

Neutral Citation Number: [2009] EWHC 2656 (Comm)

Case No: 2009 FOLIO 368

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 October 2009

Before:

THE HONOURABLE MR JUSTICE FLAUX

Between:

MARINE TRADE S.A.

Claimant

- and -

(1) PIONEER FREIGHT FUTURES CO LTD
BVI

Defendants

(2) ARMADA (SINGAPORE) PTE LTD

Mr A. Baker QC and Mr M. Jarvis (instructed by Mills & Co) for the Claimant
Mr M. Tselentis QC and Mr M. Ashcroft (instructed by Holman Fenwick Willan) for the
First Defendant

Hearing dates: 20 to 23 October 2009

Judgment

The Hon. Mr Justice Flaux :

Introduction and factual background

1. This case arises out of the dramatic fall in the freight market in the fourth quarter of 2008. The Claimant (to which I will refer as “Marine Trade”) and the First Defendant (to which I will refer as “Pioneer”) entered 14 Forward Freight Agreements (“FFAs”) between May 2007 and September 2008. The 2007 Terms of the Forward Freight Agreement Brokers Association (“FFABA”) operated so as to constitute between the parties as of 16 April 2008 a Master Agreement on the terms of the 1992 International Swap Dealers Association (Multi-Currency-Cross Border) Master Agreement (“the Master Agreement”) as supplemented and amended by clause 9 of the FFABA 2007 Terms, under which each of the FFAs was and is a Transaction.
2. An FFA on the FFABA 2007 Terms is a cash-settled contract for differences referenced to the Index rate or rates published by the Baltic Exchange as selected by the parties. A “Settlement Sum” is calculated for each FFA and each Contract Month from the “Contract Rate” agreed between the parties, the “Settlement Rate” for that Contract Month derived from the Baltic Exchange indices and the number of days in the Month.
3. Because of the dramatic downturn in the freight market in the fourth quarter of 2008, there was a significant difference between the Contract Rates fixed under the FFAs at a time when the market was more buoyant and the Settlement Rates fixed by reference to Baltic Exchange indices. In consequence, each of the FFAs between these parties has been substantially “in the money” for whichever party is “the Seller” under the particular FFA. This is not an isolated phenomenon. Across the FFA market, the size of the settlements falling due in the fourth quarter of 2008 and the first few months of 2009 was of such magnitude that a number of participants in the market have suffered cash flow difficulties, often because they have been defaulted upon by counterparties.
4. The Settlement Sums for the January 2009 Contract Month were as follows:
 - (1) US\$7,085,981.85 under the FFAs for which Marine Trade was the Seller;
 - (2) US\$12,116,223.67 under the FFAs for which Pioneer was the Seller;
5. Accordingly, subject to the issues which currently fall for decision and, specifically, the entitlement of Pioneer to net off the sums payable to it against the sums payable by it, there was a potential net balance in favour of Pioneer of \$5,030,242.50. The present dispute arose as follows. By the end of January 2009, Marine Trade had taken the view that Pioneer was affected by an Event of Default within the meaning of the Master Agreement, so that, on the construction of the Master Agreement for which Marine Trade contends, Pioneer was not entitled to set off the sums payable to it by Marine Trade against the sums payable by it to Marine Trade. In those circumstances, Marine Trade invoiced Pioneer by invoices dated 30 January 2009 for the Settlement Sum of US\$7,085,981.85.
6. Pioneer on the other hand invoiced Marine Trade by an invoice dated 1 February 2009 for the net balance of just over US\$5 million. The Settlement Date for any payment

by either party was 6 February 2009. When Marine Trade did not settle the net balance on that date, on 9 February 2009 Pioneer served a Notice under Section 5(a)(i) of the Master Agreement i.e. a Notice of failure to pay which would constitute an Event of Default by Marine Trade. Marine Trade feared that this would lead to Pioneer serving a Notice under Section 6(a) of the Master Agreement, designating an Early Termination Date, the effect of which in simple terms would be a crystallisation of a liability on each party to pay all unpaid sums under the FFAs to whichever party was in the money. In the state of the market as it then was, this would have meant that a very substantial sum was payable by Marine Trade to Pioneer by way of wash out of all the contracts.

7. In an attempt to prevent Pioneer from serving such a Notice, Marine Trade sought an interim injunction from the Commercial Court on 11 February 2009, ostensibly to preserve the status quo pending an expedited trial of the dispute between the parties. The application for an injunction was refused by Field J, essentially on the grounds of the potentially disastrous effect such an injunction could have on Pioneer's cash flow. In circumstances which will require more detailed analysis hereafter, Marine Trade then paid the net balance of just over US\$5 million under protest on 13 February 2009.
8. On 17 February 2009, Marine Trade served its own Notice on Pioneer under section 5(a)(i) of the Master Agreement in respect of Pioneer's failure to pay the Settlement Sum of US\$7,085,981.85. That sum remains outstanding and unpaid by Pioneer. In these proceedings, Marine Trade claims that sum from Pioneer. The trial of the dispute was originally due to take place on 29 June 2009, but that date was vacated and the trial was re-fixed for 19 October 2009, pursuant to a Consent Order of Andrew Smith J, under which Pioneer undertook not to send any further Section 5 Notices or any Section 6 Notice prior to the conclusion of the first instance hearing. At the end of the trial and after I had indicated my firm view that the first instance hearing would not conclude until I had delivered judgment, which I was going to reserve, the undertaking was extended until after judgment or further Order.
9. The Amended Particulars of Claim also include claims against Pioneer under other FFAs between it and the Second Defendant (Armada) which were assigned to Marine Trade by Armada. Those claims are stayed following the appointment of Judicial Managers over Armada in Singapore earlier this year. Nothing more need be said about those claims.

The terms of the contracts

10. The provisions of the FFABA 2007 Terms relevant to the current dispute are as follows:

5. Settlement Dates:

The last Baltic Exchange Index publication day of each Contract Month.

7. Settlement Sum:

The "Settlement Sum" is the difference between the Contract Rate and the Settlement Rate multiplied by the Quantity by Contract

Month. If the Settlement Rate is higher than the Contract Rate, the Seller shall pay the Buyer the Settlement Sum. If the Settlement Rate is lower than the Contract Rate, the Buyer shall pay the Seller the Settlement Sum.

8 Payment Procedure and Obligations:

Payment of the Settlement Sum is due on the later of two (2) London business days after presentation of payee's invoice (with complete payment instructions) or five (5) London business days after the Settlement Date and for this purpose a "London business day" means a day (other than a Saturday or Sunday) on which commercial banks are open for business in London). The Settlement Sum will be deemed "paid" when it has been received into the bank account designated by the payee.

Payment of the Settlement Sum shall be made telegraphically, in full, in United States dollars. The costs incurred in effecting payment shall be for the account of the payer. Payment may only be effected directly between the parties. The Settlement Sum shall be paid without any deduction or set-off except as permitted pursuant to the Master Agreement or otherwise as agreed by the Buyer and the Seller in writing.

9. ISDA Master Agreement:

This clause 9 applies only if either:

(i) this Confirmation does not already constitute a Confirmation under an existing master agreement entered into by the parties to this Confirmation; or

(ii) the parties agree, either by virtue of clause 20 or otherwise, that the terms of the Master Agreement that is constituted by this clause are to replace any such existing master agreement.

This Confirmation constitutes and incorporates by reference the provisions of the 1992 ISDA® Master Agreement (Multicurrency - Cross Border) (without Schedule) as if they were fully set out in this Confirmation and with only the following specific modifications and elections:

(a) Section 2(c)(ii) shall not apply so that a net amount due will be determined in respect of all amounts payable on the same date in the same currency in respect of two or more Transactions;

11. The terms of the Master Agreement which are relevant for present purposes are as follows:

“1. Interpretation

(a) **Definitions.** The terms defined in Section 14 and in the Schedule will have the meanings therein specified for the purpose of this Master Agreement.

