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Case No: CL-2014-000811

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

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

Date: 27/11/2017

Before :

MR JUSTICE ANDREW BAKER

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Between :

(1) MAHMOUD HAJI HAIDER ABDULLAH **(2) MAYTHAM MAHMOUD HAJI HAIDER ABDULLAH** **(3) MAHDI MAHMOUD HAJI HAIDER ABDULLAH** **(4) MANSOUR MAHMOUD HAJI HAIDER ABDULLAH**	**Claimants**
- and -	
(1) CREDIT SUISSE (UK) LIMITED **(2) CREDIT SUISSE SECURITIES (EUROPE) LIMITED**	**Defendants**

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Ian Mill QC and Daniel Cashman (instructed by **SCA Ontier LLP**) for the **First, Third and Fourth Claimants**
The **Second Claimant** in person
Richard Handyside QC and David Simpson (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Defendants**

Hearing dates: 28, 29, 30 November 2016; 1, 5, 6, 8 December 2016; 27, 28, 30 March 2017

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Judgment Approved

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Mr Justice Andrew Baker:

Introduction

1. The claimants are a father and three sons. In this judgment I refer to them by their first names when distinguishing between them. The Haider family is Kuwaiti by nationality and domicile and is very wealthy. The first claimant, Mahmoud Haji Haider Abdullah, is the father and head of the family. He completed a secondary school education in Kuwait but did not go to university; he has only very limited English. He established his business fortune initially through a very successful retail jewellery business founded in the late 1970s, subsequently expanding into many fields, including real estate, media, telecoms, financial services, medical services, energy, oil and gas, hospitality and retail.

2. The second claimant, Maytham, is a medical doctor, qualifying at the University of Kuwait in 1998. He also has a degree in Public Health and Policy awarded jointly by the London School of Hygiene and Tropical Medicine and the London School of Economics. Having practised for a few years as a GP, his principal career since 2003 has been in the medical services business and he is or has been a member of the Board of Trustees of the University of Sciences and Technology, Kuwait, and of the University of Kuwait. He has also served on the boards of other businesses, including the family holding company, Al-Zummorodah Holding Company, and its financial services subsidiary, Zummorodah Investment Company (known as Z-Invest); and in 2006, he was approved by the Qatar Financial Centre Regulatory Authority to have an 'Executive Governance Function' for United Gulf Financial Services Company.

3. The third claimant, Mahdi, has an undergraduate degree from the University of South Florida in Management Information Services and an MBA (Marketing and International Business) from the University of Miami. He spent four years at Al Ahli Bank in Kuwait, gaining some experience across all of its activities (although I did not have any real evidence as to what those activities entailed); then from 1998 his primary occupation was as director of sales and business development at Wataniya Telecoms, to which I refer further below. He was a vice-president of Al Qurain Holding Company, whose core business involved investing in listed and unlisted companies. He was also, from 2005 until 2008, chairman and managing director of Al-Zummorodah Leasing and Financing Company; and for a time he was chairman and managing director of Z-Invest.

4. The fourth claimant, Mansour, is a graduate of the Commercial College at the University of Kuwait with a degree in Marketing. He has spent his working life to date in the family's media business in Kuwait.

5. The Haider family's interest in the telecoms sector took the form of a shareholding in Wataniya Telecoms. That interest, together with the interests of other shareholders, was sold through the Kuwait stock exchange in 2003 for US$1.5 billion, generating cash of US$150m for the family. That very large, public transaction generated numerous approaches to the claimants on the part of western banks offering investment services. One such was Credit Suisse and as a result, from April 2004 the claimants were joint account holders and clients of Credit Suisse's London-based private banking business carried on by Credit Suisse (UK) Ltd, the first defendant.

Their relationship manager was Mahmoud Zaki. The Haider family as constituted by the four claimants would no doubt be characterised as an 'ultra high net worth' client by any private banking investment service. I did not have comprehensive evidence of the family's total wealth, but I am satisfied that during the period when they were investing in structured products through Credit Suisse, from mid-2004 until late 2008, their net worth was of the order of US$500 million (at least).

6. Once the private banking account was set up, there was effectively no contact between Mr Zaki or anyone working under him and either Mahmoud or Mansour. All relevant dealings and interactions during the life of the account were conducted by Mahdi or Maytham on behalf of the family. In fact, as I shall describe, there was precious little contact with Mahmoud even to set up the account. Once the account was opened, it was used by Mahdi and Maytham to invest on a leveraged basis in structured products ('Notes'), sold to them by Mr Zaki.

7. These proceedings arise out of the global financial crisis and, in particular, the market turmoil in October 2008 following the collapse of Lehman Brothers in mid-September 2008. At that time, the claimants were invested through the Credit Suisse account in three Notes of a product type labelled 'SCARP' by Credit Suisse. SCARP was an acronym for Structured Capital-at-Risk Product. The claimants had an investment in those Notes net of borrowing of c.US$26m; the aggregate redemption value, if the Notes redeemed at par, was US$58.4m. One of the Notes was issued by BNP Paribas rather than Credit Suisse; the issuer of the Credit Suisse Notes was Credit Suisse Securities (Europe) Ltd, the second defendant. All the Notes were sold to the claimants as private banking clients of Credit Suisse by Mr Zaki.

8. The claimants had also borrowed c.€5.8m from Credit Suisse, equivalent in late October 2008 to c.US$7.6m, and had cash at Credit Suisse of c.US$10.3m, so there was a cash surplus above their Euro loan of c.US$2.7m.

9. At the end of October 2008, Maytham and Mahdi chose not to meet a margin call issued by Credit Suisse, resulting in the liquidation of their investment in the Notes, as Maytham and Mahdi knew and intended it would. The claimants suffered thereby a total loss of their net investment in the Notes and their surplus cash at Credit Suisse and indeed were left overdrawn at Credit Suisse by US$336,275.60. It is common ground that the claimants owe that final overdrawn amount to Credit Suisse, subject to the impact of their claim. That is not to say that the claimants necessarily have a claim (if they establish liability) for the full amount lost by them at Credit Suisse (on a simple view, c.US$29m as at the end of October 2008). Any damages claim must compare the actual outturn (c.US$29m lost then) with the outturn that would have resulted upon a hypothesis tailored to reflect the court's findings as to liability and causation.

10. For example, if, without any breach of duty by Credit Suisse, the claimants would have held to maturity, and suffered loss on, at least some of the Notes purchased from Credit Suisse, then that must be brought into account in any damages assessment. Or, to take another example, choosing to have their investments closed out at the end of October 2008 cost the claimants, in the event, c.US$21m as against retaining the Notes then held to maturity, meeting the October 2008 margin call and any further margin calls that might have been made along the way. Therefore, if the consequences of that choice are to be visited upon the claimants, that will have a very

significant impact on the amount of any damages award. In that regard, Credit Suisse's case is that the claimants' refusal to meet the October 2008 margin call was so unreasonable as to amount to a failure to mitigate loss, or was the sole cause of loss to the extent it increased loss, or broke any chain of causation, which may be three different ways of saying the same thing.

