically reduced if it could not be sold as a going concern. Given the exodus of staff that Mr Listorti warned of, that was a very real risk. In this connection, it bears mention that Ms Lee had testified that 17 out of DB Singapore's 120 employees resigned in 2008. [note: 77] This was an attrition rate of about 14%, and most of the resignations took place in the first half of 2008, before the 18 August Announcement. From the perspective of the Plaintiffs and the rest of DKIB's employees, all that was left for them at the bank was the prospect of a few remaining monthly pay checks and the possibility of receiving a discretionary bonus, which was likely to have been much smaller than usual because of the travails the sector was going through. They would have had every reason to seek employment elsewhere. That being the case, there would have been no particular benefit to making one of the usual updates on the accruals to the pool. Something more concrete would have been necessary to incentivise employees to remain. I accept the Plaintiffs' assertion that it was difficult to see how the 18 August Announcement could have had the intended effect if it were not intended to be legally binding. [note: 78]

76 The Defendant asserted that there was no intention to create legal relations in the making of the 18 August Announcement. Instead, it was merely an expression of Dresdner Bank's plan to create a €400 million bonus pool at the time the announcement was made. This was a management decision which could be reviewed or revised as circumstances unfolded in 2008. The Defendant relied on the fact that it was an established practice for employees to be informed of bonus accruals for the year

at Business Updates. As noted above at [6], such announcements were not inviolable and accruals were open to change as the year progressed. All that was different in 2008 was that the management announced their decision on the bonus pool a few months ahead of the usual schedule. It did not waive its usual right to revise the pool. In my view, this understates what was announced on 18 August 2008. One does not generally use words such as "minimum" and "guaranteed" to convey a provisional decision. Moreover, given my findings at [44] and [61] above as to what was said by Dr Jentzsch, and how, in the circumstances, the employees were likely to have understood the message, the tenor of the announcement clearly took on a different tone.

77 The Defendant also said that the usual practice for changing the terms of an employee's terms of employment was to individually communicate any such variation in writing to the employee with the involvement of the HR Department. The fact that a Business Update was used instead suggested that there was no intention to make a binding commitment. The Defendant's HR executive, Ms Lee, testified that "[a]lthough the procedure for amending terms in the Handbook, or the manner in which such amendments were communicated to the employees, were not stipulated in the Handbook itself, such changes were always communicated in writing by the HR Department". [note: 79] However, Ms Lee was only able to point to two occasions on which variations were made in writing by the HR Department and they concerned leave entitlements. Ms Lee acknowledged that she knew of no written restriction of binding commitments being made by senior management. [note: 80]

78 The Defendant also asserted that Business Updates were informal forums for the exchange of information and updating employees about DKIB's current view as to the performance of its business. However, this assertion is contradicted by the slides used at the Management Board meeting on 12 August 2008, which stated "In order to stabilise the DKIB business it is essential and necessary to *formally communicate* the pool that has been secured for the staff base" [emphasis added]. [note: 81] Underlying the Defendant's argument is an invitation to join the Defendant in incredulity at the fact that a *bank* would choose to bind itself other than with a written agreement. It is often the case that contracting parties in a business context will choose to reduce their agreements to writing and this will naturally be one of the factors to be considered in ascertaining contractual intentions. However, the court would be astute to avoid *in effect* elevating writing into yet another element of a valid contract. To do so would be to turn a matter of evidence into one of law and potentially subvert the objective intentions of parties. The 18 August Announcement should also not be viewed in isolation as a regular Business Update. Dr Jentzsch took some pains to ensure that as many people as possible watched the update. The Plaintiffs gave evidence that the Business Update was widely publicised in advance and that employees were encouraged to watch it. [note: 82] Those with subordinates were instructed to encourage them to watch the Business Update as well. [note: 83] Following the business update, and as he had indicated he would do in his email of 11 August 2008, [note: 84] Dr Jentzsch mobilised his subordinates to ensure that everyone was apprised of the minimum bonus pool: [note: 85]

> In addition, immediately after the 18 August announcement, I initiated an "information cascade" to make sure that all staff understood what I had announced. I directed all ExCo members to reiterate to their direct reports (and so on) the minimum bonus pool that I had just announced. Because the minimum bonus pool that I had announced was unique, and given that the key purpose of the bonus pool was to stabilize the bank, I wanted to ensure that my announcement was emphasized, understood and relied upon by everyone.

79 The Defendant pointed out that if all but one of DKIB's employees left DKIB, that employee would receive the full €400 million bonus pool. Dresdner Bank could not have intended to commit itself to such an absurd result. [note: 86] In my view, such an eventuality is extremely unlikely to have

arisen. There is accordingly nothing absurd about the minimum bonus pool. On the contrary, the monetary incentive to remain would increase as more employees left, perfectly fulfilling the intention of Dresdner Bank at the time.

80 Finally, the Defendant said that the fact that the 8th Plaintiff, Anshul Sidher, attempted to negotiate guaranteed bonuses for himself and his team indicated that he did not think that the 18 August Announcement was binding. I am unable to draw that conclusion from Mr Sidher's conduct. It was perfectly logical for Mr Sidher to have wanted to go one up on his colleagues and to assure his subordinates of a guaranteed individual bonus instead of a discretionary one from a guaranteed pool.

81 Accordingly, I find that the parties did intend to be bound by the 18 August Announcement.

(4) Certainty

82 Before a contract can be said to have been concluded, the terms of the contemplated contract must be both certain and complete; however, possible gaps may be filled by a previous course of dealing between the parties or by a trade practice or where a definite formula exists: *Gay Choon Ing* at [50]. In *WN Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503 ("*Hillas*"), Lord Wright observed (at 514):

> Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects …

83 The Defendant noted that the 18 August Announcement did not give rise to individual guarantees. The fact that the actual amount of bonus for each employee was still subject to a discretionary appraisal process meant that the individual employee was still faced with the same uncertainty as to his individual entitlement as in previous years. However, I am of the view that the dictates of certainty do not require an employee to know the precise amount that he would be paid. To hold otherwise would negate the contractual value of just about every agreement to follow a process or engage in a broad endeavour rather than to secure a specific outcome.

