Neutral Citation Number: [2025] EWHC 37 (Comm)

Case No: CL-2023-000030

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

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

Date: 15/01/2025

Before :

Mr. Nigel Cooper KC sitting as a High Court Judge

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Between :

(1) NATWEST MARKET NV **(2) NATWEST MARKETS PLC**	**Claimants**
- and -	
(1) CMIS NEDERLAND BV **(2) CMIS INVESTMENTS BV**	**Defendants**

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Jonathan Davies-Jones KC and Teniola Onabanjo (instructed by **DLA Piper UK LLP**) for the **Claimants**
Tom Smith KC and Ryan Perkins (instructed by **Quinn Emmanuel Urquhart & Sullivan UK LLP**) for the **Defendants**

Hearing dates: 25 and 26 July 2024

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JUDGMENT

Nigel Cooper KC:

Introduction

1. In this action, the Claimants seek declarations in respect of sums said to be due to them, and for payment of the said sums, under seven Deeds of Indemnity ("the Deeds") granted by the Defendants. The Defendants deny any liability to the Claimants and also seek declaratory relief by way of counterclaim confirming that they have no such liability. Except where it is necessary to distinguish between the individual Claimants and the individual Defendants, I will refer to the Claimants collectively as NWM and the Defendants collectively as CMIS.

2. The Deeds were granted by CMIS between May 2006 and April 2008 and were granted in respect of certain amounts that might become payable to NWM under certain swap transactions between NWM and certain securitisation special-purpose vehicles established by CMIS (defined below as the EMAC Issuers).

3. The dispute between the parties principally turns on the construction of the relevant agreements. I was provided with witness statements from:

   i) Mr. Sachin Arvind Zodgekar and Mr. Jean-Paul Westgate on behalf of NWM.

   ii) Mr. Sean Joseph Daly on behalf of CMIS.

4. None of the above witnesses were called to give evidence orally and none have direct knowledge of the making of the relevant agreements. Indeed, none of them were employed by the party on which behalf they gave evidence at the time when the relevant agreements were made. While their evidence was helpful in explaining the structure and background of the transactions which are at the heart of the present dispute, none of the witnesses could give first-hand evidence as to the reasons for particular features of the transaction structure, such as, for example, the purpose of the Deeds. To the extent that witnesses speculated as to those reasons, I prefer to have regard to the provisions of the relevant agreements, including their recitals, as being the more reliable guide as to the commercial purpose of the agreements. In any event, as CMIS put it in their skeleton argument, there is little to be gained by speculating as to the true commercial purpose of the parties.

Background

5. The background below is largely taken from the Agreed Common Ground provided by the parties supplemented by the factual accounts set out in the parties' skeleton arguments as verified by the documents in evidence before me.

Parties

6. The First Claimant ("NWM NV") is a company incorporated in the Netherlands. The Second Claimant ("NWM PLC") is a public limited company incorporated in England. NWM NV and NWM PLC (together "NWM") are part of an international banking group which provided and provides hedging structures for mortgage-backed securitisations.

7. The First Defendant ("CMIS NBV") and the Second Defendant ("CMIS IBV") (together "CMIS") are companies incorporated in the Netherlands. CMIS' primary business is and was the provision of mortgages in the Netherlands (with CMIS NBV being the originator) and Germany (with CMIS IBV being the originator). To give an indication of the scale of the transactions involved, CMIS NBV was the provider of the Dutch mortgages, originating approximately €10 billion of mortgages in the Dutch market from 2000 to 2008.

8. In 2010, the shares in each of the CMIS parties were sold to an investment fund managed by Fortress Investment Group. Following the sale, CMIS NBV has effectively been in a state of run-off. Its main function is to continue providing the administrative services that it is contractually required to provide in respect of the 22 securitisation structures referred to above. CMIS submits that, as a consequence, it does not have the funds to pay the sums now claimed by NWM and will seek counter-indemnities from the relevant EMAC Issuers (as defined below).

The EMAC Securitisations

9. CMIS' mortgage business was funded by the mortgage-backed securitisation market. Between 2006 and 2008, CMIS established a series of securitisation special-purpose vehicles (collectively "the EMAC Issuers"). Each EMAC Issuer entered into an "EMAC Securitisation", the purpose of which was to purchase mortgage receivables originated by CMIS. The purchase price for these mortgage receivables was funded by the EMAC Issuer issuing rated floating rate notes, ("the Notes") to investors ("the Noteholders"). This action is concerned with seven of the EMAC Securitisations shown in the table below.

EMAC Issuers	**EMAC Securitisations**
E-MAC NL 2006-NHG I BV	E-MAC NL 2006-NHG I ("**Securitisation 1**")
E-MAC NL 2006-II BV	E-MAC NL 2006-II ("**Securitisation 2**")
E-MAC DE 2006-II BV	E-MAC DE 2006-II ("**Securitisation 3**")
E-MAC Program BV	E-MAC Program BV (in relation to Compartment NL 2007-I) ("**Securitisation 4**")
E-MAC Program II BV	E-MAC Program II BV (in relation to Compartment NL 2007-IV) ("**Securitisation 5**")
E-MAC Program III BV	E-MAC Program III BV (in relation to Compartment NL 2008-I) ("**Securitisation 6**")

E-MAC Program III BV	E-MAC Program III BV (in relation to Compartment NL 2008-II) ("**Securitisation 7**")

10. Securitisations 1, 2, 4, 5, 6 and 7 relate to Dutch mortgages ("the NL Securitisations") while Securitisation 3 relates to German mortgages ("the DE Securitisation").

11. The mortgage receivables for each Securitisation ("the Mortgage Receivables") were sold and assigned to the EMAC Issuers by the "Sellers" who were the entities which had originally provided (or otherwise came to have an interest in) the residential mortgage loans to which the Mortgage Receivables related ("the Mortgage Loans"). CMIS was the principal originator. The Mortgage Receivables constituted all rights of the Sellers under the Mortgage Loans including the right to receive the underlying borrowers' payments of interest and repayments of principal under the Mortgage Loans. As part of the issuance of the Notes, the assets of the EMAC Issuers (principally the Mortgage Receivables) were secured in favour of the Noteholders. Other secured parties included NWM as counterparty to the "Swaps" referred to below.

12. Pursuant to the terms of the Notes, the EMAC Issuers were obliged to pay floating rate interest at a rate referrable to EURIBOR, to holders of the Notes ("the Noteholders") on specified quarterly payment dates. The intention was that the EMAC Issuer would use the funds it received from the Mortgage Receivables to make payments of interest and principal under the Notes to the Noteholders. The interest payable under the Notes was referrable to EURIBOR and so could vary with the EURIBOR market rate. By contrast, the Mortgage Loans for each Securitisation were mostly fixed-rate mortgages. The transaction structure created the possibility that, due to a change in interest rates, there could be a cash-flow mismatch between the interest received by the EMAC Issuers pursuant to the Mortgage Receivables and the interest payable by the EMAC Issuers pursuant to the Notes.

13. This potential exposure was intended to be hedged by the Swaps thereby allowing CMIS to achieve AAA ratings on the Notes. In order to achieve these AAA ratings, the hedging for the Securitisations was structured such that certain payments to NWM under the Swaps were subordinated to the interests of the Noteholders ("the Swap Subordinated Amounts"). In other words, in respect of the Swap Subordinated Amounts, NWM was not very senior in the waterfall of payment priorities in respect of the liabilities of the relevant EMAC Issuer provided for in the security documentation for the Securitisations ("the Payments Waterfall"). It was the risk of non-payment by the EMAC Issuers in certain circumstances which was transferred to CMIS under the Deeds.

14. The principal documents for each of the Securitisations are described further below.

Prospectuses

15. For each of the Securitisations, a Prospectus was issued describing the structure, the risk factors, the parties, the securitised assets and the terms and conditions of the Notes:

Securitisation	Date of Prospectus
Securitisation 1	16 May 2006
Securitisation 2	25 May 2006
Securitisation 3	12 December 2006
Securitisation 4	17 November 2006
Securitisation 5	26 October 2007
Securitisations 6 and 7	20 February 2008

Trust Deeds and Issuer Trust Agreement

16. For each of the six NL Securitisations, the security granted by each EMAC Issuer in relation to the Mortgage Receivables was granted to a Security Trustee appointed by a Trust Deed; for Securitisation 3, the equivalent agreement was an Issuer Trust Agreement:

Securitisation	Date of Trust Deed/Issuer Trust Agreement
Securitisation 1	17 May 2006
Securitisation 2	30 May 2006
Securitisation 3	13 December 2006
Securitisation 4	28 March 2007
Securitisation 5	29 October 2007
Securitisation 6	22 February 2008
Securitisation 7	14 April 2008

17. The Trust Deeds (by clause 5.3) and the Issuer Trust Agreement (by clause 9.1) provided for the Payments Waterfall in respect of the liabilities of each EMAC Issuer described above. The Swap Subordinated Amounts to be paid to NWM appear at item (j) in a waterfall, which consists of items (a) to (n).

18. The Trust Deeds also provided (by clause 4.8) that neither the Security Trustee nor any secured party, which included NWM and CMIS, would institute any form of insolvency proceedings against the EMAC Issuer. This was in effect a non-petition clause intended to ensure the bankruptcy remoteness of the EMAC Issuers.