11. Financial market conditions in October 2008 were extraordinary. As anyone reading this judgment is likely to know already, they were, or were a reflection of, a once in a century financial shock. It can be important in such circumstances to distinguish between risk, as a function of the terms of an investment, expressed by identifying the events in which, if they occur, an investor will or may suffer loss, and risk expressed as an assessment or opinion as to, or quantification of, the chances of one or more such events occurring. An investor in structured notes who says he invested thinking his capital was 'safe', or the investment was not 'risky', may be saying he thought the terms of the notes did not provide for the possibility of loss of capital (so that his only risk was the creditworthiness of the issuer); however, he may well be saying, which is different, that he understood the terms of his investment provided for events in which he could suffer loss, but thought them extremely unlikely to occur. The investor with the latter state of mind may invest with a confident expectation that he will not suffer loss. A once in a century financial shock is apt to confound such an expectation, even if reasonably well-founded at the time of investment. If it was not a reasonable expectation at the time of investment, there can be a question of liability on the part of an advisor who fostered it, depending on the full facts of any given case.

12. In Mahdi and Maytham, this case concerned investors who say, in that latter sense, that they thought their investments were not risky. To the extent they claimed ignorance (if in truth they did) that the terms of the Notes created risk, in the former sense, I do not accept that claim, as will be seen below. The claimants accepted that, given the extent of their wealth, no issue arises as to their ability to stand the risks in fact involved in their Credit Suisse private banking account. The case therefore concerns the extent of Credit Suisse's duties as regards suitability in the case of investors who were aware of and understood the essential terms of their investments (a matter of 'product comprehension', as I shall call it), and were well able to absorb the risks generated by those terms (an issue of risk 'capacity'), but who say they under-estimated the magnitude of those risks (an issue of risk 'evaluation') so as to have had a misguided willingness to run those risks (given their risk 'tolerance' or 'appetite').

13. The claimants say that they were, and that Credit Suisse ought to have assessed them to be, low risk investors unwilling to contemplate anything more than minimal risk of loss of capital, for whom the last three Notes they purchased (Notes 18, 19 and 20, as I refer to them below) were not suitable investments, and moreover that they received bad positive advice from Credit Suisse about those Notes, principally from Mr Zaki but also from Rabih Khodari working under Mr Zaki, so that their losses are Credit Suisse's responsibility. Credit Suisse say the claimants were aggressive investors looking for strong returns, even if that meant running a significant risk of loss of capital, who were not badly advised at any point, and who in any event committed "*financial suicide*" by choosing to have their investments closed out at the end of October 2008, so that their losses should lie where they fall and they should now discharge their overdraft.

14. No distinction was drawn between the defendants at trial and I understood that I should treat any liability on the claimants' claim as jointly and severally owed by both of them. By 'Credit Suisse' in what follows, therefore, I shall mean the two defendants, without distinction, and I shall not ask whether strictly any fact or comment may relate to one but not the other.

The Notes

15. The Notes held by the claimants in October 2008 and liquidated when they refused to meet Credit Suisse's call for margin, leaving them overdrawn, were Notes 16, 19 and 20 in the sequence of structured products purchased by them through Mr Zaki. In this section of the judgment, I identify and describe all the Notes so purchased, taking them in chronological order and noting for each Note how (if at all) the claimants' investment put their capital at risk. In that regard:

    i) The claimants' investments in the Notes exposed them to the credit risk of the issuer (i.e. Credit Suisse, or in one case BNP Paribas). It will be cumbersome to keep re-stating that qualification every time. It should be treated as implicit throughout, so that when I refer to there being, or not being, a risk of loss of capital, I mean apart from the credit risk of the issuer.

    ii) There is also a sense in which an investor loses capital – or, at least, an investor's capital loses value – if he invests in a note under which the coupon is or may be below some measure of the time-value of money in the investment currency that is relevant to the investor's circumstances (e.g. an inflation rate). Whatever the scope for argument over the economic equivalence of different risks, I have no doubt that the claimants (like, I suspect, most private investors) saw as different in kind (a) a purchase for US$Xm that could redeem below US$Xm and (b) a purchase for US$Xm that would always redeem for at least US$Xm but which carried a variable or at-risk coupon so that as an investment it might or might not keep up with inflation. The former, not the latter, would have been understood by the claimants as risking a loss of capital; and in the claimants' dealings with Credit Suisse and the product explanations produced in writing by Credit Suisse, references to there being (or not) a risk of loss of capital related likewise to the former, and not the latter. Again, therefore, that is the sense in which I shall refer throughout to risk of loss of capital.

    iii) Finally, there is similarly a sense in which an investor loses capital if he invests in one currency (here, all the investments were in US$), but will ultimately require the value of his investments (if he does, other than for reinvestment) in another currency. Such an investor exposes himself to exchange rate risk by choosing to invest in the first currency. Here, all the claimants' directly relevant investments were in US$, but it is not said against Credit Suisse that it had, or failed to discharge, any relevant responsibility in that specific regard, nor did the evidence explore whether the claimants' ultimate need for the value of their relevant investments (other than for reinvestment) might be a need for value in another currency (e.g. KWD). The purpose of the claimants' Euro loan was touched on in the evidence as part of exploring Mahdi and Maytham's degree of sophistication and appetite for risk; but that does not affect the point just made. So, once again, when I refer to

whether capital was at risk or not I am referring exclusively to the claimants' investment capital, denominated as it was in US$.

2004 – Notes 1 to 4

16. The claimants contracted to purchase Note 1 on 28 April 2004 for completion on 25 May 2004. Note 1 was a US$5m 8-year 'Callable Range Accrual Note' ('CRAN') with quarterly coupon. It was a 'Range Accrual' Note because daily coupon accrued (calculated on a 30/360 day basis at the rate of 8.25% p.a.) only for days when the 12-month US$ LIBOR rate traded within a range (min.0.00%, max.X%, where X% increased over time, from 3.25% for the first year of the Note period to 7.50% for the final year). It was a 'Callable' Note because Credit Suisse had a quarterly right (coincident with coupon payment dates) to redeem early. Redemption, whether early or at full term, was always at par.

17. Upon its terms, therefore, Note 1 did not involve any risk of loss of capital, if held by the claimants until it redeemed (whether early or at full term). If the claimants sought to exit the investment when it was not otherwise redeeming, they might or might not get par for it; there was, therefore, that contingent risk of loss of capital.

18. The claimants purchased Note 1 with 3:1 leverage (US$1.25m cash, plus a loan of US$3.75m). They would therefore suffer loss if the variable coupon on Note 1 did not cover the leverage borrowing cost. But that would not be loss on Note 1 itself; and I do not think the claimants would have seen that (or Credit Suisse would have presented that) as a risk of loss of capital (again, whatever argument there could be as to its economic equivalence), given the claimants' financial circumstances. As is true of all of their Note investments through Credit Suisse, the claimants could easily have afforded to invest in Note 1 for the full amount invested, without leverage.