84 In my judgment, the observations made in *Gay Choon Ing* and *Hillas* are directly applicable to the present case. The Plaintiffs' employer had undertaken to them to pay their bonuses out of a guaranteed minimum pool of €400 million. Although the 18 August Announcement did not specify the quantum of the bonus each employee would obtain, nor the process through which this would be ascertained, the past conduct of the bank (set out at [5]–[8] above) would have provided ample details to fill such gaps. This answers many of the objections raised by the Defendant.

85 First, the Defendant said that there was some uncertainty among the Plaintiffs about whether the actual amount of individual bonuses would be determined by individual or team performance. The following examples were cited by way of illustration: [note: 87]

> The 6th Plaintiff states, at paragraph 10 of his AEIC that "The actual amount of individual bonuses would be determined by individual and team performance."
>
> The 9th Plaintiff stated at paragraph 17 of his AEIC that "Individual bonuses remained discretionary and would be determined based on the individual's performance, and the

performance of his business and his team or unit". However, on cross-examination, he admitted that this was merely his own understanding and was not specifically mentioned by Stefan Jentzsch.

The 10th Plaintiff stated at paragraph 12 of his AEIC that "[t]he actual amount of individual bonuses would be determined by individual performance". However, on cross-examination, he stated that his team's performance would also be considered as well.

86 There is, to my mind, no uncertainty suggested by any of these statements. It appears to me that the Plaintiffs were merely referring to their understanding of the manner in which individual bonuses were allocated in the past. As explained above at [7], each employee would have to negotiate a share of the bonus pool with his immediate superior, having regard to his individual performance. The superior would in turn have to negotiate for a share of the bonus pool to be allocated to his team as a whole, having regard to the team's performance. It follows that the bonus awarded to each employee would be dependent on both the performance of the employee in question as well as his team.

87 Second, the Defendant contended that there was uncertainty as to the types of payments that the bonus pool could be used to fund. Could it be used for guaranteed bonuses, severance payments, tariff payments and other liabilities of Dresdner Bank? As a starting point, it is important to bear in mind that the pool of money in question was a *bonus* pool. This fixed the limit of the types of payments that could be made from it. Moreover, the reference to the bonus pool being 75% of the previous year's bonus pool is pertinent. For this comparison to make any sense, the bonuses to be paid out of the bonus pool would have to be the same as those paid out of the relevant comparator sum the previous year. Details of the previous year's practice may not have been known to all of the employees listening to the 18 August Announcement, but it would have been a simple matter to find out. The Defendant remarked that €150 million of the bonus pool had been committed as individual guarantees. However, it is my view that the only material difference between a guaranteed individual bonus and a regular discretionary one is the date on which the Bank's discretion is exercised. I am unable to see why this should give rise to any issues as to the certainty surrounding the bonus pool. If, having regard to the bonuses paid out in the previous year, it were the case that guaranteed bonuses should not have been paid out of the bonus pool, this would amount to a breach on the part of the Defendant rather than a factor undermining the certainty of the 18 August Announcement.

88 Third, the Defendant argued that it was not clear whom the bonus pool applied to. Did it apply to front office employees, or did it extend to middle and back office employees as well? The Defendant relied upon emails and a Business Update following the announcement to show that there was some confusion about whether the back office was to be secured by the bonus pool. Again, the 75% comparator would have provided the basis on which such doubts could be resolved. It need not have been made explicitly clear at the 18 August Announcement; even if those hearing the announcement were not entirely sure what the correct position was, they could have found out.

89 Moreover, the fact that third parties to the announcement may not have been certain about its purport or may have harboured some hope of sharing in the pool does not detract from the certainty as between Dresdner Bank and the Plaintiffs. On this score, the evidence was clear: Dr Jentzsch was the CEO of DKIB and his announcement was directed to all staff who ultimately reported to him. [note: 88] This removed the need to distinguish between front office and other staff since these were terms that were not necessarily precise. The Defendant's attempt to cast doubt on which of these groups of employees would benefit was therefore irrelevant.

90 Fourth, the Defendant said that it was unclear whether the entire €400 million had to be paid out. In my view, it would have been in the contemplation of all involved that the usual practice would be followed. Since Dr Jentzsch was in the habit of retaining 3-5% of the bonus pool every year as a contingency fund, this would have also been the case with the minimum bonus pool.

91 Fifth, the Defendant argued that there was uncertainty as to how long employees would have to remain before they were eligible to receive their bonuses. Did they have to stay until the end of the year, until the bonuses were actually paid out or until the takeover by the Defendant was complete? But this was provided for in the Employee Handbook and there was no evidence that anyone had assumed that the usual rule would not apply: [note: 89]

> Employees who do not complete a full year's service during the financial year may receive a pro-rated amount.
>
> Any employee who has left the services of the Bank or who has tendered resignation at or prior to the date of payment of the bonus will not be eligible for the performance variable bonus, [notwithstanding] that the declaration of entitlement to the performance variable bonus takes place prior to the date of the bonus payment.

92 It may have been more useful for Dresdner Bank's purposes to make the relevant date the date of takeover by the Defendant. However, given that this was to take place at the beginning of 2009, the usual approach would have served well enough. In any event, this does not detract from the certainty of the 18 August Announcement.

93 Finally, the Defendant said that it was not clear how the stretch targets were to operate as the Plaintiffs had different impressions on how revenue of €2,327.5 million was to be calculated. It is relevant that the notes taken by Ms Beeson and Ms Bryant were the least illuminating on this point. However, this does not detract from the overall clarity of the representations regarding the minimum bonus pool. The Plaintiffs were not alleging that the total bonuses declared as at Letter Day fell short of what was promised because the relevant incentive payments were omitted. In any event, just because the Plaintiffs were subjectively unclear on the computation method does not render the entire scheme uncertain. They were simply content to rely on whatever method DKIB had selected for computing the incentive pool. What was relevant for their purposes was that each of them was a revenue generator and that their efforts would contribute to increasing the sum of bonuses payable.