Master Definitions Agreements and Programme Agreements

19. For three of the Securitisations, a Master Definitions Agreement was entered into containing the definitions used in the relevant transaction documents:

Securitisation	**Date of Master Definitions Agreement**
Securitisation 1	15 May 2006
Securitisation 2	26 May 2006
Securitisation 3	13 December 2006

20. For the remaining four Securitisations, a Programme Agreement was entered into setting out arrangements for certain issues relating to the issue and purchase of Notes and also containing a master definitions schedule:

Securitisation	**Date of Programme Agreement**
Securitisation 4	16 November 2006
Securitisation 5	26 October 2007
Securitisations 6 and 7	20 February 2008

Issuer Services Agreement

21. For each of the Securitisations, an Issuer Services Agreement was entered into between the EMAC Issuer, CMIS in its role as (inter alia) "MPT Provider" (mortgage payment transaction provider) and "Issuer Administrator", the security trustee and NWM as the swap counterparty. Among the tasks of CMIS under the Issuer Services Agreements was to arrange the payment by the EMAC Issuers of payments required by the Payments Waterfall. Those payments would be made from a bank account held with NWM (or their predecessor companies). Pursuant to clauses 23 and 25 of the Issuer Services Agreements, CMIS could in certain circumstances be replaced as MPT Provider or Issuer Administrator including on the occasion of a termination event relating to the insolvency of CMIS. The Issuer Services Agreements are listed below:

Securitisation	**Date of Issuer Services Agreement**
Securitisation 1	17 May 2006 (as amended on 25 June 2009)
Securitisation 2	30 May 2006
Securitisation 3	13 December 2006

Securitisation 4	16 November 2006 (as amended on 26 June 2009)
Securitisation 5	26 October 2007
Securitisations 6 and 7	20 February 2008 (as amended on 11 April 2008)

EMAC Master Agreements and Swaps

22. For each of the Securitisations, the relevant EMAC Issuer and NWM entered into hedging transactions (namely the Swaps) pursuant to a 1992 ISDA Master Agreement (Multi-Currency – Cross Border) and Schedule (together the "EMAC Master Agreements"):

Securitisation	**NWM party**	**Date of original EMAC Master Agreement**	**Date of Amended and Restated EMAC Master Agreement**
Securitisation 1	NWM BV	15 May 2006	9 December 2013
Securitisation 2	NWM BV	23 May 2006	9 December 2013
Securitisation 3	NWM Plc	13 December 2006	19 February 2014
Securitisation 4	NWM NV	27 March 2007	9 December 2013
Securitisation 5	NWM Plc	26 October 2007	9 December 2013
Securitisation 6	NWM BV	22 February 2008	9 December 2013
Securitisation 7	NWM BV	14 April 2008	9 December 2013

23. Each EMAC Swap was a "Specified Transaction" under the relevant EMAC Master Agreement and was governed by English law. The bespoke terms of each Swap were confirmed in a confirmation.

24. Under the terms of the Swaps, NWM was and is entitled to the Swap Subordinated Amounts (as defined in the Master Definitions Agreements or in the Master Definitions Schedule to the Programme Agreements), which included payments known as (i) "Notional Adjustment Payments" (to the extent that the aggregate amount of such payments exceeded the amount of certain Prepayment Penalties (as defined)); and (ii) "Subordinated Step-Up Amounts" (to the extent that after the First Put Date (as defined) there was an increase in the fixed rate swap in excess of 0.15%). Swap Subordinated

Amounts are defined as any Notional Adjustment Payments and Subordinated Step-Up Amounts which are "due but unpaid" by the EMAC Issuer.

25. Notional Adjustment Payments could arise in circumstances in which the relevant EMAC Issuer adjusted the hedges under the Swaps each quarter to bring them into line with the actual pre-payment rate of the underlying Mortgage Loans and the Notional Adjustment Payments became due from the EMAC Issuer to NWM by way of mark-to-market adjustments (to the extent that the aggregate amount of such payments exceeded the amount of the Prepayment Penalties). Notional Adjustment Payments were Swap Subordinated Amounts and so ranked behind payments to the Noteholders under the Payments Waterfall. The result was that the transaction structure of the Securitisations thereby created a particular credit risk for NWM that, if the pre-payment penalties on the underlying Mortgage Loans were insufficient, then the required Notional Adjustment Payments could go unpaid if the EMAC Issuer lacked the funds to do so.

26. Subordinated Step-Up Amounts could arise in certain circumstances following the exercise by the Noteholders of 'put notices' to redeem the Notes early. NWM had the right under the terms of the Swaps to increase (on notice) the Fixed Rate payable by the EMAC Issuer to *'reflect [NWM's] assessment of the commercial risks of entering into a transaction with [the EMAC Issuer] on a Put Date on the same terms as this Transaction'.* In that event, only the first 15 basis points of the increase ranked as senior Swap payments under the Payments Waterfall. Any part of the increase which exceeded 15 basis points (known as a "Step-Up Amount") was a Swap Subordinated Amount and so ranked behind payments to the Noteholders under the Payments Waterfall. The transaction structure of the Securitisations therefore created a particular credit risk for NWM that Subordinated Step-Up Amounts could go unpaid if the EMAC Issuer lacked funds to do so.

27. For Securitisations 1, 2 and 4 to 7, the Swaps were subject to the following express terms:

    i) Part 5(i) of the Schedule, which provided that

    > *"If [the EMAC Issuer] does not have sufficient funds available to pay, in full and on the due date, an amount to be paid by it under a Transaction: (i) [the EMAC Issuer] will notify [NWM] prior to such due date of the amount of any shortfall; (ii) [the EMAC Issuer] will pay such amount as it is able to pay on such due date; (iii) to the extent that such failure to pay in full and on the due date relates to any Swap Subordinated Amount, such failure to pay shall not constitute an Event of Default for purposes of Section 5(a)(i); (iv) payment of any such shortfall relating to any Swap Subordinated Amount shall be deferred until the first payment date under such Transaction on which [the EMAC Issuer] has sufficient funds available to pay the amount that it would, but for this Part 5(i), have been required to pay on the original due date; (v) interest shall accrue and be payable on any amount so deferred at the rate specified in Section 2(e) and (vi) to the extent that such failure to pay in full and on the due date relates to any amount other than a Swap Subordinated Amount, such failure to pay shall constitute an Event of Default in accordance with Section 5(a)(i) of this Agreement"* ("the Payment Deferral Provision")

ii) Part 5(q)/(s) which provided that:

"Amounts will be paid by [the EMAC Issuer] under this Agreement only if and to the extent that there are funds available for that purpose on the relevant date in accordance with the [Payments Waterfall]" ("the Limited Recourse Provision").

28. Securitisation 3 did not contain the Limited Recourse Provision. The Payment Deferral Provision in Securitisation 3 was also in slightly different terms to that found in the other six Securitisations and provided in Part 5(h):

"Other than in respect of Excess Swap Collateral, if [the EMAC Issuer] does not have sufficient funds available to pay, in full and on the due date, an amount to be paid by it under a Transaction: (i) [the EMAC Issuer] will notify [NWM] prior to such due date of the amount of any shortfall; (ii) [the EMAC Issuer] will pay such amount as it is able to pay on such due date; (iii) to the extent that such failure to pay in full and on the due date relates to any Swap Subordinated Amount, such failure to pay shall not constitute an Event of Default for purposes of Section 5(a)(i); (iv) payment of any such shortfall relating to any Swap Subordinated Amount shall be deemed to be due on the next Quarterly Payment Date; (v) interest shall accrue and be payable on any amount so deferred at the rate specified in Section 2(e) and (vi) to the extent that such failure to pay in full and on the due date relates to any amount other than a Swap Subordinated Amount, such failure to pay shall constitute an Event of Default."

29. The objective commercial rationale for the Payment Deferral Provisions and the Limited Recourse Provision is a matter of dispute between the parties. However, the parties do agree that the relevant EMAC Issuer can be characterised as (and was intended to be) a bankruptcy remote entity. Further, although there might be a shortfall in the funds available to pay the Notional Adjustment Payments and Subordinated Step-Up Amounts at a particular point in time, further funds might subsequently become available to make those payments.

The Deeds of Indemnity and CMIS Master Agreements

30. The structure of the Securitisations described so far is a standard structure, with one of the essential purposes of the structure being that the EMAC Issuers as special purpose vehicles can hold their assets, such as the mortgage receivables, separately from CMIS and, therefore, off CMIS' balance sheet; see *Wood, Project Finance, Securitisations, Subordinated Debt*, 3rd ed, ch. 6 (esp. at §6-040).