19. The use of leverage did, though, affect the contingent risk of loss of capital I identified in paragraph 17 above. In the usual way, the terms upon which Credit Suisse allowed the claimants to invest on a leveraged basis involved a requirement for borrowing not to exceed a 'loan to value' (LTV) percentage of the value of the investment from time to time as might be assessed by Credit Suisse. If the current value fell such that borrowing exceeded LTV, there would be an entitlement in Credit Suisse to issue a margin call and to close out the claimants' investments if the margin call was not met. A decision not to meet a margin call would therefore be, in effect, a decision not to hold until redemption. I have expressed that solely in terms of a decision not to meet a margin call, because just as the claimants could easily have afforded, if they wished, to invest in their various Notes for the full amounts invested, without leverage, equally they would always have been able promptly to meet any margin calls by Credit Suisse, if they wished to do so. The very serious risk of using leverage for some investors, namely that they might lose capital, through being closed out, for want of ability to meet a margin call, when they would have wanted to continue to hold the investment, was not a risk run by the claimants by their investments through Credit Suisse.

20. On 28 June 2004, the claimants agreed to buy Note 2, completing on 21 July 2004. Note 2 was a US$20m 7-year CRAN, with par redemption, quarterly coupon and callability, and daily coupon accrual where the 3-month US$ LIBOR + 3.40% fell within a range (min.0.00%, max.Y%, where Y% was 4.00% in the first year,

increasing to 7.50% in the final year). It was purchased with 3:1 leverage (US$5m cash, US$15m loan).

21. In July 2004, Mr Zaki sought to interest the claimants in an equity barrier SCARP similar to what would later be Note 5. I cannot say on the evidence whether he spoke to Mahdi, Maytham or both. His file note recorded that whichever of Mahdi or Maytham it was, "*did not like [the idea] due to the 60% barrier and subsequent loss of capital protection. The client was extremely knowledgeable on the financial markets and expressed interest to see equity linked investment ideas.*" Having seen and heard from Mahdi and Maytham myself, I do not think that last is a view Mr Zaki could reasonably have formed and this file note seemed to me to involve spin on his part.

22. Note 2 was called by Credit Suisse at the first opportunity. The proceeds were promptly reinvested, in that on 26 October 2004 the claimants contracted to buy Note 3, completing on 3 December 2004. Note 3 was a US$20m 8-year CRAN, with par redemption, quarterly coupon and callability, and daily coupon accrual where the 3-month US$ LIBOR + 3.00% fell within a range (min.0.00%, max.Z%, where Z% was 4.00% in the first year, increasing to 8.00% in the final year).

23. Note 4 was acquired on 22 December 2004, completing a contract concluded on 7 December 2004. Note 4 was an US$8m 2/3-year SCARP referencing a set of 50 individual stock prices. It had a '2/3-year' maturity because Credit Suisse had an option to extend the maturity from 2 years to 3 years, but only if they announced the extension by 15 December 2005. It was callable by Credit Suisse after 1 year, and again after 2 years (if extended). Coupon was semi-annual at the fixed rate of 6.00% p.a.

24. Capital was at risk under Note 4 by reference to a slightly fearsome-looking redemption price formula. Thus:

    i) Note 4 redeemed at:

    max (0%, min (100%, 172% – 2% x Abnormality Score))

    Putting that into words: the 'Abnormality Score' put capital at risk; if the Abnormality Score was 36 or less, Note 4 redeemed at par; if the Abnormality Score exceeded 36, then Note 4 redeemed below par; the higher the Abnormality Score, the lower the redemption price, with 2% of par value being lost for every Abnormality Score point above 36; if the Abnormality Score was 86 (or more), there would be a total loss of capital (Note 4 would redeem at zero).

    ii) The key concept, therefore, was the Abnomality Score, defined to be:

$$\sum_{i=1}^{5} N_i \times i$$

, where N_i is the number of weeks out of 105 where 45+i stocks were all higher or all lower than the previous week

> The '*all higher or all lower*' determination referred to was the 'Weekly Observation' result obtained by comparing the average of the daily closing prices for each stock with that average the previous week. The 105 weeks referred to were the weeks of the Note period, if Note 4 remained a 2-year Note, or the weeks of the second and third years of the Note period if Credit Suisse extended it. Putting the formula into words, then: every week within the applicable 105-week period when at least 46 of the selected stocks traded higher than the previous week or at least 46 traded lower than the previous week (in each case based on the weekly average of daily closing prices for each stock) added to the Abnormality Score; a week when 46 of the selected stocks all traded higher or all traded lower than the previous week added 1 to the Abnormality Score; 47 stocks all trading higher or all trading lower than the previous week added 2; and so on up to an addition of 5 to the Score for a week, if it occurred, when all 50 of the selected stocks traded higher or all 50 traded lower than the previous week.

25. Note 4 was purchased with 5:3 leverage (US$3m cash, US$5m loan). Since capital was at risk, leverage had a 2⅔x multiplying effect; the maximum loss on the US$3m cash investment was US$8m; 8 = 3 x 2⅔. That said, if the investment were perceived from the outset as an investment of US$8m, by an investor well able to afford to invest that sum in full, but for which Credit Suisse was offering the opportunity not to pay the full US$8m up front, there would not be the same sense of multiplying risk; the investor would understand he was putting US$8m at risk and if in the event he lost more than US$3m on the investment he would need to pay the additional amount lost at the time of the loss whereas if he paid in full up front he would feel that loss by receiving less back from Credit Suisse rather than having to pay more to Credit Suisse.

26. Note 4 also involved the contingent risk that if closed out early the claimants might lose capital (they might not be able to close out at par), even if later events would show that it would have redeemed at par if held to maturity. (At the same time, an early exit could potentially involve a close-out price better than the final redemption price, depending on the circumstances.) Again, as with Notes 1 to 3, the use of leverage added to that risk, but only if the claimants might decide not to meet a margin call.

2005 – Notes 5 to 9

27. Several of the other Notes purchased by the claimants through Credit Suisse, including Notes 16, 19 and 20 that were closed out in late October 2008, were similar in nature to each other, if considered at a reasonably high level of generality. They were all SCARPs and, like Note 4, they were all derivative investments in equities. But they were less complex than Note 4, in that capital was put at risk in a somewhat simpler way. The Note would redeem at par if some equity-based reference value never fell below a stipulated barrier during the Note period. If the barrier was hit on any day within the Note period, the redemption price would be defined by the level of the reference value at maturity, but capped at par, e.g. if the closing level was 80% of the 'strike' level that equated to par for the Note, and the barrier had been touched during the life of the Note, the Note would redeem at 80%, a 20% loss of capital, whereas if the closing level was 120% of strike, the Note would redeem at par (not at 120%). Depending on the individual Note terms, it might be also that coupon would

cease to be payable if the barrier was hit; and if that was the position, that might be permanent or it might be that coupon would resume if the reference value came back above the barrier. In the descriptions that follow, I do not refer to the impact of the barrier on coupon from Note to Note as it was not a focus of the claim.