94 A theme underlying the Defendant's objections on the issue of certainty was the fact that the Plaintiffs did not personally know how bonuses were allocated. In my judgment, this criticism is not sustainable. An individual does not need to know precisely how his counterparty will satisfy his obligations in order for him to have a contractual right. Accordingly, I find that the 18 August Announcement was sufficiently certain to be enforced.

Authority

95 Whatever the contents of the 18 August Announcement may be, the Defendant also disputed that Dr Jentzsch had the authority to bind Dresdner Bank to a contract with its employees. However, I am of the view that there was ample evidence that Dr Jentzsch was authorised to make the 18 August Announcement. He had been tasked by Mr Diekmann and Dr Walter to put together a retention package which would ensure the stability of DKIB and to assemble a team to do so. [note: 90] A draft bonus proposal was worked on in June and July 2008, during which time Dr Jentzsch had meetings with senior figures in Allianz and Dresdner Bank. [note: 91] A final plan with the following three

elements was formulated by the end of July or early August 2008: (1) a minimum guaranteed retention bonus pool of €400 million would be set aside to be paid to all employees who stayed until the end of the year (this sum represented 75% of the total of the previous year's bonuses), (2) an additional performance-related bonus pool would be set aside if certain parameters were met and (3) there would be individual guarantees for approximately 70 critical members of staff. [note: 92]

96 Dr Jentzsch obtained the approval of both the Dresdner Bank and Allianz Compensation Committees and then sent the email of 11 August 2008 to senior figures in Allianz and Dresdner Bank setting out in some detail the retention package he was going to announce (see [30] above). He then presented the retention package to the Management Board of Dresdner Bank the next day (see [32]–[33] above). The minutes taken of the meeting of the Management Board stated: [note: 93]

> The Board approves the preparation and communication of the 2008 bonus pools for DKIB as presented by Stefan Jentzsch.

97 Dr Jentzsch recounted the meeting as follows: [note: 94]

> The final decision to create the Euros 400 million retention pool was made by the Management Board … of Dresdner Bank, of which I was a member. We met on 12 August 2008 in Frankfurt to discuss the creation of the bonus pool and other issues … I gave a presentation to the Board … in which I proposed the creation of a minimum cash pool of Euros 400 million to be formally communicated to the staff at one of my business updates. The Board decision approving the creation and communication of the guaranteed minimum retention pool as presented by me was unanimous.

98 It is telling that the Defendant did not call any witness to rebut Dr Jentzsch's recollection of the meeting. The fact that the 18 August Announcement was never contradicted is also strong evidence that Dr Jentzsch had acted within his authority. In fact, as observed at [41] above, he went on, again on behalf of DKIB, to inform Allianz a month later that "[a] Guaranteed Minimum Bonus Pool of €400mn irrespective of performance has been agreed and communicated to staff in early August". Accordingly, I find that Dr Jentzsch was expressly authorised to make the 18 August Announcement, which was intended to be legally binding by Dresdner Bank.

99 I note that it may be possible to argue that Dr Jentzsch was not expressly given authority to use the word "guaranteed" to describe the bonus pool. However, the scheme he was authorised to announce was in fact a guaranteed one. In any event, Dr Jentzsch also had ostensible authority to make the 18 August Announcement. He was of great seniority within Dresdner Bank, the CEO of DKIB and the person to whom the Plaintiffs and other employees of DKIB ultimately reported. It would not have occurred to any employee in their position to question Dr Jentzsch on his authority. The Defendant cannot rely on any supposed misunderstanding or miscommunication on the part of Dr Jentzsch to excuse itself from the legal effect of the 18 August Announcement. In any event, Dresdner Bank had at no point attempted to correct what Dr Jentzsch had said. On 21 October 2008, Mr Hindle, DKIB's Head of HR, made reference to the 18 August Announcement in an email to DKIB employees, remarking that the "bonus pool for the Front Office has already been communicated by Stefan Jentzsch in his updates". [note: 95]

Conclusion on the claim in contract

100 It follows from the foregoing discussion that the Plaintiffs have proven that a binding contract between them and Dresdner Bank arose from the 18 August Announcement pursuant to which

Dresdner Bank would pay all or substantially all of the €400 million in the pool to its DKIB employees, including the Plaintiffs, as bonuses. It has not been disputed that the provisional bonuses declared in respect of each of the Plaintiffs and the other employees on Letter Day would have been the amounts paid had the Defendants complied with the terms of the 18 August Announcement. At any rate, neither party asserted that the procedure behind the 19 December Letter was unrepresentative of the usual approach taken to determine the bonus to be paid out to each employee or that this exercise was not undertaken on the premise of a €400 million bonus pool. Accordingly, I find that the Plaintiffs are entitled to payment of the balance 90% of the bonuses announced on 19 December 2008 that had not been paid out in February 2009 as damages for breach of contract.

101 In so holding, I should not be understood to be agreeing with the Plaintiffs' contention that their entitlement to their bonuses crystallised on Letter Day with the issuance of the 19 December Letter. There are several difficulties with this argument that I will note, without venturing an opinion on how they may be resolved. First, what constraints are there on when Dresdner Bank must exercise its discretion to determine bonuses? Second, what is to be made of the fact that the 19 December Letter was expressly stated to be a provisional bonus award and contained the MAC clause? It is not necessary for me to address these issues because I am satisfied that the sums declared in the 19 December Letter would have been the bonuses paid out in February 2009 had the Defendant complied with its contractual obligations under the 18 August Announcement.