31. The Deeds are, however, a particular feature of the Securitisation structure established between NWM and CMIS. In essence, in certain circumstances, they transfer the credit risk of a payment shortfall by the EMAC Issuer from NWM to CMIS. NWM and CMIS entered into a Deed in substantially similar terms for each of the Securitisations. The Deeds are governed by English law:

Securitisation	**CMIS party**	**NWM party**	**Date of Deed of Indemnity**
Securitisation 1	CMIS NBV	NWM NV	17 May 2006

Securitisation 2	CMIS NBV	NWM NV	30 May 2006
Securitisation 3	CMIS IBV	NWM PLC	13 December 2006
Securitisation 4	CMIS NBV	NWM NV	28 March 2007
Securitisation 5	CMIS NBV	NWM PLC	29 October 2007
Securitisation 6	CMIS NBV	NWM NV	22 February 2008
Securitisation 7	CMIS NBV	NWM NV	14 April 2008

32. The parties, also entered into two 1992 ISDA Master Agreements (Multicurrency – Cross Border): between NWM NV and CMIS NBV in connection with Securitisations 1, 2, 4, 6 and 7; and between NWM PLC and CMIS NBV in connection with Securitisation 5 (together the "CMIS Master Agreements"):

NWM party	**Date of CMIS Master Agreement**
NWM NV	7 March 2003 (as amended and restated on 29 September 2006, 2 February 2007 and 28 September 2010)
NWM Plc	1 September 2006

33. Pursuant to each of the Deeds:

i) By clause 1.1, "*EMAC Indemnifiable Amounts*" were defined as:

"In respect of the EMAC Master Agreement: …

(a) Any amount in or towards satisfaction of amounts, if any, due or accrued due but unpaid by the Issuer under the EMAC Master Agreement, other than the Swap Subordinated Amounts;

(b) notwithstanding their inclusion in the definition of "Swap Subordinated Amount', the aggregate of Notional Adjustment Payments, if any, due but unpaid by the [EMAC] Issuer under the EMAC Master Agreement but only to the extent such aggregate amount exceeds the Prepayment Penalties;

(c) notwithstanding their inclusion in the definition of "Swap Subordinated Amounts", payments due after the First Put Date from the [EMAC] Issuer to [NWM] corresponding to that portion, if any, of the increase in the Fixed Rate (as defined in the EMAC Master Agreement) to be paid by the [EMAC] Issuer that is in excess of 0.15 per cent …[the Subordinated Step-Up Amounts]".

ii) By clause 2.1, the Deeds provided that:

"*[CMIS] covenants with [NWM] that, subject to the following provisions of this deed:*

(i) it will on demand pay to [NWM] an amount equal to any EMAC Indemnifiable Amounts as from the date such EMAC Indemnifiable Amounts are due under the EMAC Master Agreement …;

…

(iv) it will be a primary obligor for any EMAC Indemnifiable Amounts to the extent these are not recovered from the Issuer, provided that [CMIS] will have the same benefits, protections and defences at law that are available to the [EMAC] Issuer".

iii) By clause 2.2, CMIS and NWM agreed "*for the benefit of the [EMAC] Issuer that any payments by [CMIS] of EMAC Indemnifiable Amounts pursuant to this Deed will discharge the [EMAC] Issuer's obligation to pay corresponding amounts under the EMAC Master Agreement*".

iv) By clause 6(a) of each Deed, it was agreed that "*the agreement set out in this deed shall be a Transaction under the [CMIS Master Agreement] for which this deed is a Confirmation*".

34. Pursuant to each of the CMIS Master Agreements, it was agreed:

i) By Section 2(e), that a party that defaults in the performance of any payment obligation would be required to pay interest (before as well as after judgment) on the overdue amount to the other party on demand in the same currency as such overdue amount, for the period from (and including) the original due date for payment to (but excluding) the date of actual payment, at the Default Rate, such interest to be calculated on a daily compounding basis.

ii) By Section 14, that the Default Rate was to be a *"a rate per annum equal to the cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount plus 1% per annum"*.

iii) By Section 5(a)(i), that an Event of Default would be constituted by the occurrence at any time with respect to a party of a failure by that party to make when due, any payment under the CMIS Master Agreement required to be made by it if such failure is not remedied on or before the third Local Business Day (as defined) after such notice is given to the party.

iv) By Section 6(a), that, if at any time an Event of Default with respect to a party had occurred and was continuing, the other party was entitled, by not more than 20 days' notice to the defaulting party specifying the relevant Event of Default, to designate a day not earlier than the day such notice was effective as an Early Termination Date in respect of all outstanding Transactions.

CMIS's failure to pay under the Deeds

35. On a quarterly basis since the entry into force of the Securitisations to date, CMIS (acting in its capacity as Issuer Administrator for each of the Securitisations as distinct from its capacity as the indemnifying party under the Deeds or any other capacity) has agreed with NWM the quantum of Notional Adjustment Payments and Subordinated Step-Up Amounts for the relevant quarter, including the quantum of what are referred to below as the "Relevant Amounts" (being the quantum of Notional Adjustment Payments and Step-Up Amounts from 25 January 2017 onwards).

36. In the period up to January 2017, if and when the EMAC Issuers were unable to pay subordinated Notional Adjustment Payments and/or Subordinated Step-Up Amounts due under the terms of the Swaps to NWM because they had insufficient funds, CMIS paid such sums to NWM under the terms of the relevant Deeds.

37. However, from 25 January 2017 onwards (in the case of Securitisations 1, 2, 4, 5, 6 and 7) and from 27 February 2017 onwards (in the case of Securitisation 3) CMIS has continued to agree to the quantum of these sums on a quarterly basis but, as and when the EMAC Issuers have failed to pay subordinated Notional Adjustment Payments and/or Subordinated Step-Up Amounts due under the terms of the Swaps to NWM, CMIS has refused to pay such sums to NWM.

38. By letters dated 3 February 2017 and 5 April 2017, CMIS contended that upon proper construction of the Deeds, it was not liable to pay any such sum.

39. The cessation of payments by CMIS pursuant to the Deeds coincided with a significant increase in the quantum of the subordinated Notional Adjustment Payments in respect of the Securitisations (from c. £1.8 million in 2016 to c. £93 million in 2017). There is a dispute between the parties as to whether this increase is the true explanation for CMIS's change of position and refusal to pay.

40. NWM has demanded from CMIS immediate payment of the outstanding sums due to be paid under each of the Deeds, including by way of various letters dated 4 October 2022. NWM again demanded payment of these sums from CMIS in a Letter of Claim dated 25 November 2022. CMIS has not paid the sums demanded or any part thereof and maintains that it has no obligation to do so.

41. The sums originally demanded by NWM and claimed by CMIS included Subordinated Step-Up Amounts in respect of Securitisations 1, 2, 3, 4, 5 and 7. However, NWM have discontinued their claims for these sums such that the sums sought by NWM consist almost entirely of Notional Adjustment Payments. The remaining sum sought in respect of Subordinated Step-Up Amounts for Securitisation 6 is less than €135,000.

The Issues

42. NWM contends that the sums it seeks to recover from CMIS ("the Relevant Amounts") are "EMAC Indemnifiable Amounts" under the Deeds which cannot be recovered from the EMAC Issuers and that CMIS is liable to pay those sums to NWM under the Deeds.

43. CMIS contends that:

i) The Deeds are guarantees rather than true indemnities and should therefore be construed in accordance with a rule of law known as the 'co-extensiveness principle'.

ii) The Payment Deferral Provisions provide for the deferment of payment of any shortfall by the EMAC Issuer until the first payment date on which that Issuer has sufficient funds available to pay (or in the case of Securitisation 3 until the next quarter payment date when funds are available).

iii) The Limited Recourse Provision is included in materially identical form in the Schedule to the EMAC Master Agreement for each Securitisation (except Securitisation 3).

iv) If any payment obligation of an EMAC Issuer in respect of a Swap is deferred pursuant to the relevant Payment Deferral Provision, then the relevant amount is not due or payable by the EMAC Issuer until such time as the payment obligation ceases to be deferred (being the first payment date under the relevant Transaction on which the EMAC Issuer has sufficient funds available to pay).

v) It follows that, for as long as any Notional Adjustment Payment or Subordinated Step-Up Amount is deferred pursuant to the relevant Payment Deferral Provision, the Relevant Amount does not constitute an "*EMAC Indemnifiable Amount*" as defined in the corresponding Deed, and CMIS has no obligation to indemnify NWM in respect of such amount until such time as the payment obligation ceases to be deferred.

vi) Further or alternatively, the Payment Deferral Provision and/or the Limited Recourse Provision constitute a benefit, protection or defence at law that is available to the EMAC Issuer within clause 2.1(iv) of the Deed, and CMIS is accordingly entitled to rely on those provisions against NWM (as if CMIS itself were the EMAC Issuer) by way of defence to any claim for an indemnity under the Deed.

44. In relation to both their arguments as to the effect of the Payment Deferral Provision and the Limited Recourse Provision, CMIS make their case on the basis of what they say is the proper construction of the EMAC Master Agreements and the Deeds read together and on the basis of the application of the co-extensiveness principle. They did not seek at the hearing to rely on any argument which required as a necessary constituent the manipulation of the language of the Deeds so as to extend to CMIS a protection that was otherwise only available to the EMAC Issuers.

45. In response, NWM submits that CMIS' contentions are not sustainable on a proper construction of the Deeds and the EMAC Master Agreements. They are, NWM says, also contrary to business common sense. In particular, NWM says, the construction contended for in respect of clause 2.1(iv) of the Deeds would render the Deeds devoid of any, or any substantial, commercial purpose. CMIS in reply say that the purpose of the Deeds was connected to CMIS' role as Issuer Administrator.

46. NWM originally submitted that the core of the issues remaining between the parties can be distilled as follows:

i) Are the Relevant Amounts "due" under the EMAC Master Agreements, such that they constitute EMAC Indemnifiable Amounts under the Deeds?

ii) Is CMIS entitled to rely on the Payment Deferral Provision and/or the Limited Recourse Provision by virtue of clause 2.1(iv) of the Deeds?

47. To these two issues, they added the question of whether the Deeds are to be characterised as contracts of guarantee to which the co-extensiveness principle applies.