28. The first of these equity barrier SCARPs purchased by the claimants was Note 5, traded on 2 March 2005 for purchase on 23 March 2005. It was a US$15m, 3-year Note, with semi-annual coupon of 3% and semi-annual callability by Credit Suisse. The Note referenced three major stock indices, the DJ Eurostoxx 50 Index, the S&P 500 Index and the Nikkei 225 Index. For each index, the Note specified a strike level and a continuous 'observation' of the current level, expressed as a percentage of the strike level. The Note reference value was the lowest of those three percentages. The barrier was 60% of strike. In short, then, Note 5 provided that it would redeem at par if none of the reference indices ever fell 40% (or more) below strike during the Note period, otherwise it would redeem at a percentage of par equal to the reference value at maturity (but capped at par).

29. Note 5 was purchased with 2:1 leverage (US$5m cash, US$10m loan). Since capital was at risk, leverage had a multiplying effect, this time a 3x multiplying effect; the maximum loss on the US$5m cash investment was US$15m; 15 = 5 x 3. Again, if the investment were perceived from the outset as an investment of US$15m by an investor well able to afford to invest that sum in full, but one for which Credit Suisse had offered the opportunity not to pay the full US$15m up front, there would not be the same sense of multiplying risk; the investor would understand he was putting US$15m at risk and if in the event he lost more than US$5m on the investment he would need to pay the additional amount lost at the time of the loss (whereas if he paid in full up front, he would feel that loss by receiving less back from Credit Suisse rather than having to pay more to Credit Suisse).

30. Note 5, again, also involved the contingent risk that if closed out early the claimants might lose capital (they might not be able to close out at par), even if later events would show that it would have redeemed at par if held to maturity. (At the same time, early close out could potentially involve a close-out price better than the final redemption price, depending on the circumstances.) Again, as with Notes 1 to 4, the use of leverage added to that risk, but only if the claimants might decide not to meet a margin call.

31. Note 6 was a derivative investment in the performance of the Nikkei 225 Index, traded on 22 September 2005 for purchase on 6 October 2005, but it was not a SCARP. It was a US$5m, 1½-year Note, with no coupon, paying at redemption either par or, if the Nikkei 225 at the end of the period was above the strike level set at the time of the trade, a percentage above par equal to the percentage by which that closing Nikkei 225 level exceeded par, but capped at 13%. So it offered the equivalent of a coupon of between nil and 13% for an 18-month period, with no risk to capital.

32. Note 6 was purchased with leverage (US$1.5m cash, US$3.5m loan), so the comments in paragraphs 18-19 above about risk in relation to Note 1 apply again, *mutatis mutandis* (treating the uplift over par on maturity, if any, as an effective coupon for that comparison).

33. Also on 22 September 2005, two further trades by the claimants were booked:

i) selling Note 3 back to Credit Suisse at 95.03%, completing on 27 September 2005; and

ii) buying new Note 7, a US$20m Note like Note 3, at 95.03%, completing on 14 October 2005.

34. On 29 September 2005, another two trades were booked:

i) selling Note 1 back to Credit Suisse at 95.50%, completing on 4 October 2005; and

ii) buying new Note 8, a US$5m Note like Note 1, at 95.50%, completing on 20 October 2005.

35. These four trades can be seen as two 'switch' trades. The claimants realised a capital loss of US$980,000 on Note 3 and US$225,000 on Note 1, but they were sold Notes 7 and 8 respectively at exactly corresponding discounts to par, so that if the new Notes in due course redeemed at par the claimants would recover those losses in full.

36. Notes 7 and 8 were materially identical (for present purposes) equity 'trigger' SCARPs. Like Note 5, they referenced the worst performer of the DJ Eurostoxx 50, S&P 500 and Nikkei 225 Indices, expressed as a percentage of strike levels. They had a 6-year Note period and paid no coupon as such, but operated as follows:

i) They would be 'triggered' to redeem at the end of any quarter during the period if the reference percentage was then above 100% (i.e. if all three reference indices were then above strike). Hence, they were labelled by Credit Suisse 'Trigger Redeemable' Notes.

ii) If triggered, they redeemed at a price above par equivalent to redemption at par plus payment of coupon of 8.40% p.a. (simple). For example, triggered redemption after 2 years (8 quarters) would be at 116.80% of par.

iii) If never triggered, however, they redeemed at the end of the 6-year Note period at 150% of the reference percentage at maturity, capped at par. Thus, if the Notes redeemed at the end of the Note period without being triggered, (a) there would be no return on capital at all over that 6-year period and (b) there would be a loss of capital if the worst performing of the indices was at or below 66.66% of its strike.

37. A file note of a meeting between Mr Zaki, Mahdi and Maytham on 22 September 2005 (resulting in the Note 3/Note 7 'switch' trade) stated *inter alia* that the claimants had "*invested in these Trigger Notes with success in the past*". There was no evidence that that was true, and I do not believe it was. In my view, this was again spin on Mr Zaki's part.

38. My comments on leverage in the context of Note 5 (paragraphs 29-30 above) apply to Notes 7 and 8, *mutatis mutandis*. The multiplying effect of leverage was c.4.7x (the original leverage for Notes 1 and 2/3 was in each case 3:1, giving a 4x multiplying effect, but the new purchases were at c.95% and none of the borrowing had been paid off).

39. On 15 December 2005, Note 4 was called by Credit Suisse, with settlement on 23 December 2005. The next day, 16 December 2005, Credit Suisse booked the purchase by the claimants of Note 9, to complete on 6 January 2006.

40. Note 9 was a trigger SCARP, like Notes 7 and 8, referencing (again) the DJ Eurostoxx 50, S&P 500 and Nikkei 225 Indices, but also a barrier SCARP like Note 5, with the barrier set at 60% of strike. It was a US$7.5m Note, purchased with 1.5:1 leverage (US$3m cash, US$4.5m loan), with a 3-year period and six-monthly trigger observations. If triggered (which would mean that all three Indices were at or above strike on the observation date), it would redeem at a price above par equivalent to redemption at par plus coupon of 20% p.a. (simple). If not triggered, it would redeem at par if none of the indices had ever hit the barrier during the Note period, otherwise at the level of the lowest of the three indices (expressed as a percentage of strike) but capped at par.

41. Thus, under Note 9: capital was at risk in the manner of an equity barrier SCARP as I described in paragraph 27 above; and leverage affected risk as summarised in paragraphs 29-30 above (the multiplying effect here, if relevant, being 2.5x).

2006 – Notes 10 to 14

42. In January 2006, Notes 7 and 8 redeemed at their first trigger observation date, just 3 months after issue, realising a gain. The proceeds were reinvested into Notes 10 and 11. The aggregate nominal value was US$25m (US$10m for Note 10, US$15m for Note 11), but the reinvested gain contributed to a reduction in leverage: Note 10 was purchased at 101%, so it cost US$10.1m, funded by cash of US$3m and borrowing of US$7.1m; Note 11 was purchased at par, using cash of US$3.75m and borrowing of US$11.25m. Notes 10 and 11 were both traded on 17 January 2006, for settlement on 27 January and 8 February respectively.