(b) **Inconsistency.** In the event of any inconsistency between the provisions of the Schedule and the other provisions of this Master Agreement, the Schedule will prevail. In the event of any inconsistency between the provisions of any Confirmation and this Master Agreement (including the Schedule), such Confirmation will prevail for the purpose of the relevant Transaction.

(c) **Single Agreement.** All Transactions are entered into in reliance on the fact that this “Master” Agreement and all Confirmations form a single agreement between the parties (collectively referred to as this “Agreement”), and the parties would not otherwise enter into any Transactions.

2. Obligations

(a) **General Conditions.**

(i) Each party will make each payment or delivery specified in each Confirmation to be made by it, subject to the other provisions of this Agreement.

(ii) Payments under this Agreement will be made on the due date for value on that date in the place of the account specified in the relevant Confirmation or otherwise pursuant to this Agreement, in freely transferable funds and in the manner customary for payments in the required currency. Where settlement is by delivery (that is, other than by payment), such delivery will be made for receipt on the due date in the manner customary for the relevant obligation unless otherwise specified in the relevant Confirmation or elsewhere in this Agreement.

(iii) Each obligation of each party under Section 2(a)(i) is subject to (1) the condition precedent that no Event of Default or Potential Event of Default with respect to the other party has occurred and is continuing, (2) the condition precedent that no Early Termination Date in respect of the relevant Transaction has occurred or been effectively designated and (3) each other applicable condition precedent specified in this Agreement

(c) **Netting.**

If on any date amounts would otherwise be payable:-

(i) in the same currency; and

(ii) in respect of [two or more Transactions],

by each party to the other, then, on such date, each party's obligation to make payment of any such amount will be automatically satisfied and discharged and, if the aggregate amount that would otherwise have been payable by one party exceeds the aggregate amount that would otherwise have been payable by the other party, replaced by an obligation upon the party by whom the larger aggregate amount would have been payable to pay to the other party the excess of the larger aggregate amount over the smaller aggregate amount.

5. Events of Default and Termination Events

(a) ***Events of Default.*** The occurrence at any time with respect to a party or, if applicable, any Credit Support Provider of such party or any Specified Entity of such party of any of the following events constitutes an event of default (an "Event of Default") with respect to such party:-

(i) ***Failure to Pay or Deliver.*** Failure by the party to make, when due, any payment under this Agreement or delivery under Section 2(a)(i) or 2(e) required to be made by it if such failure is not remedied on or before the third Local Business Day after notice of such failure is given to the party;

(vii) ***Bankruptcy.*** The party, any Credit Support Provider of such party or any applicable Specified Entity of such party:

(2) becomes insolvent or is unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due;

6. Early Termination

(a) ***Right to Terminate Following Event of Default.*** If at any time an Event of Default with respect to a party (the "Defaulting Party") has occurred and is then continuing, the other party (the "Non-defaulting Party") may, by not more than 20 days notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions. If, however, "Automatic Early Termination" is specified in the Schedule as applying to a party, then an Early Termination Date in respect of all outstanding Transactions will occur immediately upon the occurrence with respect to such party of an Event of Default specified in Section 5(a)(vii)(1), (3), (5), (6) or, to the extent analogous thereto, (8), and as of the time immediately preceding the institution of the relevant proceeding or the presentation of the relevant petition upon the occurrence with

respect to such party of an Event of Default specified in Section 5(a)(vii)(4) or, to the extent analogous thereto, (8).

(e) ***Payments on Early Termination.*** If an Early Termination Date occurs, the following provisions shall apply based on the parties' election in the Schedule of a payment measure, either "Market Quotation" or "Loss", and a payment method, either the "First Method" or the "Second Method". If the parties fail to designate a payment measure or payment method in the Schedule, it will be deemed that "Market Quotation" or the "Second Method", as the case may be, shall apply. The amount, if any, payable in respect of an Early Termination Date and determined pursuant to this Section will be subject to any Set-off.

(i) ***Events of Default.*** If the Early Termination Date results from an Event of Default:-

(1) ***First Method and Market Quotation.*** If the First Method and Market Quotation apply, the Defaulting Party will pay to the Non-defaulting Party the excess, if a positive number, of (A) the sum of the Settlement Amount (determined by the Non-defaulting Party) in respect of the Terminated Transactions and the Termination Currency Equivalent of the Unpaid Amounts owing to the Non-defaulting Party over (B) the Termination Currency Equivalent of the Unpaid Amounts owing to the Defaulting Party.

(2) ***First Method and Loss.*** If the First Method and Loss apply, the Defaulting Party will pay to the Non-defaulting Party, if a positive number, the Non-defaulting Party's Loss in respect of this Agreement.

(3) ***Second Method and Market Quotation.*** If the Second Method and Market Quotation apply, an amount will be payable equal to (A) the sum of the Settlement Amount (determined by the Non-defaulting Party) in respect of the Terminated Transactions and the Termination Currency Equivalent of the Unpaid Amounts owing to the Non-defaulting Party less (B) the Termination Currency Equivalent of the Unpaid Amounts owing to the Defaulting Party. If that amount is a positive number, the Defaulting Party will pay it to the Non-defaulting Party; if it is a negative number, the Non-defaulting Party will pay the absolute value of that amount to the Defaulting Party.

(4) ***Second Method and Loss.*** If the Second Method and Loss apply, an amount will be payable equal to the Non-defaulting Party's Loss in respect of this Agreement. If that amount is a positive number, the Defaulting Party will pay it to the Non-defaulting Party; if it is a negative number, the Non-defaulting

Party will pay the absolute value of that amount to the Defaulting Party.

9. Miscellaneous

(d) *Remedies Cumulative.* Except as provided in this Agreement, the rights, powers, remedies and privileges provided in this Agreement are cumulative and not exclusive of any rights, powers, remedies and privileges provided by law.

14. Definitions

“*Loss*” means, with respect to this Agreement or one or more Terminated Transactions, as the case may be, and a party, the Termination Currency Equivalent of an amount that party reasonably determines in good faith to be its total losses and costs (or gain, in which case expressed as a negative number) in connection with this Agreement or that Terminated Transaction or group of Terminated Transactions, as the case may be, including any loss of bargain, cost of funding or, at the election of such party but without duplication, loss or cost incurred as a result of its terminating, liquidating, obtaining or re-establishing any hedge or related trading position (or any gain resulting from any of them). Loss includes losses and costs (or gains) in respect of any payment or delivery required to have been made (assuming satisfaction of each applicable condition precedent) on or before the relevant Early Termination Date and not made, except, so as to avoid duplication, if Section 6(e)(i)(1) or (3) or 6(e)(ii)(2)(A) applies. Loss does not include a party’s legal fees and out-of-pocket expenses referred to under Section 11. A party will determine its Loss as of the relevant Early Termination Date, or, if that is not reasonably practicable, as of the earliest date thereafter as is reasonably practicable. A party may (but need not) determine its Loss by reference to quotations of relevant rates or prices from one or more leading dealers in the relevant markets.

“*Unpaid Amounts*” owing to any party means, with respect to an Early Termination Date, the aggregate of (a) in respect of all Terminated Transactions, the amounts that became payable (or that would have become payable but for Section 2(a)(iii)) to such party under Section 2(a)(i) on or prior to such Early Termination Date and which remain unpaid as at such Early Termination Date and (b) in respect of each Terminated Transaction, for each obligation under Section 2(a)(i) which was (or would have been but for Section 2(a)(iii)) required to be settled by delivery to such party on or prior to such Early Termination Date and which has not been so settled as at such Early Termination Date, an amount equal to the fair market value of that which was (or would have been) required to be delivered as of the originally scheduled date for delivery, in

each case together with (to the extent permitted under applicable law) interest, in the currency of such amounts, from (and including) the date such amounts or obligations were or would have been required to have been paid or performed to (but excluding) such Early Termination Date, at the Applicable Rate. Such amounts of interest will be calculated on the basis of daily compounding and the actual number of days elapsed. The fair market value of any obligation referred to in clause (b) above shall be reasonably determined by the party obliged to make the determination under Section 6(e) or, if each party is so obliged, it shall be the average of the Termination Currency Equivalents of the fair market values reasonably determined by both parties.