Postscript on discretionary bonuses

102 One of the main contentions advanced by the Plaintiffs was that, even in the absence of the 18 August Announcement, the variable bonus clause in their contracts of employment granted them a contractual entitlement to a discretionary performance-based bonus each year. [note: 96] This was a legally enforceable entitlement even though the amount of the award had to be determined by an exercise of discretion on the part of Dresdner Bank. They asserted that Dresdner Bank had to act in a bona fide and rational manner, taking into account proper factors. They relied on *Clark v Nomura International plc* [2000] IRLR 766 ("*Clark*"), a decision of the Queen's Bench Division of the High Court of England and Wales. The plaintiff, Mr Clark, was a proprietary trader for Nomura. The latter was obliged to award a discretionary bonus by reference to an assessment of his performance. Nomura exercised its discretion not to award a bonus despite the fact that he had earned substantial profits in excess of £6 million. In deciding that Nomura was in breach of its contractual obligations, Burton J made the following observations (at [40]):

> … the employer's discretion is in any event, as a result of the authorities, not unfettered, as both sides have accepted to be the law in this case. Even a simple discretion whether to award a bonus must not be exercised capriciously (*United Bank Ltd v Akhtar* [1989] IRLR 507 EAT, *Clark v BET plc* [1997] IRLR 348 and *Midland Bank plc v McCann* 5/6/1998 unreported EAT) or without reasonable or sufficient grounds (*White v Reflective Roadstuds Ltd* [1991] IRLR 331 EAT, and *McClory v Post Office* [1993] IRLR 159). I do not consider that either of these definitions of the obligation are entirely apt, when considering whether an employer was in breach of contract in having exercised a discretion which on the face of the contract is unfettered or absolute, or indeed even one which is contractually fettered such as the one here considered. Capriciousness, it seems to me, is not very easy to define: and I have been referred to *Harper v National Coal Board* [1980] IRLR 260 and *Cheall v APEX* [1982] IRLR 362. It can carry with it aspects or arbitrariness or domineeringness, or whimsicality and abstractedness. On the other had the concept of 'without reasonable or sufficient grounds' seems to me to be too low a test. I do not consider it is right that there be simply a contractual obligation on an employer to act reasonably in the exercise of his discretion, which would suggest that the court can simply substitute its own view for that of the employer. *My conclusion is that the right test is one of irrationality or*

perversity (of which caprice or capriciousness would be a good example) ie that no reasonable employer would have exercised his discretion in this way. … Such test of perversity or irrationality is not only one which is simple, or at any rate simpler, to understand and apply, but it is a familiar one, being that regularly applied in the Crown Office or, as it is soon to be, the Administrative Court. In reaching its conclusion, what the court does is thus not to substitute its own view, but to ask the question whether any reasonable employer could have come to such a conclusion.

[emphasis added]

103 On this understanding, the Plaintiffs argued that an employer had to ensure that its discretion to declare bonuses was not exercised in so unreasonable a fashion that no reasonable employer would have done the same. The employee thus had the benefit of a contractual obligation, if not a bonus as such. In *Cantor Fitzgerald International v Horkulak* [2004] IRLR 942 ("*Horkulak*"), the Court of Appeal of England and Wales held (at [46]):

In our view, the judge was correct in his general approach to the construction of the bonus clause and to hold that *the claimant was entitled, had he remained in the defendants' employment, to a bona fide and rational exercise by [the defendant] of their discretion as to whether or not to pay him a bonus and in what sum*. … the clause is one contained in a contract of employment in a high-earning and competitive activity in which the payment of discretionary bonuses is part of the remuneration structure of employers. In this case, the objective purpose of the bonus clause on the evidence … was plainly to motivate and reward the employee in respect of his endeavours to 'maximise the commission revenue of the Global Interest Rate Derivatives Business' of [the defendant]. Further, the condition precedent that the employee should still be working for [the defendant] and should not have given notice or attempted to procure his release, demonstrates that the bonus was to be paid in anticipation of future loyalty. In such a case, as it seems to me, the provision is necessarily to be read as intended to have some contractual content, i.e. it is to be read as a contractual benefit to the employee, as opposed to being a mere declaration of the employer's right to pay a bonus if he wishes, a right which he enjoys regardless of contract.

[emphasis added]

104 In *Horkulak*, the employer's obligations in determining bonuses were justified by the circumstances of the employment relationship, *viz*, the competitive environment, bonus culture and ostensible objective of the discretionary bonuses to incentivise good performance and retain employees. The Plaintiffs said that these circumstances also applied to the present case and that their contractual entitlement to a discretionary bonus came into even sharper focus with the 18 August Announcement of the minimum bonus pool. [note: 97]

105 In contrast, the Defendant asserted that there was binding authority in Singapore to the contrary. It relied on the Court of Appeal decision in *Latham Scott v Credit Suisse First Boston* [2000] 2 SLR(R) 30, where the following observations were made (at [72]):

Unless the bonus had been expressed to be guaranteed, an employee in Latham's position could not claim to be legally entitled to a bonus, the granting and quantum of which are entirely at the discretion of the employer. While he might have hoped for a bonus if he had indeed remained in the employ of CSFB, the fact remained that, even then, he would not have been able to claim to be entitled to a bonus as of right as it was entirely at the discretion of CSFB.

106 The Plaintiffs in turn distinguished this case on the basis that it concerned a claim for the loss of a chance to earn a discretionary bonus due to a wrongful termination of employment. It could therefore be said that the question the Court of Appeal was confronted with was whether the plaintiff had proven on a balance of probabilities that he would have been paid a bonus had his employment not been terminated. Notwithstanding the thorough submissions made on this point, it is in my view not necessary that a definitive pronouncement be made for the resolution of this case. The Plaintiffs' submissions hinged upon the approach taken in *Clark* and *Horkulak* being the backdrop against which the 18 August Announcement was made, with the latter being merely a variation of the *status quo*. On this understanding, the minimum bonus pool crystallised one of the discretionary elements of their bonus entitlements. I have already expressed my view of the Plaintiffs' variation argument above at [27]. In any event, it is my view that, rather than fixing one of the discretionary elements, the 18 August Announcement largely superseded whatever the existing contractual position might have been for that year. All that remained to be determined was what the appropriate awards should be as between employees. The 18 August Announcement sufficed to establish a free-standing contractual entitlement informed only by the existing practice by which bonuses were awarded. This issue has been determined on the basis of trite and well-established principles of contract law. I note that the question posed at the beginning of this judgment could have been very much more interesting than has turned out in this case. However, what duties, if any, an employer must satisfy in deciding whether to award discretionary bonuses and, if so, how much will have to be left for a more appropriate case.