43. Note 10 (also referred to at trial as the 'Gulf Note') involved only limited risk to capital (if held to maturity). The Note modelled an investment, with specified weighting percentages, in five equity funds managed by Gulf banks investing in Gulf region stocks, managed dynamically by reference to the volatility of the resulting net asset value of the notional investment. The target volatility was 18%, at which the notional investment would be a 100% cash investment in the funds; at lower volatilities, the notional investment was notionally leveraged (up to a maximum notional borrowing of 50%); at higher volatilities, the notional investment was reduced to a cash investment of less than 100% in the funds and the balance in low-risk money market funds.

44. Note 10 had a 4-year Note period and no coupon. The redemption value at maturity was taken from the net asset value at maturity of the notional investment modelled by the Note, but with a guaranteed minimum of 95%. Thus, since the purchase was at 101%, the maximum loss of capital, if held to maturity, was 5.94%. The upside was not capped. The use of leverage in the claimants' investment (as opposed to the 'internal' leverage that might be present in the notional investment modelled by the Note) had the usual multiplying effect: if viewed as an investment of US$3m (the amount of cash used to purchase), the multiplying effect of leverage was 3.366x (10.1 ÷ 3); the maximum loss of capital on that view was therefore 20%, if Note 10 was

held to maturity; but my previous comments on that effect of leverage (e.g. paragraph 29 above) apply again here.

45. As with all the Notes, there was also the contingent risk of loss of capital (and associated impact of leverage on that risk), as in paragraph 30 above.

46. Note 11 was a trigger SCARP, exactly like Notes 7 and 8, referencing once again the DJ Eurostoxx 50, S&P 500 and Nikkei 225 Indices, for a 6-year period with quarterly trigger observation periods and redemption, if not triggered, at 150% of the reference percentage (but capped at par). If triggered, because all indices were above strike on an observation date, it redeemed at a price above par equivalent to par plus coupon of 10% p.a. (simple). The risks involved in buying Note 11 were those described in paragraphs 36-37 above; the leverage was 3:1 so its multiplying effect, if relevant, was 4x.

47. Note 12 was traded on 15 March 2006 and purchased on 30 March 2006. It was a US$5m, 5-year Note, with semi-annual coupon and callability. The coupon was fixed for the first year, 5% being paid after six months and again at the end of the year; it was variable thereafter using a formula. The formula calculated a six-monthly coupon by reference to the stock price performance of 20 selected stocks. Simplifying the formula (which was I think more complicated than it needed to be), the semi-annual coupon for each coupon payment date was 4.6875% + ¼X, where X was the average of the percentage rises and falls over the period of the Note up to that date of the five worst-performing stocks in the basket over that period. X could be negative; if ¼X was –4.6875% or worse, which would be the case if the five worst-performing stocks were down, on average, at least 18.75% against strike, then the coupon for that payment date would be nil.

48. The terms of Note 12 did not put capital at risk, if held to redemption (whether at maturity or upon being called by Credit Suisse). Redemption would always be at par, so Note 12 was just a play on the future performance of the referenced stocks with a view to higher rates of coupon but at the risk of low (or nil) coupon. However, the purchase was leveraged 4:1 (US$1m cash, US$4m loan); so my observations in relation to Note 1 apply (see paragraphs 17-19 above).

49. Note 13 was purchased as a 'switch' for Note 5. By a trade booked on 29 March 2006, Credit Suisse agreed to buy Note 5 back from the claimants on 3 April 2006 in return for the issue of Note 13 to the claimants on 20 April 2006. Note 13 was a US$15m, 3-year equity barrier SCARP, with the same structure generally as Note 5 (referencing the same indices), but with index strike prices re-set (I assume to trade date values) and a quarterly coupon of 3-month US$ LIBOR + 2.65% rather than a semi-annual coupon of 3%. The risks involved were the same, for the purposes of this judgment, as those of Note 5. The investment was still leveraged 2:1 (US$5m cash invested, US$10m borrowed). (I note in passing that the strike levels of Note 13 were well above those of Note 5, by c.25% (Eurostoxx), c.7.5% (S&P) and over 40% (Nikkei). The 'switch' trade, from the claimants' perspective, treated both their sale price for Note 5 and their purchase price for Note 13 as par. Whether that represented fair pricing was not explored at trial and no claim was made in relation to the pricing of the trade.)

50. Note 11 redeemed upon the first quarterly observation of the reference indices, for US$15,229,818.75 payable on 8 May 2006. That represented very nearly US$4m after repaying the borrowing on the Note. Those net proceeds were promptly reinvested by the purchase of Note 14, a US$16m 4-year combination trigger / barrier SCARP like Note 9, again referencing the DJ Eurostoxx 50, S&P 500 and Nikkei 225 Indices. If upon any semi-annual observation all three indices were above strike, Note 14 would be called automatically, redeeming for par plus a coupon of 8% p.a. (simple). If Note 14 was not called and none of the indices ever touched the barrier (set at 60% of strike), the Note redeemed at par. If the barrier were touched by any index during the life of the Note, Note 14 would redeem, if not called prior to maturity, at the level of the worst performing index at maturity (expressed in percentage terms relative to strike levels). The types of risk involved were therefore as I described in relation to Note 9 (paragraphs 40-41 above). The leverage was 3:1 (the purchase was funded by US$4m in cash and borrowing of US$12m) for a multiplying effect by reference to the cash element, if relevant, of 4x.

2007 – Notes 15 to 17

51. In early December 2006, Note 10 (the Gulf Note) was bought back by Credit Suisse, at the claimants' request, for a price of (only) 82.86, realising a capital loss of US$1,714,000 rather than the US$600,000 maximum loss of capital if held to maturity. That was a capital loss of some 57% of the claimants' US$3m cash invested; or 17% of the total investment in the Note of US$10.1m. The claimants thus experienced, and realised in cash, a loss of capital. It was, in particular, a loss of more capital than they could have lost if they had held to maturity, due to the decision to liquidate early; this was a materialisation of the contingent risk of loss I described in paragraphs 26 and 30 above.

52. In late December 2006, Note 9 redeemed early. If I have understood correctly the Credit Suisse 'Redemption Summary', this was a redemption upon being triggered, for par plus 20% coupon, giving a return on equity (net of borrowing costs for the leverage used) of 41.5% for 12 months.

53. Although Note 9, therefore, had performed well, the claimants were unhappy at suffering a loss on Note 10. On 6 March 2007, Mr Zaki discussed the portfolio as it then stood with either Mahdi or Maytham (the evidence did not enable me to say which) on the telephone. Whichever of Mahdi or Maytham it was told Mr Zaki that he thought the account might be better simply holding cash deposits and that he was "*discussing with the family whether to liquidate to cash for the time being*" (to quote from Mr Zaki's file note of the call). On 13 March, according to another file note, Mahdi called Mr Zaki with an instruction that "*should any of the current investments redeem early in the near future, the cash proceeds should be held on deposit until further instructions*".

54. On 29 March 2007, US$5m was transferred from the Credit Suisse account to Citibank, as prelude, I infer, to Mahdi and Maytham investing in structured products there (as I mention in paragraphs 64 to 66 below). On 2 April 2007, US$1m was transferred to Investcorp (as to whom see paragraph 64 below) for investment. Also in early April 2007, Credit Suisse Note 6 redeemed upon maturity at its (capped) maximum price of 113. The redemption proceeds were not immediately reinvested.