The issues

12. The issues which arise are set out in the revised list of issues submitted by Marine Trade with its Supplemental Note for Opening dated 16 October 2009. They are as follows:
 1. Was Pioneer affected by an Event of Default under Section 5(a)(vii)(2) when the January 2009 Contract Month was due for Settlement?
 2. If so, were Settlement Sums in favour of Pioneer available for netting under Section 2(c)/clause 9(a) against Settlement Sums in favour of Marine Trade?
 3. Was Marine Trade affected by an Event of Default under Section 5(a)(vii)(2) when the January 2009 Contract Month was due for Settlement?
 4. In the light of the answers to Issues 1 to 3, what (if anything) became due to Marine Trade from Pioneer in respect of the January 2009 Contract Month when it was due for Settlement?
 5. If a sum became due to Marine Trade from Pioneer in respect of the January 2009 Contract Month when it was due for Settlement, is Pioneer presently under an obligation to pay that sum to Marine Trade? In particular:
 - (iii) is Marine Trade now affected by an Event of Default under Section 5(a)(vii)(2) and if so, is the result that Pioneer is not presently obliged to pay Marine Trade any sum in respect of the January 2009 Contract Month? [Issues 5 (i) and (ii) are no longer live for reasons explained later in the judgment.]
 6. Is Marine Trade entitled to restitution of the net aggregate Settlement Sums in respect of the January 2009 Contract Month paid to Pioneer by Marine Trade under protest?
 7. If Pioneer was affected by an Event of Default when the January 2009 Contract Month was due for Settlement, and continues to be affected by an Event of Default, should any declaration (if so in what terms) be made as to what the

parties' rights and obligations will be if the latter Event of Default ceases to affect Pioneer hereafter?

Issue 1.

13. Marine Trade's case is that with effect from January 2009 at the latest (and in all probability from some time in the fourth quarter of 2008) and at all material times thereafter, Pioneer was and continued to be in default under Section 5(a) (vii) (2) of the Master Agreement due to an inability to pay its debts when they fell due and/or a failure generally to pay its debts as they became due.
14. As to the test under that provision, I agree with Mr Andrew Baker QC, who appeared on behalf of Marine Trade, that the relevant "bankruptcy" event of default has two elements: (1) inability to pay debts as they become due and (2) failure generally to pay debts as they become due. These are distinct and not cumulative and the occurrence of one or other will amount to an Event of Default, although Marine Trade's case is that both elements are clearly satisfied in relation to Pioneer. So far as inability to pay debts as they become due is concerned, it is common ground that guidance as to the meaning of the first element is to be found in authorities on section 123(1)(e) of the Insolvency Act 1986 by which a company is deemed unable to pay its debts "if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due".
15. Failure to pay a debt other than for a substantial reason is itself evidence of inability to pay and since "the reason for non-payment has to be substantial [it] is not enough if a thoroughly bad reason is put forward honestly" (per Dillon LJ in **Re Taylor's Industrial Flooring Ltd** [1990] BCC 44 at 50. There is obviously a forward looking aspect to this element, in the sense that the evidence may be such as entitles the court to infer that the party will not be able to pay a debt or debts in the near future, even though the party has yet to actually fail to pay a debt.
16. There is no authority which assists as to the meaning of the second element. However I accept Mr Baker's submissions as to its meaning, which were not challenged by Mr Tselentis on behalf of Pioneer. The adverb "generally" qualifies "to pay debts" not "fails". In other words, it is not necessary to demonstrate a general failure to pay, but there must be evidence that the party has failed to pay a substantial volume of its debts on time. A few isolated instances will not suffice.
17. In support of its case that Pioneer was unable to pay its debts or had failed generally to pay its debts when they fell due from the fourth quarter of 2008 onwards, Marine Trade and its legal advisers engaged in a detailed analysis of Pioneer's payment history from October 2008 to date by reference to the disclosure provided and other materials. Pioneer challenged any suggestion that there had been an Event of Default within the meaning of Section 5(a)(vii)(2) and called its Chief Operating Officer and Director of Risk Management, Chen Yang (Eddie Chen) to give evidence to refute any such suggestion. He was cross-examined by Mr Baker QC in detail for a day and a half concerning Pioneer's dealings since October 2008 with various counterparties.
18. On the last day of the trial, Mr Tselentis QC made a concession on behalf of Pioneer that it had been affected by an Event of Default under Section 5(a)(vii) (2) in January 2009 and at all material times thereafter to date. In the light of that concession, the

answer to Issue 1 was admitted to be “Yes”. Equally, in view of the concession, Issues 5(i) and (ii) no longer arise. Given the concession and after discussion with Counsel, it seemed to me that the court should not make any specific findings of fact in relation to Pioneer’s payment history and Mr Chen’s evidence. It is neither necessary to do so, nor appropriate, given the delicate state of the market generally and the fact that findings about Pioneer’s dealings with counterparties might have an impact on matters which are not directly before the court.

Issue 2

19. Issue 2 raises the question whether, on the basis that Pioneer was admittedly affected by an Event of Default under section 5(a)(vii)(2) at all material times, the Settlement Sums of US\$12,116,223.67 in favour of Pioneer are available for netting against the Settlement Sum of US\$7,085,981.85 in favour of Marine Trade. Mr Baker on behalf of Marine Trade contends that they are not because, since Pioneer is affected by the Event of Default, the amount of US\$12,116,223.67 is not “otherwise....payable” nor is Marine Trade under any “obligation to make payment” of that sum within the meaning in each case of Section 2(c). The effect of the non-compliance with condition precedent (1) under Section 2(a)(iii) is that Marine Trade is simply under no obligation pursuant to that provision to make any payment to Pioneer, so that netting is not possible.
20. Mr Tselentis for Pioneer seeks to avoid that conclusion in a number of ways. First he contends that reading clauses 7 and 8 of the FFABA 2007 Terms, together with Section 2 of the Master Agreement, it is contemplated that the obligation which comes into existence when the Settlement Sum is calculated can be discharged in one of two ways: (1) by payment of the relevant Settlement Sum and (2) by netting coupled with payment of the resulting balance. This may very well be right when there is no Event of Default affecting a party, but seems to me to beg the question (or rather not answer the question) whether netting is available when there has been an Event of Default.
21. Second, he submits that since Section 9 provides that remedies are cumulative, the provisions are to be read separately so that netting may be available under Section 2(c) notwithstanding the non-compliance with the condition precedent in Section 2(a)(i). The effect of such non-compliance is merely to suspend the obligation to pay so long as the condition precedent operates. The word “payable” in Section 2(c) means “falling due for payment” (i.e even if the obligation to pay has been suspended) and not “enforceable by payment”, so that netting remains available even when the party seeking to do so is affected by an Event of Default.
22. I have no doubt that Mr Baker’s construction of the provision in Section 2(c) is the correct one. As a matter of ordinary language, “payable” clearly means now due and owing, for immediate payment and not only payable if and when some suspensive condition for which Mr Tselentis contends is satisfied. Quite apart from the ordinary meaning of language, when the agreement is considered as a whole, the word “payable” in Section 2(c) clearly means that there is a current enforceable obligation to pay. This is clear from the fact that, having talked about “amounts which would otherwise be payable”, the provision goes on to talk about “each party’s obligation to make payment” being “automatically satisfied and discharged” by payment of the balance after netting. However, where Pioneer is affected by an Event of Default, as a

consequence of Section 2(a)(iii), Marine Trade has no obligation to make payment to Pioneer at all.