48. CMIS distils the issue even further and says that the sole issue that falls to be determined in the proceedings is whether NWM can recover the Swap Subordinated Amounts from CMIS notwithstanding that those amounts are subject to a payment deferral so far as the EMAC Issuers are concerned.

Relevant Legal Principles

49. So far as construing the Deeds and other securitisation documents together is concerned, the effect of the judgments of Lord Clarke in *Rainy Sky v Kookmin Bank* [2011] 1 WLR 2900 at [14], [21]–[28] and of Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] AC 1173 at [8]–[14] can be summarised as follows:

i) The court's task is to ascertain the objective meaning of the language used by the parties. The Court must consider what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant.

ii) The exercise is a unitary one in which the Court must consider the language used, the relevant surrounding circumstances and the commercial consequences of rival constructions (*Re Sigma Finance Corp* [2009] UKSC 2 at [12]).

iii) An overly literal interpretation of a provision without regard to the whole scheme may distort or frustrate the commercial purpose. Of great importance for the ascertainment of the relevant meaning, therefore, is an understanding of the overall scheme and a reading of the relevant term which places it in the context of the overall scheme (*Re Sigma Finance* at [12] and [35]-[37]).

iv) Where there are two available constructions, the Court is entitled to prefer the construction that is consistent with business common sense and to reject the other, or to prefer the construction that produces the more commercial result.

50. For the purposes of the issues which I have to decide, each party inevitably contended that their construction of the agreements was the one which fitted the parties' commercial purpose and was consistent with business common sense. The difficulty in the present case is the lack of relevant contemporaneous evidence as to either the parties' commercial intentions or the factors which determine objectively what accords with business common-sense. I have drawn inferences where I sensibly can but this is a case where the language used and understanding the scheme of the Securitisation structure overall is of great importance to the proper construction of the Deeds.

51. So far as the question of whether a contract is a contract of guarantee or a contract of indemnity is concerned, the parties were agreed that the decision in Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd [2011] 2 All ER (Comm) 307 provides a useful summary of the principles:

    i) A contract of suretyship may contain a range of obligations, falling into two broad categories - guarantee and indemnity obligations; at [19] – [34].

    ii) Whether a particular contract is of one kind or the other, or indeed a combination of the two, turns on the construction of the words used; at [20] and [27].

    iii) In this respect, suretyship is an area of law bedevilled by imprecise terminology, where it is important not to confuse the label used by the parties with the substance of the obligation. Labels may or may not be indicative of what the parties intended; at [20].

    iv) The parties' own use of the terms 'guarantee' or 'indemnity' is not conclusive but it will be indicative; at [20].

    v) The substance of an obligation is to be identified in accordance with normal principles of construction, and by looking at the instrument as a whole without any preconceptions as to the nature of the obligation; at [20].

    vi) The essential characteristics of an indemnity obligation is that it is not a secondary obligation (as characterised above) but imposes a primary payment obligation on the giver of the indemnity; at [25] – [26].

    vii) A contract of guarantee, in the true sense, is a contract whereby the guarantor promises the creditor to be responsible for the due performance by the principal debtor of his existing or future obligations to the creditor if the principal debtor fails to perform them or any of them. This does not mean that the guarantor's liability can only sound in damages; it can also sound in debt; at [23].

    viii) One essential distinguishing feature of a true contract of guarantee is that the liability of the guarantor is always ancillary, or secondary, to that of the principal debtor, who remains liable to the creditor. There is no liability on the guarantor unless and until the principal debtor has failed to perform his obligation. In accordance with the principle of co-extensiveness, the guarantor is generally only liable to the same extent that the principal is liable to the creditor; at [24].

    ix) A contract which contains a provision preserving liability in circumstances where a guarantor would otherwise be discharged will usually indicate that the contract is one of guarantee, because such a provision would be unnecessary if the contract were one of indemnity. On the other hand, a provision stating that the surety is to be liable in circumstances where the principal has ceased to be liable may be indicative either of a guarantee (because the provision would be unnecessary in the case of a contract of indemnity) or of an indemnity (because it makes clear that the liability of the surety was intended to be independent of the principal's liability); at [27].

52. I accept that all the principles set out in the previous paragraph guide the task of construing CMIS' obligations under the Deeds.

53. It is correctly accepted by CMIS that the principle of co-extensiveness does not apply to a contract of indemnity; see Vossloh at [26].

54. So far as the principle of co-extensiveness is concerned, CMIS referred me to a passage from *Andrews and Millett, The Law of Guarantees* (7th edition) at paragraph 6-002, which explains the principle in the following terms:

> *"The most important aspect of the nature of a guarantor's liability as a secondary liability is that it is co-extensive with the liability of the principal. This means that as a general rule, the surety's liability is no greater and no less than that of the principal, in terms of amount, time for payment and the conditions under which the principal is liable. Accordingly, in Hartland Public Officer of the Gloucestershire Banking Company v Jukes (Executors and Executrix of William Steward Deceased) (1863) 1 Hurl. & N. 667, where the principal and surety both gave a promissory note to the creditor as security for advances, no action could be maintained on the note against either principal or surety until an advance was made to the principal by the creditor. Co-extensiveness of liability is one of the essential characteristics of a guarantee that distinguishes it from a contract of indemnity …*
>
> *However, the principle of co-extensiveness is not an immutable rule. The precise extent of the liability of the surety will always be governed by the provisions of the guarantee on their true construction, and the parties remain free in certain respects to provide for limitations of the surety's liability without detracting from the nature of the contract as a guarantee. Furthermore, the court has not always regarded itself as bound to treat the surety as co-extensively liable with the principal, and there are circumstances where the surety will remain liable notwithstanding the fact that the principal is not, or is no longer, liable for the principal obligation."*

55. Two matters stand out from the above passage.

    i) The principle of co-extensiveness is not a strict rule. Even in relation to a contract of guarantee, its application will still be subject to the provisions of the contract in question and its effect will be dependent on the true construction of those provisions.

    ii) Even under a contract of guarantee to which the principle of co-extensiveness applies, there may be circumstances where the surety remains liable notwithstanding that the principal is released from its obligations to the creditor. Whether this is the case will depend on the true construction of the terms of the contract said to be a contract of guarantee.

Commercial Context and the parties' intentions

56. Both parties made submissions to me as to the commercial context relevant to the construction of the Deeds and to determining the parties' intentions. Those submissions are relevant not only to the specific questions of construction I have to decide but also to the wider question of the nature of the Deeds. For that reason, I address the question of commercial context separately to my conclusions on each of the principal issues.

However, I do not overlook the fact that the process of construction is a unitary exercise dependent both on the relevant commercial context and the language of the contracts.

57. CMIS submits that the Deeds are curious documents, which were executed behind the scenes between NWM and CMIS. They contend that it is unusual for an originator of a securitisation to provide a guarantee or indemnity in favour of the swap counterparty because the whole point of a securitisation is to remove assets and liabilities from the originator's balance sheet. They submit that if the Deeds are construed as entitling NWM to the indemnity they seek, this would run contrary to the purpose of a securitisation by restoring a liability for the EMAC Indemnifiable Amounts to CMIS balance sheets.

58. CMIS also points to the fact that the drafting of the Deeds is bespoke and is not a standard form document promulgated by the Loan Markets Association or similar organisation or in the standard form of guarantee as required by a bank. They highlight that the Deed is not a one-sided document but confers benefits on both parties. They also suggest that the origins of the Deeds are shrouded in obscurity to a far greater extent than a normal bank guarantee or indemnity.

59. These submissions were made in support of CMIS' submission that the purpose of the Deeds should be narrowly construed and limited to ensuring the fulfilment by CMIS of its role as Issuer Administrator to pay over to NWM the sums to which it was entitled under the Payments Waterfall.

60. CMIS further submitted that the Deed does not include any form of non-compete provision, by which they mean a provision that the guarantor agrees not to assert its right of counter-indemnity against the principal debtor until such time as the guaranteed sums have been paid in full to the creditor. CMIS says that such a broadly drafted non-compete provision is commonplace in virtually all modern guarantees but not present in the Deeds. They submit that this means that CMIS is free to enforce counter-indemnity claims against the relevant EMAC Issuer as soon as they pay any amount to NWM and that is precisely what CMIS intends to do if the Court enters judgment for NWM.

61. This submission was made on the basis that the risk of counter-indemnity claims would have been known to the parties at the time that the Deeds were made and would be something the parties would want to avoid given that their intention was that the EMAC Issuers were to be bankruptcy remote. CMIS go further and submit that if the Deeds are to be construed as permitting NWM to recover the EMAC Indemnifiable Amounts from CMIS, this would raise questions as to whether NWM fairly presented the risks associated with the Securitisations to the Noteholders.

62. As to the risk of counter-indemnity claims by CMIS against the EMAC Issuers, both parties explored in some detail the legal issues which potentially arise. NWM submitted that such claims were not possible or at least were very unlikely to succeed whereas CMIS submitted that they had very strong claims to a right of counter-indemnity.

63. In the end, this is not an issue which I can or should decide at this stage beyond accepting that while there may be significant commercial or legal hurdles to any counter-indemnity claims by CMIS, they are at least arguable.