Terms Implied into the Contract of Employment

107 I will address the other claims advanced by the Plaintiffs for completeness. The Plaintiffs' second claim was that the Defendant's failure to pay the Plaintiffs their 2008 bonus in full in accordance with the 18 August Announcement was a breach of the Defendant's duty to behave in a way that preserved the trust and confidence that an employee should have in his employer. [note: 98] The crux of this claim as set out in their pleadings was that the Defendant breached the implied term of trust and confidence by acting contrary to the 18 August Announcement. This was made apparent by the statement of claim:

> 53. Further and/or alternatively, the Defendant's failure to so pay the Plaintiffs their 2008 Bonus in full in accordance with its promises to the Plaintiffs was a breach of the Defendant's duty to behave in a way that preserved the trust and confidence that an employee should have in his employer. The Plaintiffs will rely, among other things, on a statement made by Mr Blessing published on the intranet on 26 February 2009:
>
> "…The board promised something and the board has somehow failed to deliver this. This is an issue that also affects credibility, which was something that we were aware of as we were making the decision…We, my colleagues and I, also have to fight to rebuild the trust that we have shattered with this decision."
>
> [emphasis in original]

108 However, I note that the Plaintiffs expanded their claim materially after the trial. Their closing submissions asserted: [note: 99]

> The whole course of conduct of [Dresdner Bank] from 18 August 2008 to 18 February 2009, including both the introduction and inclusion of the MAC Clause in the 19 December 2008 Bonus Letters, and the manner of triggering and applying the MAC Clause, in the light of the repeated

promise and reassurance to the contrary effect, amounted to a breach of the implied term of trust and confidence.

109 The crux of this excerpt and the elaboration in the rest of the submissions is that Dresdner Bank had deliberately misled the Plaintiffs and other employees regarding the minimum bonus pool so as to secure stability for itself pending the transaction with the Defendant, all the while cynically intending to renege on its commitments once the transaction was completed and stability was no longer necessary. [note: 100] The function of pleadings is to give fair notice of the case which has to be met and to define the issues which the court will have to decide on so as to resolve the matters in dispute between the parties: *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 at [61]. It was not at all apparent from the statement of claim that the more sophisticated and expansive approach taken in the Plaintiffs' closing submissions would be pursued and I am of the view that the Defendant would have wished to adduce other evidence to rebut this case. I further note that it is unlikely that this was an argument that the Plaintiffs only came upon as evidence was being led in the course of the trial. The same argument was advanced in the English proceedings with a favourable outcome for the plaintiffs there (see *Attrill (HC)* at [198]–[231]), and the High Court decision was released before the start of the trial. The Plaintiffs had ample opportunity to make this a part of their case at an earlier stage. Accordingly, I disregard the Plaintiffs' arguments to the extent that they exceeded the comparatively narrow bounds of their pleadings.

The implied term of trust and confidence

110 The most authoritative espousal of the implied term of trust and confidence is found in *Malik v Bank of Credit and Commerce International SA (In Compulsory Liquidation)* [1998] AC 20 ("*Malik*"). The principle approved therein is that there is a term implied in law that an employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: *per* Lord Steyn at 45 and 46.

111 This principle has received approval in Singapore. In *Wong Leong Wei Edward and another v Acclaim Insurance Brokers Pte Ltd and another suit* [2010] SGHC 352, Chong J noted (at [51] and [52]):

> It is thus apparent from *Malik v BCCI* that a claimant will be entitled to damages from a former employer if he or she can prove that the former employer was in breach of the implied term of trust and confidence and which resulted in loss of future employment prospects. …
>
> … on the authority of *Malik v BCCI*, I accept the submission by Edward's counsel that, in principle, if it can be shown that the defendant had wrongfully dismissed Edward in a manner that was dishonest or illegitimate which amounted to a breach of the implied term of trust and confidence, and as a direct result of that wrongful dismissal it can be proven that Edward suffered a real and provable financial loss, in my view, Edward would be entitled to claim against the defendant for such loss beyond the contractual notice period. However, as I have already made clear that the defendant was entitled to terminate Edward from his position on not one but two separate grounds, I find that there is no merit to his claim which I dismiss accordingly.

112 In *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 ("*Luzhou Bio-Chem*"), Loh J held (at [59] and [60]):

> … unless there are express terms to the contrary or the context implies otherwise, an implied term of mutual trust and confidence, and fidelity, is implied by law into a contract of employment

> under Singapore law. As stated in *Malik v BCCI* at 45, the implied term of mutual trust and confidence operates as a default rule. Parties may thus exclude or modify them to limit its content. It also follows that express terms may modify the scope of the implied term. …
>
> The content of that implied term can thus vary greatly depending on the facts in each case; this includes but is not limited to the type of employer and employee, the business or activity of the employer, the position or nature of the appointment of the employee, the employee's level within the hierarchy of employees, the express and other implied terms of employment and the termination provision. These factors are obviously not exhaustive and there will be as many factors as there are types of employment contracts and individual facts and circumstances.

113 The Defendant asserted that the implied term of trust and confidence was not settled law in Singapore and that the issue had not been resolved conclusively in our courts. [note: 101] In my view, this submission is unsustainable. Loh J's remarks quoted above were not *obiter dicta* but formed the basis of his finding of breach and his award of damages. It bears mention that the appeal against Loh J's decision was heard and dismissed by the Court of Appeal on 23 September 2013.