23. That “payable” connotes an immediately enforceable obligation to pay is also clear from the definition of “Unpaid Amounts” for the purposes of the calculation of the payment due on Early Termination. This refers to such unpaid amounts being “the amounts that became payable (or that would have become payable but for Section 2(a)(iii))” which demonstrates that the effect of non-compliance with the conditions precedent in Section 2(a)(iii) is that the amounts have not become payable. That is only consistent with “payable” meaning immediately due for payment and wholly inconsistent with Mr Tselentis’ construction of “payable” as somehow covering a situation where the payment obligation has been suspended. Mr Tselentis accepted that if his construction of “payable” was wrong (which I do consider it to be), his argument on Issue 2 could not run.
24. Given what I consider to be the clear construction of Section 2(c), it is not necessary to consider in any great detail the various arguments about the commercial purpose of the provision with which Pioneer sought to bolster its construction. The main thrust of those arguments was the alleged absurdity of a situation such as would obtain if Marine Trade were right, where a Non-Defaulting Party could insist that the Defaulting Party paid sums gross to it without netting off, even if, were the Non-Defaulting Party to designate an Early Termination Date under Section 6 (which ex hypothesi it would not do) the calculation of the payment on such Early Termination would result in a substantial balance in favour of the Defaulting Party, because the Settlement Sums which would have become payable to the Defaulting Party but for Section 2(a)(iii) fall to be considered in arriving at the eventual figure.
25. However, it seems to me that there is an obvious difference between what is to happen whilst the contract is subsisting and how the parties resolve their differences on early termination by way of “wash-out”. As Mr Baker pointed out, in what might be described as orthodox contractual analysis, if one party is in default and that amounts to a repudiatory breach of contract, the other party can accept that repudiation as bringing the contract to an end and thereby terminate any of its own obligations for the future. To that extent, some of the Early Termination provisions of the Master Agreement might be said to be unorthodox, in the sense that they seek to balance the current and future obligations of the Non-Defaulting Party under the relevant futures transactions against those of the Defaulting Party. They are no doubt designed at least in part to ensure a “wash-out” between the parties on termination which strikes a fair balance to reflect that transactions which by definition were going to continue for some time into the future have been terminated early.
26. However, it does not seem to me that what will happen on early termination necessarily has any connection with what happens when the relevant transactions are subsisting. Where the Non-Defaulting Party has chosen (as it is perfectly entitled to do) not to elect for early termination under Section 6, I can quite see the commercial sense of being able to insist on “gross” payment by a Defaulting Party.
27. In any event, even if it could be said that the commercial balance of the argument lay in favour of Pioneer, that is not enough to gainsay the clear meaning of Section 2(c) as I have held it to be. This is not a case in which Pioneer has suggested that the construction for which Marine Trade contends is so unreasonable commercially that

the court should endeavour not to construe the agreements in that way, applying Lord Reid's famous dictum in Schuler v Wickman Machine Tools [1974] AC 235 at 251.

Issues 3 and 4

28. These Issues can be considered together. It is now accepted by Pioneer that Marine Trade was not affected by an Event of Default when the January 2009 Contract Month was due for settlement on 6 February 2009, although it still contends that Marine Trade became affected by a bankruptcy Event of Default within Section 5(a)(vii)(2) in April or May 2009, a matter to which I return below in relation to Issue 5(iii). Accordingly, the answer to issue 3 is "No" and to Issue 4 that on 6 February 2009, the full amount of US\$7,085,981.85 became due and payable by Pioneer to Marine Trade.

Issue 5(iii)

29. This issue arises because Pioneer contends that (even though it now accepts that Marine Trade was not subject to a bankruptcy Event of Default on 6 February 2009) Marine Trade became subject to such an Event of Default in April or May 2009, at which point Pioneer's obligation to pay Marine Trade US\$7,085,981.85 was removed or at least suspended until such time as the Event of Default was cured. This issue raises three sub-issues: (i) upon which party is the burden of proof under Section 2(a)(iii) in relation to whether Marine Trade was affected by an Event of Default; (ii) wherever the burden of proof lies, does the evidence demonstrate that Marine Trade has been affected by an Event of Default since April or May 2009; (iii) if so, is Pioneer relieved as a consequence of the liability to pay Marine Trade the sum of US\$7,085,981.85 which, on my earlier findings, it became liable to pay on 6 February 2009.

Burden of proof

30. I consider that if the question of the burden of proof were being considered as a matter of principle, untrammelled by what might be described as historical accretion, I would have concluded that since it was Pioneer which was alleging that Marine Trade was affected by an Event of Default, the burden was on Pioneer to prove on a balance of probabilities that Marine Trade was so affected, on the well-established principle that "he who alleges must prove".
31. However, Mr Tselentis challenged that approach, citing passages from Phipson on Evidence 16th edition para 6-08 and Bullen & Leake & Jacob's: Precedents of Pleadings 13th edition page 210, to demonstrate that, where contractual performance is subject to a condition precedent, if the defendant raises an argument that the claimant has failed to comply with a condition precedent, the burden is on the claimant to prove that it has complied with that condition precedent. No authority is cited for that proposition, which seems to me to echo the formalistic approach to pleading and the burden of proof supposedly abolished by the Common Law Procedure Act 1854. However, fortunately the decision in this case, as in most others, will not depend upon where the burden of proof lies, so that it is not necessary to decide this point.

Event of Default: the facts

32. Marine Trade called Mr Massimo Arnese who is an independent consultant engaged by them to deal with post-contractual matters such as settlements under FFAs. He gave evidence about, inter alia, the financial state of Marine Trade in and since the fourth quarter of 2008. The cross-examination by Mr Tselentis focused on Marine Trade's dealings with three counterparties, North China Lines, TMT Asia Limited ("TMT") and Bunge S.A. ("Bunge"), with a view to demonstrating that Marine Trade had been unable to pay its debts as they fell due in and since January 2009. By the end of the trial, Mr Tselentis was not suggesting that there was an Event of Default affecting Marine Trade at any time prior to April or May 2009 and he no longer pursued any case in relation to the dealings with North China Lines. However, it will still be necessary to consider the relationships between Marine Trade and TMT and Bunge respectively and Mr Arnese's evidence about those relationships, to see if there was an Event of Default.
33. A useful starting point for considering whether a party is able to pay its debts as they fall due is to look at its latest published accounts or if those are out of date, up to date management accounts. Marine Trade is a Luxembourg registered company and, accordingly, there are publicly available accounts for the year ended 31 December 2008. Those show that of some €47 million of current assets, €32 million was debtors (i.e. counterparties who owed monies to Marine Trade) with €15 million of cash at the bank. There was no contingency reserve and the surplus of assets over liabilities (i.e. counterparties to whom Marine Trade owed monies) was only just over €1 million, demonstrating, as Mr Tselentis put it, a delicate financial balance between receivables and debts.
34. That delicate financial balance has to be considered against the background of a seriously deteriorating market in the last quarter of 2008 and the first quarter of 2009 with many counterparties in the FFA market defaulting on payments or paying late, which inevitably must have had a negative effect on Marine Trade's own financial position. This is indeed what emerges from its dealings with TMT and Bunge.
35. The position with TMT began to deteriorate in March 2009. There was an invoice from TMT for US\$8.1 million for the February Contract Month due for payment on 6 March. Marine Trade paid US\$6 million on the due date and the balance 12 days late on 18 March. In April 2009, there was an invoice from TMT of some US\$9 million for the March Contract Month, due on 7 April 2009. US\$4 million was paid on 14 April. On 20 April TMT served a Section 5 Notice in respect of the balance, which Marine Trade then paid on 27 April.
36. In his evidence Mr Arnese said that the background to this was that Marine Trade was negotiating with TMT (through Mr Alan Cordle in its London office) an agreement to vary the prices under the various FFAs to reflect the fact that the market freight rates at that time were artificially low and did not reflect the true value of the contracts projecting forward into 2009 and 2010. He claimed that, in effect, TMT was content to receive payments somewhat late whilst these negotiations continued.
37. It is clear from the correspondence with TMT which has been disclosed that there were such negotiations, in the sense that Mr Arnese was anxious to arrive at such a variation of the FFAs (as he had done with North China Lines), although to what

extent TMT was willing to agree anything of the sort seems to me to be in real doubt. At all events, it does not seem to me that TMT was somehow content to be paid late during negotiations. The service of a Section 5 Notice on 20 April is really inconsistent with any such contentment. I suspect that the truth is that Marine Trade paid late not because TMT was content it should do so, but because it could not do otherwise, being dependent upon receivables (which were being paid late) before being able to discharge its own liabilities.