64. Nevertheless, it seems to me that there is no good evidence that the risk of counter-indemnity claims was or should reasonably have been in the mind of both CMIS and NWM when the Deeds were being negotiated. Likewise, I do not consider that the fact that the Deeds are uncommon documents to find in a securitisation structure and are bespoke is a reason to conclude that the documents were not intended to impose potentially significant liabilities on CMIS. Rather, it seems to me at least equally arguable that the facts that the agreements are unusual and were in a bespoke form point to the documents being intended to ensure that if the EMAC Issuers failed to pay EMAC Indemnifiable Amounts to NWM, then NWM were entitled to recover those sums from CMIS even if the reason for the Issuers' failure to pay was that the Issuers did not have the funds to make the required payments.

65. Similarly, I do not accept that the fact that the scale of the payments now demanded by NWM from CMIS is such as it may lead to CMIS becoming insolvent is a material factor which I can properly take into account when construing the Deed. There is no evidence that the risk of such significant exposures was in the mind of either party at the time the Deeds were concluded. Further, notwithstanding the amount of the sums, which NWM now seeks to recover, it cannot be said that the possibility that CMIS owes NWM such a significant sum is such a commercially absurd result that the court should conclude that this is not what the parties intended. As both parties accepted, whichever party is right as to the construction of the Deeds, one of them was inevitably accepting the credit risk that the EMAC Issuers would not be able to pay the EMAC Indemnifiable Amounts.

66. I do consider it relevant that both parties were experienced in securitisation structures of the type in issue and both advised by law firms very experienced in drafting the documents required for such structures. Those advisers would be well aware of the difference between contracts of guarantee and contracts of indemnity as well as the potential impact of language suggesting possible primary obligations on CMIS. In this regard, I consider that there is considerable force in the argument made by NWM that if the Deeds were intended to have the limited effect suggested by CMIS, then the Deeds would have been drafted in substantially different form.

67. In his witness evidence, Mr. Daly referred to evidence given by Mr. Willems, the former Chief Investment Officer of Credit Management & Investor Solutions B.V. ("CMIS Group"), to the court in Amsterdam, the Netherlands as to the circumstances in which NWM released a parent company guarantee previously given by General Motors in respect of certain liabilities of CMIS NBV under an ISDA Master Agreement which CMIS NBV had signed with NWM NV. Mr. Willems' evidence to the court in Amsterdam was to the effect that he believed that the Deeds provided little security for NWM's exposure to the EMAC Issuers. I did not find this evidence helpful in circumstances where I have no good evidence of the issues in the Dutch proceedings and Mr. Willems' view as to the effect of the Deeds reflected only his opinion. I further note that during the period of Mr. Willems' employment with CMIS Group, CMIS was indemnifying NWM for sums not recovered from the EMAC Issuers where there was a shortfall in the sums received by the EMAC Issuers preventing them making the payments to NWM.

Are the Deeds to be construed as contracts of guarantee and, if so, what is the consequence?

68. CMIS submits that the Deeds are to be construed as contracts of guarantees based on two key factors.

    i) First, CMIS says, the Deeds are expressly drafted on the footing that NWM will only be entitled to demand payment from CMIS as from the dates when the EMAC Indemnifiable Amounts are due under the EMAC Master Agreement. The EMAC Indemnifiable Amounts are in turn defined as amounts that are 'unpaid' by the Issuer. This arrangement CMIS says is consistent with a contract which is a contract of guarantee.

    ii) Second, CMIS says, the express language of clause 2.1(iv) provides decisive support for the conclusion that the Deeds are to be characterised as a guarantee because:

        a) The opening words of the clause are consistent with a contract of guarantee because CMIS' obligation to pay the EMAC Indemnifiable Amounts is parasitic on the Issuer's failure to perform its own obligations.

        b) The proviso at the end of clause 2.1(iv) is an express incorporation of the co-extensiveness principle. CMIS goes on to say that this proviso was obviously inserted at the behest of CMIS when the contract was being drafted but there is no evidence to establish whether this is correct or not.

        c) A conventional principal debtor clause would not be sufficient to impose a true primary obligation on CMIS. But in case there was any doubt, the drafters inserted the proviso at the end of clause 2.1(iv).

69. The points made in the previous paragraph are supplemented by the following relevant considerations:

    i) In support of their arguments, CMIS submits that NWM did not provide any coherent meaning for the words 'benefits, protections and defences at law' found at the end of clause 2.1(iv). CMIS says that this phrase is a broad one intended to ensure that, if the EMAC Issuer was not obliged to pay NWM, then nor was CMIS.

    ii) CMIS further submits that if the parties are minded to exclude any one or more of the normal principles in the law of guarantees, then this can only be done using clear and unambiguous language. This, it is said, is effectively a rule of strict construction which survives the modern approach to contractual construction.

70. While I am not persuaded that it is correct to describe the requirement for clear and unambiguous language as a rule of strict construction, I accept that in general courts should still require evidence of clear intention from words used in a contract of guarantee to justify the nature and extent of the liability undertaken by a surety.

71. In response, NWM relied on the following matters to establish that the Deeds are not contracts of guarantee or at least not contracts to which the co-effectiveness principle applies.

i) The Deeds are entitled 'Deeds of Indemnity'. While this is not conclusive, it is indicative, especially when the contracts were drafted, as these were, by skilled lawyers.

ii) The Deeds use the language of indemnity not the language of guarantee. The verb 'guarantee' and the noun 'guarantor' do not appear anywhere. In contrast, the verb 'indemnify' and the phrase 'EMAC Indemnifiable Amounts' are used throughout.

iii) The verb 'indemnify' appears twice in Recital 3(ii) and clause 10 of the Deeds and in both contexts can only refer to sums for which the EMAC Issuers cannot ever be liable. In other words, in both places, the verb is being used in its technical sense of establishing a primary liability and not as a synonym for the verb 'guarantee'.

iv) In respect of the term 'EMAC Indemnifiable Amounts', that term is defined at clause 1.1 of the Deeds to cover 4 different types of payment sums set out at letters (a) to (d); of which at least one, the 'EMAC Mark to Market Value', represents a sum for which the EMAC Issuers could never be liable because it is a sum payable by NWM to the EMAC Issuer. Again, therefore, the words 'EMAC Indemnifiable Amounts' are being used in a technical sense to refer to sums to be indemnified by way of a primary payment obligation.

v) Each of the payment obligations found in clauses 2.1(i) to (iii) are properly categorised as primary payment obligations. In particular, the obligation in clause 2.1(i) requires payment on demand of any EMAC Indemnifiable Amounts from the date they are due under the EMAC Master Agreement, which is a badge of a primary obligation.

vi) In light of the above, the covenant in the first half of clause 2.1(iv) that CMIS will be a primary obligor for any EMAC Indemnifiable Amounts makes sense and the words should be given effect in accordance with their terms. What the words are doing is reflecting and reinforcing that the payments required under clause 2.1(iv) are primary obligations in the same way that the obligations in clause 2.1(i) to (iii) are.

vii) It would be wrong to construe the second half of clause 2.1(iv) as a derogation from the first half and as emptying that payment requirement of any meaning, which is what CMIS's argument that the second half is the embodiment of the co-extensiveness principle would do.

viii) Further, the payment obligations created by clause 2.1(i) are simply not in the nature of secondary obligations.

ix) Clauses 4(a) and (b) make explicit that CMIS' liability is not co-extensive with the liability of the EMAC Issuers or indeed of any other *'person liable in respect of any of the EMAC Indemnifiable Amounts or interested therein*'.

x) Standing back from the detail, the essential nature of a secondary obligation is that the guarantor can have no liability unless the principal debtor has an obligation which it has failed to perform. The essential nature of a primary obligation is that it is not a secondary obligation.

xi) If what the parties had really intended was secondary liability as regards the Notional Adjustment Payments and the Subordinated Step-Up Amounts such that CMIS could not be liable to pay unless and until the EMAC Issuer had the funds available in accordance with the Payment Waterfalls but had defaulted in payment then in the real world, the Deeds would have been drafted in completely different way. In particular, the payment obligation in respect of the Notional Adjustment Payments and the Subordinated Step-Up Amounts would have been drafted: either (i) as a see-to-it guarantee in respect of the EMAC Issuer's payment obligations; or (ii) as an obligation conditional upon on-going payment default by the EMAC Issuer.

xii) The question of the proper characterisation of the Deeds cannot be divorced from that of their commercial purpose.

a) In particular, if CMIS were right to characterise the Deeds as contracts of guarantee and right to assert that the co-extensiveness principle applies, their approach produces the surprising and uncommercial result that the Deeds would respond as regards Notional Adjustment Payments and Subordinated Step-Up Amounts in circumstances where the EMAC Issuers had the funds available to pay NWM the Notional Adjustment Payments and Subordinated Step-Up Amounts, but would not respond in any other set of circumstances. In short, the Deeds would respond as regards the Notional Adjustment Payments and Subordinated Step Up Amounts in circumstances where they were entirely unnecessary, and they would never respond in circumstances where they were needed.

b) The suggestion that the purpose of the Deeds was to encourage CMIS (as the Issuer Administrator) to perform its obligations under the Issuer Services Agreement and distribute funds to NWM when available is commercially unreal. NWM had other routes available by which it could ensure the distribution of funds when they were available.

c) CMIS' approach to characterisation involves a result which does not offer any credible explanation for why the Notional Adjustment Payments and Subordinated Step-Up Amounts were included within the definition of EMAC Indemnifiable Amounts at all.

xiii) In support of the arguments set out in the previous sub-paragraph, NWM rely on the following passage in Re Sigma Finance Corp [2009] UKSC 2:

"of much greater importance …in the ascertainment of the meaning that the deed would convey to a reasonable person with the relevant background knowledge, is an understanding of its overall scheme and a reading of its individual sentences and phrases which places them in the context of that overall scheme" [12]

xiv) None of the *in terrorem* consequences, which CMIS suggests would follow if the Deeds are construed as contracts of indemnity should be given any weight in the exercise of characterisation.

a) In the first place, the risk that a CMIS insolvency might pose for its role as Issuer Administrator and as MPT Provider is not a risk inimical to the transaction structure. On the contrary, it was a risk expressly contemplated by the transaction documentation.

b) In the second place, the risk of CMIS having an unfettered right of counter-indemnity against the EMAC Issuers which might result in insolvency proceedings against the EMAC Issuers can also be disregarded in the exercise of characterisation because there is no basis for a finding that any such unfettered right exists under English or any other law.