55. The next investments by the claimants through Credit Suisse came in May 2007 (Note 15) and September 2007 (Note 16). The former followed a meeting in Kuwait at which Mr Zaki persuaded Mahdi and Maytham to invest again and presented what became Note 15. Those further investments were as follows:

    i) Note 15 was traded on 3 May 2007, for purchase on 24 May 2007. It was a US$10m, 3-year combination trigger / barrier SCARP, like Notes 9 and 14 before it. The types of risk involved were therefore as I described in relation to Note 9 (paragraphs 40-41 above). If triggered, it would redeem for par plus coupon of 14% p.a. (simple). Favourably for the investor (in comparison to the previous similar Notes), Note 15 triggered if upon a semi-annual observation all the reference indices were above 93.25% of their respective strike levels. The barrier was the now familiar 60% of strike; and the reference indices were again DJ Eurostoxx 50, S&P 500 and Nikkei 225. Leverage was used (US$4m cash, US$6m borrowed, a multiplying effect, if relevant, of 2.5x). This was, in substance, a reinvestment by the claimants of their 'equity' in Note 14 which redeemed early upon being triggered on 4 May 2007.

    ii) Note 16 was purchased in early September 2007, completing what was effectively a 'switch' trade, switching out of Note 12 into Note 16. But Note 16 was a different type of investment. Note 12, as I observed when describing it, did not put capital at risk and was rather a play on the performance of a collection of individual stocks so as to generate (if the play went well) a strong coupon. There was contingent capital risk in the claimants' investment in Note 12 due to the use of leverage, but that is a different point. Note 16, however, was a trigger SCARP, like Notes 7, 8 and 11 (see above, paragraphs 36, 37 and 46). In relation to triggered redemption, Note 16, like Note 15, was favourable to the investor in that triggering, so as to realise a good return, did not require all the reference indices to be above strike. In the case of Note 16, the trigger point was 97% of strike. The reference indices were, as now usual, DJ Eurostoxx 50, S&P 500 and Nikkei 225; the notional (and par redemption) amount was US$5m; the period was 6 years; the observation for triggering was quarterly and the coupon if triggered was 8% p.a. (simple). Note 12 was sold back to Credit Suisse, and Note 16 bought, at a price of 92, so the sale and purchase price for each US$5m Note was US$4,600,000. The claimants thus realised a loss of US$400,000 on Note 12 and the leverage on Note 16 was 4:0.6, for a multiplying effect, if relevant, of 7.66x.

    iii) Note 17 was also purchased in September 2007, a trade booked on 13 September and completed on 18 September. It was a US$6m, 3-year equity barrier SCARP, referencing the now usual three indices, paying coupon quarterly at a rate of 3-month US$ LIBOR + 5.5% p.a.; the barrier was set at 50% of strike, so the redemption price was indexed to the worst performing index (but capped at par), rather than simply being par, only if one of the indices fell by at least 50% at some point during the life of the Note. The claimants bought Note 17 at par, with 2:1 leverage, giving a multiplying effect, if relevant, of 3x, i.e. they used US$2m cash and borrowed US$4m.

2008 – Notes 18 to 20

56. In March 2008, there was some discussion and correspondence between Mr Zaki and Mahdi about the possibility of a margin call in respect of the Credit Suisse Notes as markets were turbulent and had deteriorated. Mr Zaki indicated that a transfer of anything over US$3m would be a good way to support the account in the circumstances. In the event, no margin call was issued and no fresh funds were applied to the account then.

57. Two months later, however, on 20 May 2008, the claimants transferred US$13m to Credit Suisse in order to, and it was used to, pay down sums outstanding by way of borrowings against the Notes, in other words to reduce the leverage in the claimants' Note portfolio. In seeming contradiction of a decision to reduce leverage, just a few days later, on 23 May 2008, Mr Zaki met Mahdi and Maytham in Kuwait and booked on their instruction the purchase of Note 18, a US$20m Note purchased at par funded entirely by borrowing. On one view, the multiplying effect of that leverage was infinite (there was zero equity and dividing by zero gives infinity). But that would consider the decision to invest in Note 18 in isolation. If it was a decision, on reflection, to revert to the previous leverage in the extant Note portfolio and to use the fresh funds recently injected to support the new purchase (or indeed if further investment was the intention all along, but for cash-flow efficiency the new funds were used to reduce borrowing pending any new investment), the leverage might be seen rather as 7:13 (US$13m cash, US$7m new borrowing), for a multiplying effect of just over 1.5x. Note 18 is the first Note in respect of which a claim is made, so the decision to invest in Note 18 was explored in some detail in the oral evidence at trial and I shall revert to that decision, and the 23 May meeting in particular, later.

58. For now, it suffices to say as to the nature of Note 18 that it was a US$20m, 3-year equity barrier SCARP, callable quarterly at par, paying coupon quarterly at the rate of 12% p.a., with the barrier set at 60% of strike levels. It referenced the usual three indices plus the Swiss Market Index. The nature of the risks to capital were therefore the same as with a number of the previous Notes. (Whether the magnitude of those risks in the prevailing market circumstances was the same or similar as before may be a different question, i.e. how real was the claimants' chance of failing to earn coupon or (more importantly) their chance of losing capital.)

59. Note 19 was rather different to any of the other Notes bought by the claimants through Mr Zaki. It was a US$2.4m, 1-year bet on the stock prices of BNP Paribas, Barclays and JP Morgan, issued at a discounted price of 87, to redeem at par (equivalent to paying coupon of 20.48% for the year) if none of those prices fell during the year to 50% of strike. If the 50% barrier was touched by any of the stocks, then redemption would be at the worst of the three closing levels (expressed as a percentage of strike), but capped at par. Thus, capital was at risk in a way that was broadly similar, in concept, to the risk in the claimants' equity barrier SCARPs; but by reference this time to the three particular stocks only, rather than by reference to major stock indices.

60. The purchase of Note 19 for US$1,992,000 was leveraged 1:1, i.e. the claimants used cash and new borrowing each of US$996,000, giving a multiplying effect (if relevant) of 2x.

61. That brings me, finally, to Note 20, purchased in the eye of the fiscal storm in October 2008. It was issued to the claimants as a 'switch' trade, Note 20 being acquired in

return for Notes 13, 15, 17 and 18 being taken back by Credit Suisse. The circumstances in which that occurred, including the advice on the basis of which the claimants acted, I shall consider in more detail later in this judgment, but in short there had been a breach of the capital protection barriers under Notes 13 and 15 and a restructuring to lower barriers and extend maturity was sought by the claimants and recommended by Mr Zaki and Mr Khodari, with a view to improving the ultimate outturn for the claimants at maturity.