38. That position became even clearer in relation to the April Contract Month in May 2009. In early May 2009, US\$9.4 million fell due for payment by Marine Trade. It is apparent that on 5 May a meeting took place between Mr Arnese and Mr Cordle at which Mr Arnese made a proposal for variation of the contract price, payment of the amount due in May and future payment from recoveries made from various debtors of Marine Trade.

39. The terms of the proposal appear from an email that day from Mr Cordle to Mr Arnese setting out what Mr Cordle had sent to Mr Su, the ultimate owner of TMT:

1) April account: BHP & Classic monies to be paid asap-\$3.3M plus \$0.7M other, totalling \$4M.

2) April balance: \$5.4m to be paid by 28th.

3) Assign/novate BHP and Classic to TMT-current worth \$26M.

4) Other freight business: reduction in charterparty rate from \$72k/day to \$15k/day.

5) Marine Trade has outstanding debtors:-

Agrenco-\$7M

Armada-\$14M

Brit Bulk-\$40M

Balance of Marine Trade debt to TMT to be received from recoveries from these parties. Marine Trade and TMT to cooperate with information sharing and actions that are mutually beneficial.

6) Pioneer

A joint proposal for Cal 10?

40. Mr Cordle's email continues:

[Mr Su] immediately came back and said he wanted 2) by 21st May and 5) he was very blunt and said no way did he agree to accept payment from these parties.

Can you please review your position, and see if you have any other alternatives?

41. In response the same day, Mr Arnese indicated that the offer already made was the best he could offer, stating:

After your ..message I tried to find alternatives but regretfully at this moment due to the defaults and to the expected future bad news about our paying parties this is our best (ie point 2 cannot be satisfied within the proposed terms but to be postponed subject to recover[y] of money from our debtors.

42. This email exchange clearly posed some difficulty for Mr Arnese, since on the face of it there was an admission in writing that Marine Trade could not pay its debts when they fell due. In cross-examination, he was somewhat evasive on this point and even when I put to him the direct question that the statement in his email showed that Marine Trade could not pay the balance of the May monies, US\$5.4 million, without getting the money in first from its debtors, he essentially failed to answer the question, saying that he was trying to negotiate an assignment. That may well be so, but the reason why Marine Trade wanted to assign receivables to TMT is clear: it could not pay what it owed TMT, unless it received monies first from its own debtors. Despite Mr Arnese's unwillingness in evidence to accept the inevitable, the email exchange on 5 May could not be clearer. Marine Trade could not pay its debts as they fell due and there was an admission in writing to that effect.

43. On 7 May 2009, Mr Cordle sent Mr Arnese an email indicating that he had contacted Mr Su and that TMT was only prepared to accept the assignment of BHP and Classic monies. Mr Arnese seems to have thought (quite how I am not sure) that negotiations were finalised, subject only to formalisation. In another email on 7 May, Mr Cordle made it clear that this was not so:

To be absolutely clear the negotiations are not finalised. TMT cannot accept the proposals at this level.

We are able to accept assignment of the BHP/Classic whilst negotiations continue.

44. On 13 May 2009, Mr Cordle sent Mr Arnese another email with a further response from Mr Su:

I have a response from Mr Su: in return for the \$4M payment (payable now) he agrees not to pursue legal channels.

I have no instructions regarding the entire proposal, but suggest we at least keep communications open via the above payment.

45. Marine Trade did not pay the \$4 million immediately, but only five days later on 18 May. The following day 19 May 2009, TMT served a Section 5 Notice in respect of the unpaid balance of US\$5.4 million. It was sent by courier to Marine Trade's registered office in Luxembourg, addressed to the two individuals who were named in the FFAs as the contacts at Marine Trade. On 27 May 2009, Mr Arnese sent Mr

Cordle an email claiming that the communication had been with two individuals who were not representatives of Marine Trade, a thoroughly bad point. The email went on:

We take this opportunity to recall your firm message dated 13 May wherein you have confirmed that as per instructions received from Mr Su in his capacity as representative of TMT, you undertook not to take any action in respect of sums payable in May 2009 settlement provided that Marine Trade would pay the sum of \$4 million.

Relying on this undertaking, Marine Trade have remitted the sum of US\$4 million to TMT. We trust that the above is sufficiently clear and any default notice for May 09 account will be clearly invalid and considered in breach of the covenants.

46. This was refuted by Mr Cordle in his response on 2 June:

It is denied that my email of 13 May amounted to an undertaking or a representation on behalf of TMT Asia Limited that it would not rely on its contractual rights under the FFAs in the absence of proper and timely payment by Marine Trade. Indeed it was subsequently made clear to you that TMT Asia Limited would take any and all action that it deemed appropriate in the circumstances including any legal action. Your alleged and/or purported reliance on that email is also denied.

47. It appears from that email that there may have been some further communication between Mr Arnese and Mr Cordle at some stage between 13 and 27 May, but Mr Arnese was not asked about this in cross-examination, so it is not possible to take it further. At all events, the email from Mr Cordle attached a copy of the Section 6 Notice which TMT served dated 29 May, which designated early termination on 3 June 2009. The assignment of BHP/Classic monies referred to in Mr Arnese's proposal was completed at some stage in early June. On early termination (taking account of the US\$5.6 million thereby assigned) the amount due to TMT was some US\$62 million. Mr Arnese accepted in evidence that Marine Trade was not in a position to pay that sum in cash on that date. Of that amount, some US\$9 million has been paid by Marine Trade between July and October 2009. TMT has not yet pursued further any claim to the balance.

48. Mr Baker sought to overcome what he described as the wrinkle of Marine Trade not being able to pay the early termination payment in cash by contending that TMT had not been entitled to serve a Section 6 Notice, because the 13 May 2009 email had represented that if the \$4 million were paid, no further action would be taken. It had been paid, so TMT was estopped from serving a Section 6 Notice for May 2009.

49. I consider there are two answers to that point. First, it seems to me that all that the 13 May email was saying was that if the \$4 million was paid straight away, no legal action would be taken in relation to that sum. It seems to me inherently implausible that, given the tough stance being adopted by TMT only days previously (in the

emails of 5 and 7 May), TMT would have foregone its right to serve Section 5 and 6 Notices in respect of the April Contract Month, for which it was owed US\$9.4 million, in return for only US\$4 million. I do not consider that is what the 13 May email was saying. At its very best from Marine Trade's point of view, the 13 May email is equivocal and that is not enough to found an estoppel.