72. Largely for the reasons given by NWM, I consider that they are correct that the Deeds are contracts of indemnity as opposed to being contracts of guarantee.

73. Stepping back and looking at the Deeds and Securitisation documentation generally, the documents and the structure they create are complex and carefully drafted to work together. As noted in paragraph 66 above, the documents were obviously drafted by skilled legal professionals for parties, which were highly experienced in the securitisation structures. If the intention of those parties and their advisers was to draft a deed of indemnity which was in reality a contract of guarantee or to ensure that CMIS were to have no greater liability in respect of the EMAC Indemnifiable Amounts than the EMAC Issuers, then I consider that the contract would have been drafted in very different terms and would not have been titled 'Deed of Indemnity'. In particular, when one looks at the covenants in clause 2.1 and sees that each of sub-clauses (i) to (iii) is in 'on demand' terms and such that they are only properly characterised as being obligations of indemnity, then it seems to me to follow that by imposing an obligation on CMIS as primary obligor in sub-clause (iv) the parties were intending that CMIS should accept an obligation to indemnify NWM in the technical sense. This conclusion is reinforced by the link between the obligation on CMIS to pay EMAC Indemnifiable Amounts that are due on demand under clause 2.1(i) and the acceptance of a role as primary obligor for EMAC Indemnifiable Amounts which are not recovered from the EMAC Issuer under clause 2.1(iv).

74. Although the words 'to the extent these are not recovered from the Issuer' in clause 2.1(iv) are arguably consistent with the only obligation on CMIS being a secondary obligation arising only after the EMAC Issuer has failed to pay, I do not consider that this is the intention of the words here. Rather, I accept Mr. Davies-Jones KC's submissions that the words are intended only as a statement of fact as to the sums for which CMIS is to be a primary obligor and which are payable on demand. This it seems to me is the construction of the first half of clause 2.1(iv) which is consistent with the nature of the obligations assumed under clause 2.1 and with the Deeds taken as a whole; see the approach in Vossloh at [45].

75. This conclusion is not undermined by the second half of sub-clause (iv) for reasons set out in paragraphs 78 and **Error! Reference source not found.** below. Nor is it undermined by the fact that parties do sometimes describe a party as being a primary

obligor even in circumstances where the contract looked at as a whole is a contract of guarantee. Looking at the Deeds, I accept that when the term 'primary obligor' is used in clause 2.1(iv), it is intended to create a primary obligation in the sense that this term is used in a contract of indemnity rather than being consistent with a contract of guarantee imposing only secondary obligations.

76. I have already stated that I accept that if the Deed was to have the limited purpose suggested by CMIS, then it would have been drafted in different terms. There is nothing in the language of the Deeds which points to the purpose of clauses 2.1(i) and (iv) being only to ensure that CMIS complied with its responsibilities as Issuer Administrator for distributing the EMAC Issuer's assets in accordance with the Payments Waterfall rather than imposing primary payment obligations on CMIS.

77. Further, I accept that the fact that the document is titled 'Deed of Indemnity' and uses the language of indemnity rather than that of guarantee is of significance in the context of the Deeds. As already set out above, these agreements were drafted by skilled professionals, who would have understood the significance of the language they were using. Accordingly, while neither the title nor the language of the Deeds is necessarily conclusive as to the nature of the agreements, this is a case where the choice of title and of language does carry significant weight in determining the nature of the contract.

78. So far as the second half of clause 2.1(iv), is concerned, I accept NWM's submission that it cannot be construed in a way which deprives CMIS' express acceptance of a responsibility as primary obligor of any effect. If one were to construe the phrase '[CMIS] will have the same benefits, protections and defences at law that are available to the Issuer' as extending to CMIS the entitlement to rely on the Payment Deferral Provision or the Limited Recourse Provision then this would contradict the notion that CMIS was to be a primary obligor for the amounts that could not be recovered from the EMAC Issuer. I also consider that if the intention of the parties were to provide CMIS with such entitlement, then the clause would say so expressly rather than using the opaque language of the existing clause. In this regard, I accept NWM's submissions that:

    i) The words 'at law' qualify not only the word 'defences' but also the words 'benefits' and 'protections', a conclusion which is reinforced by comparison with the language of clause 4(c) of the Deed of Indemnity and section 9(d) of the CMIS ISDA Master Agreement 1992.

    ii) The intention of the phrase is to ensure that where the EMAC Issuer has no liability for a payment because there has been an event which gives it a right at law to refuse payment, for example, a frustrating event or where for any other reason the EMAC Issuer's payment obligation was void as a matter of law, CMIS would be entitled to rely on that event or reason as well.

79. I do agree with CMIS that the provisions of clauses 4(a) and (b) of the Deeds are more consistent with provisions which might be found in a contract of guarantee rather than a contract of indemnity. But, while I do not consider that the sub-clauses advance NWM's case that the Deeds are contracts of indemnity, nor do I consider that they materially undermine NWM's case. The presence of those provisions is explicable as a piece of belt-and-braces drafting; see Shanghai Shipyard Co. Ltd v Reignwood Intl Investment (Group) Co. Ltd [2021] 1 WLR 5408 at [38].

80. Finally, I turn to deal with CMIS' arguments on the consequences of a finding that the Deeds are contracts of indemnity rather than guarantee.

81. As to this, I accept that the risk of a CMIS insolvency for its role as Issuer Administrator and MPT Provider is not a risk which was inimical to the transaction structure. On the contrary, as already stated above, it was a risk expressly contemplated by the transaction documentation such that in the event of such an insolvency, the Issuer Services Agreements provided for the termination of its roles as Issuer Administrator and as MPT Provider and for the appointment of substitute providers; see for example clause 25 of the Issuer Services Agreement for Securitisation 1.

82. CMIS also says in relation to this issue that in the event that they are found to be liable for the EMAC Indemnifiable Amounts, they will seek a counter-indemnity from the EMAC Issuers with the consequence that those Issuers will be forced into insolvency. I have explained in paragraphs 60 to 66 above, why I do not consider that this risk affects the proper construction of clause 2.1 of the Deeds.

83. For all the above reasons, I consider that the Deeds are contracts of indemnity as opposed to contracts of guarantee and the co-extensiveness principle does not apply for the purposes of construing their provisions, particularly clauses 2.1(i) and 2.1(iv).

Are the Relevant Amounts "due" under the EMAC Master Agreements (and therefore under the Deeds)?

84. The material terms in respect of Securitisations 1, 2, 4, 5, 6 and 7 are set out above at paragraphs 22 to 29.

85. By way of recap pursuant to clause 2.1(i) of the Deeds: CMIS covenanted that, subject to the terms of the Deeds, it would on demand pay to NWM an amount equal to any EMAC Indemnifiable Amounts as from the date such EMAC Indemnifiable Amounts were due under the EMAC Master Agreement.

86. CMIS submitted that in circumstances where the EMAC Issuers were entitled to rely on the Payment Deferral Provisions in the Securitisations to defer their payment obligation in relation to EMAC Indemnifiable Amounts, there could be no payment due for the purposes of clause 2.1(i) of the Deeds.

87. The Payment Deferral Provision is found at part 5(i) of the Schedule to the EMAC ISDA Master Agreement for those Securitisations. By way of reminder it provides that:

"*If [the EMAC Issuer] does not have sufficient funds available to pay, in full and on the due date, an amount to be paid by it under a Transaction: (i) [the EMAC Issuer] will notify [NWM] prior to such due date of the amount of any shortfall; (ii) [the EMAC Issuer] will pay such amount as it is able to pay on such due date; (iii) to the extent that such failure to pay in full and on the due date relates to any Swap Subordinated Amount, such failure to pay shall not constitute an Event of Default for purposes of Section 5(a)(i); (iv) payment of any such shortfall relating to any Swap Subordinated Amount shall be deferred until the first payment date under such Transaction on which [the EMAC Issuer] has sufficient funds available to pay the amount that it would, but for this Part 5(i), have been required to pay on the original due date; (v) interest shall accrue and be payable on any amount so deferred at the rate specified in Section 2(e);*

and (vi) to the extent that such failure to pay in full and on the due date relates to any amount other than a Swap Subordinated Amount, such failure to pay shall constitute an Event of Default"

88. For Securitisation 3:

i) Clause 2.1(i) of the Deed contains a materially identical provision to that found in the Deeds for the other Securitisations, save that it refers to a "*written demand*", which NWM says, and I find, was made in NWM's letter to CMIS of 4 October 2022.

ii) The Payment Deferral Provision is found in Part 5(h) of the Schedule to the EMAC Master Agreement. By way of reminder, it provides:

"*Other than in respect of Excess Swap Collateral, if [the EMAC Issuer] does not have sufficient funds available to pay, in full and on the due date, an amount to be paid by it under a Transaction: (i) [the EMAC Issuer] will notify [NWM] prior to such due date of the amount of any shortfall; (ii) [the EMAC Issuer] will pay such amount as it is able to pay on such due date; (iii) to the extent that such failure to pay in full and on the due date relates to any Swap Subordinated Amount, such failure to pay shall not constitute an Event of Default for purposes of Section 5(a)(i); (iv) payment of any such shortfall relating to any Swap Subordinated Amount shall be deemed to be due on the next Quarterly Payment Date; (v) interest shall accrue and be payable on any amount so deferred at the rate specified in Section 2(e) and (vi) to the extent that such failure to pay in full and on the due date relates to any amount other than a Swap Subordinated Amount, such failure to pay shall constitute an Event of Default*."