Findings on breach

114 That said, I am of the view that the Defendant is correct to argue that its decision not to pay the Plaintiffs the bonus promised in the 18 August Announcement did not amount to the breach of such a term. *Malik* requires, firstly, that the impugned conduct of the employer to be without reasonable and proper cause and secondly, that such conduct is both calculated and likely to destroy or seriously damage the relationship of confidence and trust. It bears emphasising that it would take quite extreme behaviour on the part of the employer to satisfy these requirements. In the present case, even if one takes the view that it was dishonourable for Dresdner Bank to have gone back on its word regarding the minimum bonus pool, it must be accepted that it had compelling reasons for doing so. In the first place, the 18 August Announcement took place against the backdrop of an industry under severe pressure. A 25% reduction on the previous year's discretionary bonus payout was considered to be generous by all involved. Dresdner Bank suffered significant losses in 2008. Mr Hessenmueller gave evidence that DKIB and Dresdner Bank respectively reported operating losses of €6.275 billion and €5.598 billion. [note: 102] Dresdner Bank's Financial Report for 2008 stated that "[i]n view of the acute danger to the continued existence of Dresdner Bank as a going concern and the fact that capital ratios had fallen below minimum regulatory capital requirements, Commerzbank resolved on 3 March 2009 to increase Dresdner Bank's capital by €4.0 billion in the first quarter of 2009". [note: 103]

115 The minimum bonus pool also had to be considered in the context of the Defendant's management of its other affairs. The email of 18 February 2009 indicated that Defendant's own employees would not receive a bonus for 2008. It might have appeared to be untenable for the management of the Defendant to pay out sizable bonuses in one of its subsidiary companies during a period of remunerative austerity as regards its own employees. It is for that reason that Mr Blessing wrote to Dr Walter on 8 November 2008 to express his opinion that the minimum bonus pool "could be an emotional burden for the integration [of Dresdner Bank and the Defendant], since almost no one here can understand how Dresdner Bank can pay out higher bonuses than [the Defendant], despite losing billions. I find this very alarming, also in respect to the public debate". [note: 104]

116 The public debate referred to by Mr Blessing was the scrutiny that the financial industry in general had come under in respect of its remuneration practices and the attention that had been paid to DKIB's minimum bonus pool in particular. On 10 November 2008, he wrote to Mr Diekmann: [note:

105]

> The variable remuneration in our sector is a matter of controversy and intense public discussion. Not least for this reason, we are irritated, and frankly also somewhat annoyed by the conduct of the Dresdner Bank's Board in their structuring and awarding of bonuses.

117 On 8 November 2011, the *Frankfurter Allgemeiner Zeitung* ran an article headed "The salary gradients in favour of Dresdner Bank" which made reference to the minimum bonus pool as "a taste of things to come". [note: 106] The pressures of such media coverage have to be considered in the light of the assistance that the Defendant was receiving from the German government. The Defendant had on 3 November 2008 announced that it would receive an initial €8.2 billion in guaranteed funding commitments and €15 billion in debt guarantees from the German government's stabilisation fund, *Sonderfonds Finanzmarktstabiliseriung*. [note: 107] On 8 January 2009, the German government approved the provision of further funding and capital to the Defendant by way of a capital contribution and a purchase of 25% of its shares for €10 billion. [note: 108] The management of Dresdner Bank and the Defendant would have feared an unfavourable juxtaposition of impending fiscal austerity in the German and European economy and burdens on the state and taxpayers with the perception of largesse and extravagance in the payment of its employees.

118 To my mind, all of these constitute reasonable and proper causes for not following through with the 18 August Announcement. The difficulties that Dresdner Bank was going through would have been known to the Plaintiffs. Even if they were deeply unhappy with what had taken place, and were victims of breaches of contractual obligations owed to them by their employer, it is my view that the circumstances were such that the relationship of trust and confidence cannot be considered to have been destroyed or seriously damaged from an objective point of view. The assessment of whether there has been a breach of this implied term should not focus on the subjective unhappiness of employees to the exclusion of the pressures that employers face.

119 Accordingly, I find that there was no breach of the relationship of trust and confidence. I would add that, as noted above at [23], the Plaintiffs had also contended that there was a parallel term to be implied into the employment contract that an employer has a duty not to be perverse, arbitrary or inequitable to its employees. However, no substantial submissions were made on this argument and I decline to express a view in this regard save to note that my finding that the Defendant had reasonable cause to act the way it did is equally applicable here.

Compliance with the MAC Clause

120 This brings me to the Plaintiffs' third argument, which relates to the MAC clause. The Plaintiffs' primary position was that the MAC clause could have no legal effect if the 18 August Announcement was found to be binding. This was because, in claiming for the Defendant an entitlement to vary the bonuses declared on Letter Day, the MAC clause was a variation adverse to the interests of the Plaintiffs. The Plaintiffs said that the cases indicated that an inference of acceptance by an employee would not readily be drawn where the employer purported to unilaterally vary terms to the detriment of the employee: *eg*. *Saleem Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbak BA* [2010] IRLR 715 at [44]–[51]. As always, in the absence of a waiver of the requirement of acceptance, the court will look for an unequivocal communication of acceptance. The Plaintiffs, standing on their rights flowing from the 18 August Announcement, made no such communication and the MAC clause consequently did not alter those contractual rights.