62. For the present purpose of identifying the nature of the Note and the types of risk involved, it suffices to say as follows:-

i) Note 20 was traded on 9 October 2008 for purchase on 23 October 2008, with a nominal amount (par redemption value) of US$51m, equal to the aggregate nominal amounts of Notes 13, 15, 17 and 18.

ii) The new Note had a 5-year Note period, thus a final maturity date of 23 October 2013 (if not earlier called), whereas Notes 13, 15, 17 and 18 were all 3-year Notes, with final maturity dates in April 2009, May 2010, September 2010 and June 2011 respectively. Note 20 was callable by Credit Suisse after 2 years, then every quarter thereafter.

iii) Coupon was payable quarterly at 3-month US$ LIBOR + 1.65% p.a.

iv) Note 20 was an equity barrier SCARP referencing the usual three indices. Expressed as percentages of closing levels of those indices at the trade date, the barriers were set at c.76% for the S&P 500, c.71% for the DJ Eurostoxx 50 and c.68.5% for the Nikkei 225. Par redemption was guaranteed only if all three indices stayed above their respective barrier levels throughout the 5-year Note period.

v) If the barrier was touched, redemption (capped at par) was calculated by reference to the worst performing index at maturity, considering closing levels as percentages of strike levels. However, strike levels were not index levels at the time of the trade in October 2008 but substantially higher levels, c.155% of trade date levels for the S&P 500 and DJ Eurostoxx 50 and c.175% thereof for the Nikkei 225, because they were the weighted averages of the strike levels of the 'outgoing' Notes 13, 15, 17 and 18.

vi) The 'switch' out of Notes 13, 15, 17 and 18 into Note 20 was priced at 58.47, i.e. Notes 13, 15, 17 and 18 were sold back to Credit Suisse, and Note 20 was purchased from Credit Suisse, for US$29,819,700. In the case of the outgoing Notes, the price of 58.47 was a weighted average of individual prices of 54.95 for Note 13, 48.20 for Note 15, 62.65 for Note 17 and 65.00 for Note 18. Thus the claimants realised a capital loss of US$21,180,300 (in aggregate) on Notes 13, 15, 17 and 18, each of which had been purchased at par, but if new Note 20 in due course redeemed at par the claimants would recover that loss in full.

Credit Suisse Notes Timeline

63. The chronology of the claimants' investments in Notes through Credit Suisse, as set out in narrative form above, is summarised, I hope conveniently for anyone

considering this judgment, in the 'CS Notes timeline' diagram produced as an appendix to the judgment. The diagram captures not only the basic details and lifespan of each Note, but also the extent to which, as I have found in the narrative above, later Notes were in substance investment continuations of prior Notes.

Investments Elsewhere

64. The claimants' investments through Credit Suisse, from April 2004, were their first investments in structured products. They regarded themselves as expert investors in Kuwait, identifying and participating in investment opportunities by way of direct share ownership in Kuwaiti businesses. Whilst I did not have much detail, my impression was that this was, or at any rate included, what I would describe as entrepreneurial venture capital investments. Outside Kuwait, they had a substantial portfolio of assets comprising cash reserves in Zurich (Credit Suisse), Geneva (Deutsche Bank) and London (Citibank), a hotel in Germany worth something like €150m, real property in London, Paris, Brussels and Marbella, and from 2004 sums (ultimately totalling c.US$10m) invested through Investcorp, a Bahraini company upon whose recommendations the claimants took direct shareholdings in a number of companies, mostly in the US.

65. At Deutsche Bank, the claimants' relationship manager was Patrick Huser. From about the same time as their structured products investments with Credit Suisse began, the claimants invested in structured products at Deutsche Bank as well, through Mr Huser. Those products all had unconditional capital protection guaranteeing par redemption, save for one with guaranteed minimum redemption of 95% and one of 97%. I did not regard these investments through Deutsche Bank as informative or useful in relation to the claimants' investment objectives, in particular their attitudes towards risk, for the Credit Suisse portfolio. If anything, they assisted the claimants' case, in that trading even the Deutsche Bank products involved risk warnings and client categorisations by the bank that might be thought, taken at face value, to suggest a moderately aggressive risk appetite, yet the investments all in fact fitted the generally conservative risk appetite the claimants claim to have had.

66. Rather later in the chronology, from about May 2007 only, the claimants also invested through Citibank, Barclays and possibly BNP Paribas (disclosure was incomplete), in products broadly similar to the Credit Suisse SCARPs, with par redemption guaranteed only if equity-related price barriers were not hit during the life of the investment and capital at risk if the barriers were hit. The investments with Citibank and Barclays were closed out, crystallising losses, at about the same time as was the Credit Suisse portfolio, similarly because the claimants decided not to meet margin calls. The claimants made no complaint or claim against Citibank or Barclays about their investments with them or about those losses. I shall come back to that when considering the claimants' decision not to meet the Credit Suisse margin call. If there was indeed any similar investment with BNP Paribas, I could not say on the evidence what happened to it.

67. As regards Citibank, Mahdi's evidence, which I accept notwithstanding criticisms of it by Mr Handyside QC for Credit Suisse, was that the Citibank investments resulted from the claimants having invited Citibank to show them products similar to the Notes they were buying from Credit Suisse, because they liked them and were happy with them, based on their understanding of the risks involved; and that they (the

claimants, meaning in practice he and Maytham) indeed regarded what they did with Citibank as similar in kind to what they did with Credit Suisse. As with Deutsche Bank, indeed more so, the claimants' investments through Citibank involved the generation of risk warnings and client classifications that might suggest, read in isolation, a high risk tolerance and aggressive investment approach. But again as with Deutsche Bank, and accepting Mahdi's evidence also on this, the claimants regarded those as box-ticking by the bank, and a means of allowing for higher-risk investments if he and Maytham wanted them in the future. In short, Mahdi and Maytham did not understand from the Citibank documentation, to the extent they read it at all, that by the particular products they bought they were in fact running more than a small risk of loss of capital.

The Claimants at Credit Suisse up to March 2008

68. The foundation of the claimants' claim is their allegation (at paragraph 14(2) of the Particulars of Claim) that "*Mahdi and Maytham (and, therefore, the Haider family)*" were only willing to invest with Credit Suisse on the basis that "*very little risk*" was taken with their capital. It is said that this was made clear to Mr Zaki at the outset, when he was introduced to the family and the private banking relationship was established; and that it remained a constant throughout, or at any rate the claimants never communicated to Credit Suisse any change. Mr Handyside QC criticised what he said was confusion and inconsistency in the way the claimants' case had been formulated over time. There was to my mind some force in that criticism, but not enough to influence my assessment of the claimants' case as pleaded by reference to the evidence given at trial.

69. The claimants' claim, as thus pleaded, defines their collective (joint) investment objectives and attitude to risk, for investments through Credit Suisse, by reference to that of Mahdi and Maytham. That is important. At my request, in the light of Mahmoud's evidence in particular, the parties in closing argument made some submissions as to the nature of any duties concerning suitability of investments for a joint investment account if there are differences of investment objective or risk appetite between account holders. For example, suppose two joint account holders, one content to invest in products involving at least some risk of loss of capital, to improve returns, but the other dead set against anything other than full protection of capital even though that might limit returns. At first blush, it is perhaps tempting to say that the latter account holder's stance should mean that any product involving risk to capital must be considered unsuitable. Indeed, that is the line seemingly taken by Credit Suisse's 2008 "*Client Classification and Suitability & Appropriateness Policy*", at paragraph 4.3.1 stating that, "*If a relationship is held with more than one client (joint accounts) the suitability and/or the appropriateness assessment must always be carried out with respect to the client a) the least sophisticated and b) the least financially able to bear the risks involved, of all such clients*".