89. Turning first to Securitisation 3 and NWM's argument that it permitted only one deferral of any payments otherwise due, the Payment Deferral Provision in respect of Securitisation 3 permits deferral until the "*next Quarterly Payment Date*". The Quarterly Payment Dates are the 25th day of February, May, August and November. NWM says that on its proper construction the provision does not on its terms defer CMIS's payment obligation until an unspecified future date when the EMAC Issuer has sufficient funds to pay rather it permits one postponement until the next Quarterly Payment Date (which has now passed for all sums outstanding under Securitisation 3). In contrast, CMIS submits that while the language of Securitisation 3 is different, the effect is identical to that for the other securitisations. If the EMAC Issuer does not have any sufficient funds to pay a Swap Subordinated Amount on any Quarterly Payment Date, then the due date is repeatedly deferred to the next Quarterly Payment Date until such time as the Issuer has sufficient funds available to pay the sum in question.

90. On the language of Securitisation 3, both interpretations of its provisions are possible. But, on balance, I am persuaded that CMIS' interpretation of clause 5(h) is to be preferred. The language of the clause permits an interpretation which allows for a repeated deferral of payment of sums outstanding in respect of a Swap Subordinated Amount until such time as the Issuer had sufficient funds available to pay the sums in question. Further, no good explanation is available as to why the scheme for Securitisation 3 should be different to that for the other securitisations. Securitisation 3 relates to the German mortgage lending unlike the other Securitisations but this does not in itself provide any explanation for why a different approach is to be taken for

payment deferrals under that Securitisation in contrast to the scheme for the Dutch mortgage lending.

91. I therefore turn to consider the position in relation to the other six Securitisations.

92. CMIS' case was succinctly summarised at paragraph 61 of their Skeleton Argument, namely:

i) Clause 2.1(i) of the Deed of Indemnity is the only provision under which NWM can demand payment from CMIS. Even if a deferred sum can be treated as an "EMAC Identifiable Amount", this does not mean that a demand for payment of that sum can be made under clause 2.1(i).

ii) A demand can only be made under clause 2.1(i) as from the date such EMAC Indemnifiable Amounts are due under the EMAC Master Agreement.

iii) In this context, the word 'due' is expressly tied to the contractual due date under the ISDA Master Agreement which necessarily changes whenever a payment is deferred.

93. There is a well-recognised distinction in English law between the date on which a debt accrues (i.e., is due) and the date upon which a debt is payable. Although the two dates may often coincide, they are conceptually distinct. The courts have recognised that the drafting of the ISDA Master Agreement reflects this distinction. So, for example, in Videocon Global Ltd v Goldman Sachs International [2016] EWCA Civ 130, it was held in respect of the drafting of Section 6 of the ISDA Master Agreement at [53]:

"The first important point to note is that, as in many contracts, there is a clear distinction in the Master Agreement between, on the one hand, the underlying indebtedness obligation and the date on which such obligation accrues, (i.e. the date at which the relevant amount becomes due) and, on the other hand, the payment obligation and the date upon which the obligation to pay the relevant amount arises. Although the language of section 6 might be said to be somewhat inconsistent, on occasions, between its use of words 'due' on the one hand and 'payable' on the other, nonetheless the distinction between the debt obligation and the payment obligation and the different dates upon which those obligations respectively arise, is clear in the scheme of the contract. That distinction is particularly clear, for example, in the definition of payment date in section 6(d)(ii).

94. In the context of section 2 of the ISDA 1992 Master Agreement, the Court of Appeal in Lomas & Ors. v. JFB Firth Rixson Inc [2012] 2 All ER (Comm) 1076 also considered the nature of the obligations imposed by that section. The court made the following findings:

"[25] Section 2 of the master agreement is, however, all about the payment obligation and does not, in our view, touch the underlying indebtedness obligation. In particular, section 2(a)(i) obliges each party to make each payment specified in the confirmation and it is that payment obligation which is, by section 2(a)(iii), made subject to the condition precedent that no event of default has occurred and is continuing.

…

[28] A similar argument to that advanced by Mr. Fisher was submitted to Gloster J. by Mr. Jonathan Crow QC in Pioneer Freight Futures Co. Ltd (in liq) v. TMT Asia Ltd [2011] EWHC 778 (Comm) … a case about FFAs decided after the decision of Briggs J in the present case, at any rate in his oral reply (see [72]). It was rejected by her for much the same reasons as we have set out. She said (at [91])

> *"Once one approaches the analysis on the basis that, under section 2(a)(iii), one is only looking at the payment obligation, rather than the debt obligation, the whole machinery makes sense. Thus the wording of section 2(a)(iii) makes it clear that the payment obligation is subject to the condition precedent that no Event of Default or Potential Event of Default has occurred "and is continuing". The natural reading of those words envisages that once a condition precedent is fulfilled, the obligation to pay revives. There is no need for any further creation of the debt obligation itself, as Mr. Crow seeks to suggest.'*

We would respectfully adopt those observations of Gloster J and hold that the underlying debt obligation is undisturbed by the event of default; it is merely the payment obligation which is barred if there is an event of default. We turn therefore to the next question, which is whether the obligation to pay is extinguished or is merely suspended so that it can and will revive if the event of default is cured before termination by either party or on the maturity of the transaction.

95. Likewise in Deutsche Bank AG v Sebastian Holdings Inc. [2024] 3 WLR 135, a case concerning the proper construction of s.24(2) of the Limitation Act 1980, Popplewell LJ said at [13] – [14]:

> "*I start with the ordinary meaning of the word "due", without resort to context. Each side submitted that its natural meaning favoured the construction for which it contended. Mr McLeod submitted that its natural meaning was payable. Mr Morris submitted that its natural meaning was owing (which is the expression I shall use to mean an amount in respect of which a liability has arisen notwithstanding that it may be payable at a future time).*
>
> *I would reject both submissions. As a matter of language, devoid of context, "due" may mean owing or payable. If a lease provides for rent to accrue from day to day but to be payable monthly in arrears, one might equally say that the rent falls due daily or that it falls due at the end of the month. Either is a natural use of language.*
>
> *Others have expressed the same view. In Ex p Kemp, In re Fastnedge (1874) LR 9 Ch App 383, Mellish LJ said at p 387:*
>
> > *"Now, the words 'debts due to him' are certainly words which are capable of a wide or a narrow construction. I think that prima facie, and if there be nothing in the context to give them a different construction, they would include all sums certain which any person is legally liable to pay, whether such sums had become actually payable or not. On the other hand, there can be no doubt that the word 'due' is constantly used in the sense of 'payable' …"*

In In re Stockton Malleable Iron Co (1875) 2 Ch D 101 Sir George Jessel MR said at p 103:

"On the seventh article the argument addressed to me was this. It was said 'moneys due' included moneys owing, but not at present payable. To that I answer, adopting the criticism of Mellish LJ in Ex p Kemp on the words of the Bankruptcy Act, that the word 'due' may mean either owing or payable, and what it means is determined by the context.""

96. What both the Videocon case and the Deutsche Bank case emphasise is that the word 'due' can refer to the accrual of a debt or the fact that the debt is payable or both. The word may be used interchangeably in different contexts within the same agreement and even within the same provision of the agreement. Further, the decision in Lomas confirms that where a payment obligation is suspended or deferred this does not disturb the underlying debt obligation. It follows that it is necessary to look to the language of the relevant agreements to determine when the word 'due' is being used to refer only to a party's payment obligation or when it is being used to refer either only to the accrual of party's obligation in debt or to both that obligation and the obligation of payment.