121 However, the Plaintiffs had a fallback position. They said that if, contrary to their primary case,

it was found that the 18 August Announcement had no legal effect, then the Defendant was bound by the MAC clause and could not vary or rescind the bonuses declared on Letter Day without complying with the dictates of that clause. This the Defendant did not do, and the purported reduction of the bonus on 19 February 2009 had no effect. My difficulty with this argument is that it was not made clear to me how the Defendant came to be bound by the MAC clause. This is made more peculiar given the extensive discussion on the contractual effect of the 18 August Announcement. I had also in a list of issues given to the parties invited submissions in the following terms:

> 12. What is the legal effect of the 19 December 2008 bonus letter issued by the Defendant to the Plaintiffs?
>
> a. Could the Defendant validly qualify the 19 December bonus letter as a "provisional" letter, and/or validly insert the MAC Clause in the bonus letter?
>
> b. If so, was the Defendant legally bound to finalise the provisional bonus award in accordance with the terms of the letter?
>
> c. If so,
>
> (i) *was this on the basis that there was, by virtue of the 19 December 2008 letter, a variation of the Plaintiffs' contracts of employment, or a separate contract between the Defendant and the Plaintiffs or on some other basis? If so, were there requirements of acceptance and consideration to be met and, if so, were they?*
>
> [emphasis added]

122 This question went unanswered. In the absence of the necessary elements of a contract being established, the 19 December Letter amounted to no more than a gratuitous promise unenforceable at law. Moreover, even on the terms of the 19 December Letter itself, the bonus declared was expressly characterised as "provisional". The MAC clause stated:

> The provisional bonus award stated above is subject to review in the event that additional material deviations in [DKIB's] revenue and earnings, as against the forecast for the months of November and December 2008, are identified during preparation of the annual financial statements for 2008 i.e. that [DKIB's] earnings position does not deteriorate materially in this period. This will be reviewed in January 2009 by Stefan Jentzsch. In the event that such additional material deviations are identified, the Company reserves the right to review the provisional award and, if necessary, to reduce the provisional award.

However, it was not stated in the clause or anywhere else in the 19 December Letter that the *only* situation in which the provisional bonus award would be altered would be pursuant to the review mechanism in the MAC clause. Accordingly, I am of the view that the MAC clause has no contractual effect and the Defendant was not bound to vary the bonuses declared on Letter Day only in accordance with the MAC clause.

The Final Remuneration Statements Signed by the 3rd and 7th Plaintiffs

123 The Defendant additionally contended that the claims of the 3rd and 7th Plaintiffs, Robert Coughlan and Poh Tze Tiong, were barred because they had signed documents known as "final remuneration statements". Each of these documents computed the salary due to Mr Coughlan and Mr

Poh for the period immediately prior to the cessation of their employment with Dresdner Bank. The material portion of the final remuneration statements stated: [note: 109]

> I acknowledge the above computation as full and final settlement of all my claims against Commerzbank AG, Singapore Branch and the Commerzbank Group, its subsidiaries and associated companies (collectively referred to as the Group), arising out of the cessation of my employment with the Bank.

124 The Defendant claimed that "it is evident that the parties had envisaged that claims 'arising out of' an employee's 'cessation of employment' included any benefits to which an employee were [sic] entitled under their contracts of employment. … It is clear that discretionary bonuses, along with other items such as salary … all formed part of the remuneration package provided for under the 3rd and 7th Plaintiff's employment contracts". [note: 110]

125 In my judgment, the Defendant's proposed interpretation founders on the fact that Mr Coughlan and Mr Poh's causes of action in respect of the 18 August Announcement arose independently of their cessation of employment: they could have maintained a claim whether or not they continued to be employed by the Defendant. It is clear from the computations on the documents that they were intended to be a final accounting of the remuneration due immediately before the end of the employment relationship, which need not necessarily be on the payday for the month. Moreover, as the material portion of the final remuneration statements was in effect a disclaimer clause inserted by the Defendant for its own benefit, it has to be construed strictly against the Defendant. Accordingly, I find that the 3rd and 7th Plaintiffs' claims are not barred by their having signed the final remuneration statement.

Conclusion

126 In conclusion, the Plaintiffs' claim for breach of contract is allowed. The Defendant is to pay the Plaintiffs the bonuses declared on Letter Day, less the 10% that was paid out on 19 February 2009. In addition, pre-judgment interest at the rate of 5.33% per annum on these sums is to be paid to the Plaintiffs beginning 19 February 2009 and ending on the date of this decision.

127 Costs are to follow the event, to be taxed if not agreed.

[note: 1] *Eg*, 1ABD39.

[note: 2] 1ABD54.

[note: 3] *Eg*, 1ABD41.

[note: 4] PCB125.

[note: 5] Joerg Hessenmueller's AEIC at para 23.

[note: 6] 4ABD2574.

[note: 7] Joerg Hessenmueller's AEIC at para 23.

[note: 8] NE 14 March 2013, p 34 line 15 – p 35 line 2 (Stefan Jentzsch).

[note: 9] Lee Lay Hoon's AEIC at para 31.

[note: 10] Joerg Hessenmueller's AEIC at para 33.

[note: 11] NE 14 March 2013 at p 53 line 7 – p 54 line 14 (Stefan Jentzsch).

[note: 12] Lee Lay Hoon's AEIC at para 33.

[note: 13] Stefan Jentzsch's AEIC at para 4; PCB5.

[note: 14] Plaintiffs' Closing Submissions at para 13.

[note: 15] Stefan Jentzsch's AEIC at para 11.

[note: 16] PCB8.

[note: 17] PCB11B.

[note: 18] 1ABD300.

[note: 19] PCB12-15; Stefan Jentzsch's AEIC at para 12.

[note: 20] PCB21-23.

[note: 21] Stefan Jentzsch's AEIC at para 18-19.

[note: 22] Stefan Jentzsch's AEIC at para 26 and 30.

[note: 23] Stefan Jentzsch's AEIC at para 34.

[note: 24] Defendant's Closing Submissions at para 51.

[note: 25] Stefan Jentzsch's AEIC at para 39.

[note: 26] Stefan Jentzsch's AEIC at para 40; Daniel John Brader's AEIC at para 25.

[note: 27] PCB143.

[note: 28] PCB295.

[note: 29] SOC at para 36.

[note: 30] PCB288.

[note: 31] PCB461-463.

[note: 32] PCB464-465.

[note: 33] SOC at para 67.

[note: 34] SOC at para 49-51.

[note: 35] Defence (Amendment No 1) at para 51.

[note: 36] Defence (Amendment No 1) at para 51A.

[note: 37] SOC at para 52.

[note: 38] SOC at para 53.

[note: 39] Defence (Amendment No 1) at para 53-54.

[note: 40] SOC at para 55-57.

[note: 41] Defence (Amendment No 1) at para 56.