50. The second answer follows on from the first. Despite the posturing in his email of 27 May and to an extent in his evidence, I doubt very much whether, as an experienced businessman in these types of contract, Mr Arnese really believed that, by the 13 May email, TMT was agreeing to forego its right to serve Section 5 and 6 Notices, in return for payment of only US\$4 million. Ultimately in cross-examination, Mr Arnese said no more than that Marine Trade had misunderstood what TMT was saying in the 13 May email and that TMT had clarified its position in the email of 2 June. Of course Marine Trade had never sought clarification of what the 13 May email meant. Mr Arnese also said that, if Marine Trade had received a clear message in May, then Marine Trade would obviously have paid the outstanding sum in May. That evidence begs the question as to why Marine Trade did not pay on 2 June, to which the obvious answer is because it was unable to do so, but that evidence is also wholly inconsistent with Marine Trade having relied on the 13 May email to its detriment so as to found an estoppel.
51. In conclusion in relation to the dealings with TMT, the evidence, particularly in the contemporaneous correspondence to which I have referred, demonstrates clearly that since early May 2009 Marine Trade has been unable to pay its debts when they fell due and the email of 5 May was an admission to that effect. Accordingly since early May, Marine Trade has been affected by an Event of Default pursuant to Section 5(a)(vii)(2).
52. Consideration of the dealings with Bunge only serves to confirm that conclusion. Again the position in April and May was one of late and partial payments. Mr Arnese's evidence was that throughout this period he was negotiating an agreement with Bunge to revalue the FFAs on the basis that the market was artificially low. He asserted that Marine Trade was not looking for a discount but looking for the same common vision as to the value of the contracts and that agreement was ultimately made with Bunge on that basis.
53. Bunge in fact served a Section 5 Notice on 25 May 2009. Mr Arnese contended that he had been told that this was a purely administrative procedure and the Notice was designed to put pressure on Marine Trade to finalise the agreement. In fact, the agreement with Bunge was entered on 3 June 2009. It described the "Notional Debt" to Bunge (i.e. the sum which would be calculated on early termination) as US\$23.2 million. It then set out that Bunge had agreed to accept payment of US\$11,600,000 (ie. 50% of the Notional Debt) in full and final settlement of it, to be paid by a payment of US\$2 million within two London business days and then US\$685,000 per month from August 2009 to September 2010 on the 5th business day of each month. It also provided that if Marine Trade failed to pay any of the instalments or was subject of a winding up order or similar, the full amount of the Notional Debt would become payable.
54. Despite Mr Arnese's attempts to categorise this as a revaluation of the value of the FFAs and not a discount, this agreement reads as and clearly is a settlement

agreement under which Bunge agreed to accept less than the full amount which would otherwise be due, all against the background that Marine Trade had been struggling to make payments in full and on time. In my view, the Section 5 Notice was not simply some empty administrative gesture, but Bunge reserving its rights under the FFAs until such time as Marine Trade agreed to pay and did pay a substantial sum.

55. Accordingly, I am firmly of the view that since May 2009, Marine Trade has been affected by an Event of Default under Section 5(a)(vii)(2). The next question is what effect, if any, that had on the unpaid debt due from Pioneer for the January 2009 Contract Month.

The consequences of there being an Event of Default

56. Pioneer's case is that, once Marine Trade was affected by that Event of Default, whatever obligation Pioneer had until that time under Section 2 of the Master Agreement to pay the US\$7,085,981.85 Settlement Sum for the January Contract Month, was suspended by virtue of Section 2(a)(iii). The thrust of the argument for Pioneer was that, since by virtue of Section 2 there was a continuing obligation to pay, if payment was not made and, at a later date, an Event of Default intervened, the party who had failed to pay on the due date was excused payment.
57. It seems to me that this argument confuses the requirement to satisfy the conditions precedent contained in Section 2(a)(iii) before any obligation to pay the Settlement Sum accrues, with what happens thereafter. In my judgment, the requirement to satisfy the conditions precedent arises only once, at the time that the Settlement Sum falls due, in this case on 6 February 2009. Provided that those conditions precedent were satisfied at that time, which it is now accepted they were, Pioneer's obligation to pay US\$7,085,981.85 accrued on 6 February 2009. Thereafter, Pioneer was in breach of that obligation in failing to discharge that debt.
58. Applying recognised principles of contractual construction, where a contractual obligation (and corresponding contractual right in favour of the other party) has accrued, it would require clear words in the contract to remove that obligation and corresponding right at some later stage. There are no such clear words in these agreements. Pioneer relied upon the words "is continuing" in Section 2(a)(iii)(1) in support of the argument that Marine Trade had to continue to comply with the condition precedent after 6 February 2009 for the obligation to pay to continue. However, in my judgment, the words "has occurred and is continuing" are focusing on whether there is an Event of Default at the time that the obligation to pay accrued, i.e. on 6 February 2009. Once the obligation accrued on 6 February 2009 because there was no Event of Default at that date, Pioneer remained under an obligation to discharge that debt, irrespective of whether Marine Trade became affected at a later date by an Event of Default, at least unless and until Pioneer served a Section 6 Notice and designated Early Termination.
59. In support of his contrary construction, Mr Tselentis contended that the reason why Section 2(a)(iii) continued to operate even after its initial fulfilment, was to ensure that cash payments did not have to be made to a bankrupt party. This reasoning seems to appeal also to the textbook writers who have commented on this point. However, it seems to me that this overlooks the fact that, at the time when the obligation accrued, by definition, the party to which the Settlement Sum is owing was not bankrupt (i.e.

the conditions precedent were fulfilled). The paying party should not be able to take advantage of its failure to pay in the interim and then claim that the conditions precedent are not now being complied with as an excuse for non-payment. I agree with Mr Baker that, if this argument were correct, it would be a defaulter's charter, particularly since it may well be that it is the failure of the paying party and other non-paying counterparties which has had a sufficiently detrimental effect on the cash flow of the other party to mean that that party is now bankrupt within the meaning of Section 5(a)(vii)(2).

60. Pioneer's original case in relation to its own entitlement to the Settlement Sums it claimed for the January 2009 Contract Month was that, even if it was affected by an Event of Default as at 6 February 2009, at a later date it was no longer affected by an Event of Default, and at that point Marine Trade's obligation to pay the Settlement Sums (which had been suspended during the period of default) accrued. Since Pioneer now accepts that it has been affected by an Event of Default at all material times, this point does not strictly arise, but since the point was fully argued, I will express my view about it.
61. By parity of reasoning with my conclusions set out above on Issues 2 and 5(iii), it seems to me that Clauses 7 and 8 of the FFABA 2007 Terms and Section 2(a)(i) and (iii) are "one time" provisions for the calculation and assessment at the end of the Contract Month of whether a sum is owed. If the party seeking payment of a Settlement Sum for a Contract Month cannot comply with the conditions precedent, then it is clear from the terms of the contract which I have discussed in relation to Issue 2, that no obligation to pay the Settlement Sum comes into existence. There is nothing in the wording of the provisions of the contract to suggest that if the condition precedent is fulfilled at some later date, some obligation to pay then springs up. I agree with Mr Baker that to the extent that textbook writers, specifically Simon Firth in **Derivatives: Law and Practice**, express the contrary view, they do not identify which term of the FFABA 2007 Terms or the Master Agreement is alleged to have this effect.

Issue 6

62. Marine Trade seeks to recover by way of restitution the sum of US\$5,030,242.50 which it paid under protest in February 2009. It is clear that the English law of restitution has set its face against the development of any general principle, such as is known to civil law systems, of a *condictio indebiti*, an action for the recovery of money on the ground that it was not due. If authority is needed for that proposition, it can be found in the speech of Lord Goff of Chieveley in **Woolwich Equitable Building Society v Inland Revenue Commissioners** [1993] AC 70 at 172:

To the simple call of justice, there are a number of possible objections. The first is to be found in the structure of our law of restitution, as it developed during the 19th and early 20th centuries. That law might have developed so as to recognise a *condictio indebiti* - an action for the recovery of money on the ground that it was not due. But it did not do so. Instead, as we have seen, there developed common law actions for the recovery of money paid under a mistake of fact, and under certain forms of compulsion.