97. Turning first to the language of the EMAC Master Agreements:

i) The language of Part 5(i) of the Schedule to the relevant EMAC Master Agreements makes clear that payments were only capable of being deferred by the EMAC Issuer thereunder once the "*due date*" had been reached.

ii) There is no express language in Part 5(i) of the Schedule to suggest that the accrual of a debt, as opposed to its payment, is being deferred. Had it been intended to defer the accrual of the debt, then I consider that one would expect the clause to say so expressly.

iii) Not only is there no express language to produce that result, but the focus of Part 5(i) is on the payment of the relevant debt obligations, rather than their accrual. Throughout Part 5(i), the language of deferring payment only is used. In particular, the start of sub-paragraph (iv) of Part 5(i) makes clear that the subject of the deferral provision is "*payment*" rather than anything else.

iv) Mr. Smith KC and Mr. Davies-Jones KC both submitted in their oral submissions that references to 'due date' in the first, second and fourth lines of Part 5(i) is a reference to the due date for payment. However, Mr. Davies-Jones KC also submitted that the intention of the clause was not to modify the accrual of the underlying debt, which was also due. Mr. Smith KC accepted in his oral submissions that this was correct and Part 5(i) was only concerned with deferral of the EMAC Issuer's payment obligations.

v) The language of sub-paragraph (iii) of Part 5(i) – "*such failure to pay in full… on the due date*" – also supports the idea that the relevant debt must be due, since there could be no "*failure*" if no debt had accrued by that date.

vi) Further sub-paragraph (iii) refers to Swap Subordinated Amounts. The definition of Swap Subordinated Amounts found in the Master Definitions Agreement uses 'due' in sub-paragraph (i)(a) and (b) to refer to amounts which

have accrued due. In particular, so far as Notional Adjustment Payments are concerned, they are Swap Subordinated Amounts to the extent that they are 'due' but 'unpaid'

vii) Further, pursuant to sub-paragraph (v) of Part 5(i), interest is payable on the payment deferred at the Default Rate specified in Section 2(e) of the relevant EMAC Master Agreements. The very fact that interest is payable assumes the relevant debt is due in the sense of owing; interest would not be accruing if there was no present debt; that is to say if the debt had not accrued due. This conclusion is supported by the particular rate at which interest accrues on the deferred payment - viz the Default Rate. If, by operation of Part 5(i), the debt is not due, in the sense of accrued, there would be no rationale for applying the Default Rate. The very notion of "*default*" establishes once again that a debt has become due and is outstanding, albeit that payment is being deferred.

viii) The above interpretation of clause 5(i) means that there can be a consistent interpretation across clause 5(i) and clause 5(h) in the EMAC Master Agreement for Securitisation 3 because both clauses are concerned with the deferral of a payment obligation rather than deferral of the accrued debt.

98. In circumstances where the language of clause 5(i) postpones the payment date of EMAC Indemnifiable Amounts but does not affect the accrual of the debt obligation or the fact that such amounts are owing, the next question is whether for the purposes of clause 2.1(i) of the Deeds, the use of the word 'due' in that sub-clause refers to sums which are due in the sense of being payable or whether it is referring to sums which are due in the sense of being owing.

99. I find that in the context of clause 2(1)(i), the word 'due' is being used to refer to sums which are accrued due so that there is an existing obligation in debt irrespective of whether payment has been deferred.

i) I consider that this construction for clause 2.1(i) is consistent with the purpose of the Deeds as discussed in the section on commercial context at paragraph 56 and following above.

ii) It is consistent with the definition of Swap Subordinated Amount in the Master Definitions Agreement.

iii) It is consistent with the definition of EMAC Indemnifiable Amounts found in clause 1.1 of the Deeds, which defines those amounts:

a) Generally as 'any amount in or towards satisfaction of amounts if any, *due or accrued due but unpaid by the Issuer under the EMAC Master Agreement'*.

b) In relation to Notional Adjustment Payments, as being the aggregate of such payments *due but unpaid by the Issuer* under the EMAC Master Agreement to the extent that such aggregate amount exceeds the Prepayment Penalties.

c) In relation to increases in the Fixed Rate to be paid by the Issuer that are in excess of 0.15 per cent, such payments that are *due* after the First Put Date.

iv) It is further consistent with the description of the purpose of the Deeds found in Recital (3)(ii) namely to indemnify NWM in relation to amounts owing to NWM in relation to the hedging agreements, which would include the EMAC Master Agreements and the Schedules thereto.

100. CMIS submitted that its construction, the effect of which is that CMIS cannot be liable to indemnify NWM under the Deeds at a time when the relevant EMAC Issuer benefits from a deferral of its obligation to pay, is the "*plain effect*" of the language used by the parties. But, for the reasons outlined in paragraphs 84 to 99 above, I do not accept this submission. Further, I consider that to construe clause 2.1(1) in the manner submitted by CMIS would be inconsistent with my conclusion that the Deeds are properly to be construed as contracts of indemnity imposing primary obligations on CMIS.

101. CMIS also submitted that its construction is consistent with the objective commercial purpose of the structure. CMIS relied on, *inter alia*, the evidence of Mr Daly for the proposition that the liability in respect of the Relevant Amounts could be substantial and contends that it would not have made commercial sense for it to expose itself to a risk of a very large claim that it might have had insufficient funds to pay. CMIS argues that such a scenario gave rise to a risk of it entering insolvency proceedings, as a result of which it might be unable to carry out its obligations as Issuer Administrator and its obligations as original lender to German and Dutch mortgagors. It was said by CMIS that the mortgagors may then make claims against it which would deplete the pool of assets available to the Noteholders. CMIS's submission was that the parties to the Deeds could not have intended CMIS to become insolvent during the life of the transactions.

102. For the reasons set out in the section on commercial context at paragraph 56 and following above, I do not accept these submissions. The Securitisation documentation as a whole demonstrates that the risk that CMIS could become insolvent was a risk that the Noteholders were exposed to generally and it was something expressly contemplated by some of the Securitisation documentation. In particular, the Issuer Services Agreements expressly provided for termination of the appointment of CMIS as Issuer Administrator and the appointment of a substitute in the event that CMIS became insolvent and was unable to perform as Issuer Administrator (clause 25 of each Issuer Services Agreement). Further, the fact that CMIS agreed to arrangements which with the benefit of hindsight have exposed it to the risk of a large claim is not a reason to prefer CMIS's construction; it is possible that one side may have agreed to something which with hindsight did not serve its interest (*Wood v Capita Insurance*).

103. I find that the purpose of the Deeds (objectively established) was to protect NWM in the event that the relevant EMAC Issuer failed to make payment to NWM of (*inter alia*) Swap Subordinated Amounts when such payment fell due under the Swaps. CMIS accepted the risk that it might be called upon to make payments under the Deeds in circumstances where the EMAC Issuers had insufficient funds to pay. The interpretation contended for by NWM is consistent with the objective commercial purpose of the structure.

104. In summary, the Relevant Amounts are "*due*" under the EMAC Master Agreements for the purposes of clause 2.1(i) of the Deeds and, therefore, are to be paid by CMIS to NWM under the Deeds.

Is CMIS entitled to rely on the Payment Deferral Provision and/or the Limited Recourse Provision by virtue of clause 2.1(iv) of the Deeds?

105. This question only arises in circumstances where I have found that the Relevant Amounts are under the terms of the Deeds EMAC Indemnifiable Amounts which are due under the EMAC Master Agreement.

106. As set out above, pursuant to the Payment Deferral Provisions (and, save in respect of Securitisation 3, the Limited Recourse Provision), the EMAC Issuers are entitled to defer payment of the sums which make up the EMAC Indemnifiable Amounts in the event that they do not have the funds available to make the payments. CMIS claims to have the same right of deferral pursuant to the co-extensiveness principle which they say is given contractual effect by the second half of clause 2.1(iv). This is the only route by which CMIS sought to rely on the Payment Deferral Provisions (and Limited Recourse Provision). CMIS abandoned any argument that they could rely on clause 2.1(iv) in any event by manipulating the language of the Payment Deferral Provisions.

107. In circumstances where I have held above that the Deeds are contracts of indemnity to which the co-extensiveness principle does not apply and where I have found that the language of clause 2.1(iv) is not apt to allow CMIS the protection of the Payment Deferral Provisions, it follows that the answer to this question must be 'no'.

Quantum

108. The amounts claimed pursuant to the Deeds, and in respect of each Securitisation, are set out in Schedules 4A to 4E and 5A and 5B to the Re-Amended Particulars of Claim. They are:

    i) €41,458,759 in respect of Securitisation 1 (due to NWM NV);

    ii) €30,932,183 in respect of Securitisation 2 (due to NWM NV);

    iii) €2,805,953 in respect of Securitisation 3 (due to NWM PLC);

    iv) €29,132,463 in respect of Securitisation 4 (due to NWM NV);

    v) €35,563,138 in respect of Securitisation 5 (due to NWM PLC);

    vi) €10,437,629 in respect of Securitisation 6 (due to NWM NV);

    vii) €4,923,803 in respect of Securitisation 7 (due to NWM NV).

109. CMIS has not disputed the quantum of the amounts claimed by NWM. Indeed, notwithstanding their failure to pay the sums demanded pursuant to the Deeds, they have continued, in their capacity as Issuer Administrator, to agree the amounts due in respect of the Swaps. Further evidence as to the process by which the amounts were compiled is found in the first witness statement of Mr. Zodgekar. That evidence was not challenged.

Conclusion

110. For all the above reasons, I find that NWM's claims succeed as shown in paragraph 108 above. It follows that CMIS' counterclaim fails.

111. NWM also seeks further declaratory relief in respect of CMIS' liability for those amounts. In this regard, I will leave the parties to agree so far as possible the terms of any declarations still required in light of the judgment above.

112. I would further ask the parties to liaise as to an appropriate final order dealing with any other matters arising from this judgment. To the extent that the terms of such an order cannot be agreed, then I will deal with any outstanding matters at a hearing to deal with consequential matters including costs and any application for permission to appeal, if any.

113. I am very grateful to counsel and their instructing solicitors for all their work in the preparation and presentation of their respective cases.