[note: 42] Defence (Amendment No 1) at para 57-58.

[note: 43] PCB 138.

[note: 44] Stefan Jentzsch's AEIC at para 37.

[note: 45] PCB60-61.

[note: 46] Paragraph 12a of the English Particulars of Claim (3ABD1999-2000) read with paragraph 22b of the English Defence (3ABD2012).

[note: 47] NE 21 March 2013, p 8-9 (Michael Reuther).

[note: 48] PCB72.

[note: 49] PCB65.

[note: 50] PCB75-82.

[note: 51] NE 15 March 2013, p 5 line 4-11 (Stefan Jentzsch).

[note: 52] PCB83-84.

[note: 53] Defendant's Closing Submissions at para 51.

[note: 54] SOC at para 16(c).

[note: 55] Defendant's Closing Submissions at para 52(a).

[note: 56] Defence (Amendment No 1) at para 51A.

[note: 57] SOC at para 16(a).

[note: 58] Defendant's Closing Submissions at para 52(c).

[note: 59] Stefan Jentzsch's AEIC at para 28.

[note: 60] PCB56-57.

[note: 61] PCB65.

[note: 62] NE 25 March 2013, p 74 line 1-20 (Helmut Merkel).

[note: 63] PCB100.

[note: 64] PCB107.

[note: 65] Defendant's Closing Submissions at para 59-61.

[note: 66] Monica Conti-Dack's AEIC at para 21.

[note: 67] NE 12 March 2013, p 138 line 6-24 (Monica Conti-Dack).

[note: 68] NE 18 March 2013, p 87 line 19-25 (Robert Coughlan).

[note: 69] NE 18 March 2013, p 31 line 8-10, p 32 line 5-11 (Poh Tze Tiong).

[note: 70] Defence (Amendment No 1) at para 51A.

[note: 71] NE 14 March 2013, p 130 line 19-p131 line 6 (Stefan Jentzsch).

[note: 72] NE 14 March 2013, p 26 line 12-15 (Stefan Jentzsch).

[note: 73] NE 11 March 2013, p 49 line 9-p50 line 17 (Daniel John Brader); NE 12 March 2013, p 76 line 11-24, p 78 line 6-10 (Monica Conti-Dack).

[note: 74] NE 11 March 2013, p 58 line 14- p 59 line 3 (Daniel John Brader); NE 12 March 2013, p 4 line 31- p 5 line 7 (Daniel John Brader); NE 12 March 2013, p 88 line 2-13, p 112 line 8-17, p 122 line 6-11 (Monica Conti-Dack); Adrian Loh Jenn Yeh's AEIC at para 14; NE 14 March 2013, p 130 line 19-p131 line 6 (Stefan Jentzsch); NE 15 March 2013, p 180 line 21-p181 line 21 (Stefan Jentzsch); NE 18 March 2013 p 29 line 11-p30 line 13, p 75 line 24-p76 line 2 (Poh Tze Tiong); NE 18 March 2013 p 91

line 12-17 (Robert Coughlan); Anshul Sidher's AEIC at para 16; NE 19 March 2013 p 87 line 1-21 (Anshul Sidher); NE 19 March 2013 p 132 line 15-p 133 line 4 (Keith Charles Moore III); NE 19 March 2013 p 143 line 13-21 (Peter Weigel); NE 19 March 2013 p 222 line 20-p 223 line 15 (Xiao Zhao Tan); NE 20 March 2013 p 51 line 3-12 (Keith Alexander Dack).

[note: 75] Xiao Zhao Tan's AEIC at para 25.

[note: 76] Plaintiffs' Closing Submissions at para 187.

[note: 77] NE 16 April 2013, pp65 line 20-66 line 13 (Lee Lay Hoon).

[note: 78] Plaintiffs' Closing Submissions at para 193.

[note: 79] Lee Lay Hoon's AEIC at para 17.

[note: 80] NE 16 April 2013 at pp 45-46 (Lee Lay Hoon).

[note: 81] PCB73.

[note: 82] *Eg*, Daniel John Brader's AEIC at para 17; Anshul Sidher's AEIC at para 16; Xiao Zhao Tan's AEIC at para 12.

[note: 83] *Eg*, NE 12 March 2013, p 76 line 11-24, p 78 line 6-10 (Monica Conti-Dack).

[note: 84] PCB60

[note: 85] Stefan Jentzsch's AEIC at para 39.

[note: 86] Defendant's Closing Submissions at para 163-164.

[note: 87] Defendant's Closing Submissions at para 175.

[note: 88] Stefan Jentzsch's AEIC at para 30; NE 14 March 2013, p 25 line 3-8; p26 line 12-21 (Stefan Jentzsch).

[note: 89] PCB125.

[note: 90] Stefan Jentzsch's AEIC at para 21.

[note: 91] Stefan Jentzsch's AEIC at para 24.

[note: 92] Stefan Jentzsch's AEIC at para 25.

[note: 93] PCB65.

[note: 94] Stefan Jentzsch's AEIC at para 30.

[note: 95] PCB143.

[note: 96] Plaintiffs' Closing Submissions at para 85.

[note: 97] Plaintiffs' Closing Submissions at para 101.

[note: 98] SOC at para 53.

[note: 99] Plaintiffs' Closing Submissions at para 399.

[note: 100] Plaintiffs' Closing Submissions at para 399-469.

[note: 101] Defendant's Closing Submissions at para 366.

[note: 102] Joerg Hessen Mueller's AEIC at para 90.

[note: 103] Joerg Hessen Mueller's AEIC at para 91.

[note: 104] PCB168A.

[note: 105] PCB168D.

[note: 106] Plaintiffs' Closing Submissions at para 429; PCB168E.

[note: 107] Michael Paul Reuther's AEIC at para 29.

[note: 108] Michael Paul Reuther's AEIC at para 38.

[note: 109] Robert Coughtlan's AEIC at p 60; Poh Tze Tiong's AEIC at p 59.

[note: 110] Defendant's Closing Submissions at para 399.