63. I do not read Lord Hoffmann's speech in **Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners** [2007] 1AC 558 at paragraphs 20 to 23 as suggesting anything different. Indeed, in referring to Lord Goff's speech in the **Woolwich** case, he said at paragraph 21:

The answer, at any rate for the moment, is that unlike civilian systems, English law has no general principle that to retain money paid without any legal basis (such as debt, gift, compromise, etc) is unjust enrichment. In the *Woolwich* case [1993] AC 70, 172 Lord Goff said that English law might have developed so as to recognise such a general principle - the *condictio indebiti* of civilian law - but had not done so. In England, the claimant has to prove that the circumstances in which the payment was made come within one of the categories which the law recognizes as sufficient to make retention by the recipient unjust. Lord Goff provided a list in the *Woolwich* case at pp 164-165 and the decision itself added another. [i.e. money paid by way of tax to a public body which was acting ultra vires]

64. The furthest Lord Hoffmann might be said to have gone in that case towards the general principle is in suggesting a flexible approach to what constitutes a "mistake". He seemed to consider that in the **Deutsche Morgan Grenfell** case, the taxpayer should be deemed to have paid under a mistake. The taxpayer would have had a perfectly good cause of action based on the **Woolwich** principle, but that cause of action was time barred and so the taxpayer needed to rely on having made a mistake in order to take advantage of the extended limitation period available under section 32 of the Limitation Act 1980.
65. Accordingly, to recover the sum paid under protest in February 2009, Marine Trade must bring itself within one of the established categories which English law recognises as sufficient to make retention of the money by the other party unjust, specifically (since no other category is relied on) that the money was paid by mistake. This category extends not just to mistake of fact but mistake of law, since the House of Lords in **Kleinwort Benson v Lincoln City Council** [1999] 2 AC 349 abolished the rule that money paid under a mistake of law is not recoverable. In a case where it is alleged that money has been paid by mistake, two matters must be established, in relation to both of which the burden is on the claimant: (1) that there was a mistake and (2) that the mistake caused the payment: see per Lord Hope of Craighead in **Kleinwort Benson** at 407H.
66. In the present case, the mistake is said to have been the erroneous impression that there was a real and substantial chance that Pioneer was not affected by an Event of Default and that, accordingly, payment of the US\$5 million was due. The evidence about this is contained in paragraphs 4 to 6 of Mr Arnese's first witness statement. Without setting that out *in extenso*, the relevant passages can be summarised as follows:
- (1) It was Mr Arnese's clear view at the end of January 2009 (as a result of market rumours and reports in Lloyd's List and Tradewinds that Pioneer had defaulted on its obligations to Armada) that Pioneer was affected by an Event of Default

pursuant to Section 5(a)(vii)(2) of the Master Agreement. He also understood that, if this was the case, Marine Trade was not obliged to make any payment to Pioneer, by virtue of Section 2(a)(iii).

- (2) When Pioneer issued a Section 5 Notice on 9 February 2009, Marine Trade concluded that Pioneer maintained its view that it was not affected by an Event of Default and that the balance invoiced of US\$5,030,242.50 was due and owing.
 - (3) When Marine Trade's application for an injunction was refused, it was faced with a real risk that Pioneer would take steps to bring about early termination of the FFAs. Despite Mr Arnese's view as to Pioneer's financial situation, Pioneer was the party in a position to know in fact whether or not it was affected by an Event of Default. Its demand for payment amounted to a statement on its part that it was not affected by an Event of Default. If Pioneer had not served a Section 5 Notice, Marine Trade would not have paid Pioneer the sum of US\$5,030,242.50.
 - (4) To avoid the risk of liability in the event of early termination, Marine Trade paid the sum of US\$5,030,242.50 on 13 February 2009 under protest and on the express basis that the sum was not due and that Marine Trade would seek to recover the sum in these proceedings. Mr Arnese describes this as "the only option available to Marine Trade to avoid the risk that Pioneer would take steps to designate early termination".
 - (5) If Pioneer were correct in its view that it was not affected by an Event of Default and that sums were due to it from Marine Trade (which Mr Arnese did not consider to be the case), the consequences of Pioneer designating early termination would have been a debt due to Pioneer of some US\$116 million. However, if Pioneer were not correct in its view and Marine Trade failed to pay, he believed Pioneer would still designate early termination.
 - (6) Even though Mr Arnese was confident that Marine Trade would succeed in establishing that it was not liable to pay any sums to Pioneer because Pioneer was affected by an Event of Default, the damage to Marine Trade's reputation of a designation of early termination, even if not justified, would have been very severe.
67. Mr Baker submitted that the case raised the issue of what degree of doubt on the part of the paying party will negative mistake, an issue on which there was no authority binding on the court. However, Mr Baker conceded that if the law was that the "mistake" argument was only available where the degree of doubt in the payer's mind was such that he thought that he was probably liable to pay, Marine Trade could not satisfy that test. This was because Mr Baker accepted, realistically in my view, that the highest he could put Mr Arnese's evidence was that Mr Arnese thought, at the time of payment, that Marine Trade was probably not liable to pay. However, Mr Baker submitted that the law did not require the paying party to demonstrate that, notwithstanding any doubt, he still thought he was liable to pay and that, as a matter of principle, there was no maximum amount of permissible doubt.
68. Mr Ashcroft (who dealt with the issue of restitution on behalf of Pioneer) submitted that the law was that any substantial degree of doubt was inconsistent with mistake and, if he was wrong about this, his fall back position was that the payer could not

establish payment by mistake if he paid thinking that payment was probably not due. He submitted that, whichever test applied, Mr Arnese's evidence as to the circumstances in which Marine Trade came to pay would not satisfy the test. He also submitted that the evidence did not establish causation either, a matter to which I return below. It was no doubt for those reasons that there was no cross-examination about this part of Mr Arnese's evidence.

69. The question whether a person who pays in doubt can be said to be paying by mistake was considered by Lord Hope in **Kleinwort Benson** at 410C, where he said:

Cases where the payer was aware that there was an issue of law which was relevant but, being in doubt as to what the law was, paid without waiting to resolve that doubt may be left on one side. A state of doubt is different from that of mistake. A person who pays when in doubt takes the risk that he may be wrong--and that is so whether the issue is one of fact or one of law.

70. It is fair to say that this is not a promising start for Mr Baker's argument. However, he points out that this is only a dictum and that the remainder of the majority of their Lordships who considered that a payment made under a mistake of law should be recoverable in restitution left open the question whether a payment would be by mistake if the payer was in doubt. Lord Goff of Chieveley does not deal with the specific point and Lord Hoffmann at 401G-H expressly leaves the point open:

I should say in conclusion that your Lordships' decision leaves open what may be difficult evidential questions over whether a person making a payment has made a mistake or not. There may be cases in which banks which have entered into certain kinds of transactions prefer not to raise the question of whether they involve any legal risk. They may hope that if nothing is said, their counter-parties will honour their obligations and all will be well, whereas any suggestion of a legal risk attaching to the instruments they hold might affect their credit ratings. There is room for a spectrum of states of mind between genuine belief in validity, founding a claim based on mistake, and a clear acceptance of the risk that they are not. But these questions are not presently before your Lordships.

71. Mr Baker also submits that although that may have been Lord Hope's view in 1998, by the time of **Deutsche Morgan Grenfell**, he had resiled from that view. At paragraphs 64 and 65 of the speech, he said:

64. In support of these arguments reference is made to what I said in *Kleinwort Benson* [1999] 2 AC 349 about the state of mind of the payer who claims to have made a payment under a mistake. At p 409-410 I said that cases of mistake could vary from complete ignorance to a state of ample knowledge but a misapplication of what was known to the facts - from sheer ignorance to positive but incorrect belief, as Mason CJ said in *David Securities Pty Ltd v Commonwealth*

Bank of Australia (1992) 175 CLR 353, 374. But I also said that a state of doubt was different from a mistake, and that a person who pays when in doubt takes the risk that he may be wrong. I ended this passage at p 411C-D by saying that the critical question was whether the payer would have made the payment if he had known what he is now being told was the law.

65. These propositions are capable of further refinement: see Professor McKendrick, 'Mistake of Law' - *Time for a Change*, in *The Limits of Restitutionary Claims: A Comparative Analysis* (ed Swadling, 1997), pp 232-233; Graham Virgo, *The Principles of the Law of Restitution* (1999), p 161; Professor Burrows, *the Law of Restitution*, 2nd ed (2002), p 140. The difficult question is what degree of doubt is compatible with a mistake claim, as Professor Burrows points out. I see the issue as being essentially one of causation. What was the effect of the mistake on the payer? But the basic principle is, of course, that of unjust enrichment. At what point can it be said that the payee has been unjustly enriched? The answer to these questions will depend on the facts of the case. One can leave on one side cases where there is another ground on which the payee was entitled to be paid: *frustra petis quod mox restitutus es*. As for the rest, the payer's reason for making the payment despite his doubt will have a part to play in resolving the issue as to whether the payer, who would not have made the payment had he known the true state of the facts or the law at the time of the payment, should bear the risk or can recover on the ground that he was mistaken.

72. Lord Hoffmann in **Deutsche Morgan Grenfell** refers to Lord Hope's dictum in **Kleinwort Benson** and then says, at paragraphs 26 and 27:

26. This was a very compressed remark in the course of a discussion of other matters and I do not think that Lord Hope could have meant that a state of doubt was actually inconsistent with making a mistake. Contestants in quiz shows may have doubts about the answer ("it sounds like Haydn, but then it may be Mozart") but if they then give the wrong answer, they have made a mistake. The real point is whether the person who made the payment took the risk that he might be wrong. If he did, then he cannot recover the money. Speaking for myself, I think that there is a parallel here with the question of whether a common mistake vitiates a contract. As Steyn J said in *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255, 268:

"Logically, before one can turn to the rules as to mistake...one must first determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake. It

is at this hurdle that many pleas of mistake will either fail or prove to have been unnecessary."

27. Likewise, the circumstances in which a payment is made may show that the person who made the payment took the risk that, if the question was fully litigated, it might turn out that he did not owe the money. Payment under a compromise is an obvious example: see *Brennan v Bolt Burdon* [2004] EWCA Civ 1017; [2005] QB 303. I would not regard the fact that the person making the payment had doubts about his liability as conclusive of the question of whether he took the risk, particularly if the existence of these doubts was unknown to the receiving party. It would be strange if a party whose lawyer had raised a doubt on the question but who decided nevertheless that he had better pay should be in a worse position than a party who had no doubts because he had never taken any advice, particularly if the receiving party had no idea that there was any difference in the circumstances in which the two payments had been made. It would be more rational if the question of whether a party should be treated as having taken the risk depended upon the objective circumstances surrounding the payment as they could reasonably have been known to both parties, including of course the extent to which the law was known to be in doubt.

73. Lord Walker did not address this question and Lord Scott of Foscote dissented. However there is a passage in the speech of Lord Brown of Eaton-under-Heywood at paragraph 175 which takes issue with what Lord Hoffmann had said:

Lord Hoffmann suggests (at paragraph 26) that: "The real point is whether the person who made the payment took the risk that he might be wrong. If he did, then he cannot recover the money." But my thesis is not that, if someone pays money knowing that he may not be under any liability to do so, he cannot recover it. Rather it is that he cannot recover it as money paid under a mistake of law so as to benefit from the longer limitation period available under section 32. Certainly he can recover the money provided only that he sues in time and has some other cause of action, such as total failure of consideration. Clearly the quiz contestant who, in doubt whether Haydn or Mozart wrote the *eine kleine nachtmusik* answers Haydn, made a mistake. Suppose, however, that, making that mistake, he had paid out money legally due only if Haydn had been the correct answer. To my mind he, no less than the quiz contestant, took the risk that he might be wrong: he could not recover his payment as money paid under a mistake of law (or fact) although, provided he sued within six years, he could well recover it on another basis.

74. Mr Baker submitted in effect that this statement should be discounted because Lord Brown was dissenting. However, as Mr Ashcroft pointed out, Lord Brown only dissented on the facts as to whether the bank had had any doubt as to whether it was liable to pay the Inland Revenue.
75. Speaking for myself I am not convinced that, even if Lord Hope was resiling from what he had said earlier (and the editors of the leading textbook, **Goff & Jones: The Law of Restitution 7th edition (2007)** do not seem to think that he was: see the discussion at paragraph 4-002B), he was going any further than saying that there may be cases in which it can still be said that the payer was under a mistake, even if he had a degree of doubt as to the position. However, in my judgment, nothing in the speeches of their Lordships who touched on this issue supports Mr Baker's proposition that a payer can still be making a payment by mistake, when his state of mind is that he thinks it more likely than not that he is not liable to pay.
76. In my judgment, the furthest that a court of first instance could or should go as to the current state of the law is that there may be cases in which a payer can still be said to be under a mistake, even if he has doubts, provided that he paid concluding that it was more likely than not that he was liable to pay. This is the view of Professor McKendrick in the passage to which Lord Hope referred with apparent approval in paragraph 65 of his speech in **Deutsche Morgan Grenfell**.
77. However, as Mr Baker has to accept, that is not the present case. I consider that a case where the payer makes the payment thinking that it is more likely than not that he is not liable to pay, such as the present case, cannot properly be described as a case of mistake at all. I agree with Mr Ashcroft that there was no mistake: Mr Arnese thought that it was more likely than not that Pioneer was affected by an Event of Default and that was indeed the position.
78. Since I have concluded there was no mistake, I can deal with the second matter which Marine Trade would have to establish, causation, shortly. It was essentially common ground that the judgment of Robert Goff J in **Barclays Bank v Simms & Cooke (Southern) Limited** [1980] QB 677 lays down a "but for" test of causation; in other words, the mistake must be an effective cause of the payment. As in cases of inducement in misrepresentation, it may not matter if there were other reasons for payment, provided that the mistake was an effective cause. Mr Baker sought to pray that principle in aid here, by submitting that the mistake he alleged was still an effective cause, even though Marine Trade may have had other reasons for paying, such as the commercial need to avoid the designation of early termination.
79. However, in my judgment, the principle does not assist Marine Trade here. Whilst it is true that it was never put to Mr Arnese in cross-examination that, if he had known then what he knows now about Pioneer being in default, he would still have paid anyway, the effect of his evidence is clear. Marine Trade's principal concern was to avoid Pioneer designating early termination, because the payment calculation which would then ensue would result in a very substantial sum in favour of Pioneer, which Marine Trade simply could not afford to pay. That was why Marine Trade was anxious to try to restrain Pioneer from serving any Section 6 Notice by injunction and when that failed, the only way in which Marine Trade could be sure of avoiding the risk of early termination being designated by Pioneer was to make payment of the balance of US\$5,030,242.50.

80. The correct analysis is that the payment was made to avoid that risk, irrespective of whether Pioneer was in fact entitled to demand payment because it was affected by an Event of Default, with Mr Arnese in fact thinking that Pioneer was so affected and thus not entitled to demand payment. That was not a payment by mistake or caused by mistake. In my judgment the claim in restitution fails.

Issue 7

81. In circumstances where Pioneer admits that it has been affected by an Event of Default under Section 5(a)(vii)(2) at all material times since 6 February 2009 and remains so affected, Mr Baker urged me not to grant any declaratory relief in favour of Pioneer and thus not to consider Issue 7. He submitted that the proposed issue trespasses on the position in subsequent months after January 2009 which the parties have agreed will have to be the subject of a subsequent trial.
82. Mr Tselentis on the other hand submitted that I would not be deciding a point in the abstract and that, since I had heard argument on the point, I should decide it now. On this matter, I am firmly with Mr Baker that points should not be decided in the abstract. Nonetheless, I have already indicated in paragraphs 60 and 61 above that I do not consider that subsequent curing of the default means that some obligation upon Marine Trade to pay springs up at that later date, so that in any event I would not have been prepared to grant Pioneer the declaratory relief it sought.