70. But that would be to focus on risk and ignore reward – the other account holder might complain that the resulting portfolio under-performed. A correct analysis may therefore be more complex, its starting premise that a joint account requires a single investment objective and risk/reward strategy. Conflicting investment objectives and attitudes to risk on the part of account holders may just be inconsistent with the existence of a joint account (or its continuation, as the case may be), at all events if the conflict cannot be resolved. (Thus, for example, it may be the Credit Suisse

policy quoted above assumes that the bank's approach would be explained to the more sophisticated and/or risk-tolerant joint account holder whose consent to that approach for the account would be obtained so it could be a joint account.) In that regard, provisionally and with respect, I have some difficulty with Teare J's view in *Zaki et al. v Credit Suisse (UK) Ltd* [2011] EWHC 2422 (Comm), in which a father, his wife and daughters were joint account holders and Teare J said at [29] that: "*... because Mr Zeid's wife and daughters allowed Mr Zeid to deal with Mr Zaki on their behalf in every respect, I do not consider that they can assert that what was suitable for him was not suitable for them. ... Mr Zeid had authority to deal with the day to day conduct of the account. That must include the imparting of such information as was necessary to enable Mr Zaki, and hence CSUK, to advise whether an investment was suitable or not, for example the investment objectives of the Claimants.*"

71. I do not need to take those thoughts any further, however. For Credit Suisse, the primary submission on this point was that it is not open to the claimants to advance a claim by reference to Mahmoud's investment objectives or attitude to risk, if different to that of, or at any rate communicated to Credit Suisse by, Mahdi and Maytham. I agree. The claim is pleaded on the basis that Mahdi and Maytham's stance defined the claimants'; I am satisfied that Credit Suisse reasonably sought to answer that case only, and that an understanding that that was the case to be met informed Mr Handyside QC's cross-examination, particularly of Mahmoud and Mansour; so it would be unfair to consider any possible claim founded otherwise than upon whatever findings I now make as to Mahdi and Maytham's investment objectives and attitudes. That is not to say that Mahmoud's evidence about his intentions for monies invested with Credit Suisse is irrelevant. To the extent I accept that evidence, it may inform my assessment of Mahdi and Maytham's evidence about their intentions.

72. I make two other observations, before turning to the claimants' evidence:

i) The first is that "*very little risk*" is not "*no risk*". The case, therefore, is one of degree. An investment product exposing the investor to a risk of losing capital, but only a remote risk, because capital would be lost if specified events occurred, but those events were very unlikely to occur, would fit the pleaded criterion of running "*very little risk*".

ii) The second is that the only claims made are for alleged breaches of duty on the part of Credit Suisse in respect of the claimants' decisions to invest in Notes 18, 19 and 20, decisions made in May, June and October 2008 (respectively). For Notes 18 and 19, the relevant foundation for any claim, therefore, is Mahdi and Maytham's investment objective and attitude to risk in May/June 2008, albeit the history of investing with Credit Suisse since April 2004 may inform any assessment as to that. For Note 20, in my judgment rather different considerations arise. As I have already described in part, and will come to in more detail below, Note 20 was structured for and sold to the claimants in very extreme circumstances for a special purpose, taking the Note portfolio as it then stood as a given (comprising Notes 13, 15, 16, 17, 18 and 19). The sale of Note 20 stands to be judged in that rather particular context, not by reference to whatever may otherwise have been Mahdi and Maytham's investment objectives and attitudes.

73. The purpose of this section, then, is to identify and explain my findings as to Mahdi and Maytham's investment objectives and attitudes, in relation to their Credit Suisse investments, during the life of the Credit Suisse account until the US$13m cash injection in March 2008 and the purchase of Note 18 two months later.

74. All four claimants gave evidence at trial. Before I turn to their evidence, it is convenient to say something about Mr Zaki and Gaby Bejjani, who worked for the Haider family as Head of Treasury for the Al-Zummorodah group from early 2007 until 23 October 2008 and who gave some advice to Mahdi and Maytham in connection with investment ideas from late 2007. Neither Mr Zaki nor Mr Bejjani gave evidence.

75. In Mr Zaki's case, I had some rather flimsy and out of date medical evidence he had at one stage provided to Credit Suisse's solicitors in an attempt to persuade them he was unfit to help; but Mr Handyside QC did not rely on that evidence, accepting squarely that Mr Zaki had been unwilling to assist. For the claimants, Mr Mill QC submitted I should therefore draw "*all relevant adverse inferences from Mr Zaki's failure to give any account of his conduct in relation to this case*", in particular as regards his knowledge and understanding of the claimants and their investment objectives, and as regards what he may have said to Mahdi and Maytham in persuading them to invest. Mr Mill QC referred me to *Petrodel Resources Ltd v Prest* [2013] UKSC 34, [2013] 2 AC 415, *per* Lord Sumption JSC at [44], *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 (C/A) at 340 and *re Coroin Ltd* [2012] EWHC 2343 (Ch), *per* David Richards J at [274]-[275]. Since Mr Zaki was domiciled abroad and no longer in Credit Suisse's employ, Mr Handyside QC submitted that this was not a case of a party failing to call a witness it could reasonably be expected to call and that it would be wrong in those circumstances to draw any adverse inference. I have not needed to resolve that difference between the parties and have been able to reach clear conclusions on the evidence I did receive without the need to bolster it by the drawing of adverse inferences.

76. In the case of Mr Bejjani, his last day in the claimants' employ was 23 October 2008, but Mahdi accepted in cross-examination that he knew of no reason why Mr Bejjani could not have been called as a witness, and at the time of the main case management conference in the case he was identified as a witness the claimants intended to call. Mr Handyside QC submitted that I should draw against the claimants an adverse inference as to what Mr Bejjani would have said about their investment objectives and attitude to risk when purchasing Notes 18 and 19, and what he would have said generally about the restructuring (Note 20). I am not persuaded that is right. There is contemporaneous evidence from Mr Bejjani, in telephone transcripts, that in my judgment broadly supports the claimants' case as to their investment objectives and attitude to risk, and as to the extent of his involvement in their Credit Suisse portfolio. It would be wrong in those circumstances, I think, to proceed, in effect, upon the basis that had Mr Bejjani been a witness his evidence would have been unhelpful to the claimants, which is the logic behind drawing an adverse inference from his absence. I did though bear carefully in mind that I did not have the benefit of hearing from Mr Bejjani when assessing what I made of the claimants' witness evidence and the contemporaneous material.

77. Turning, then, to the claimants' evidence, it was apparent to me that Mansour had no relevant involvement, for the purposes of the claims made. He was a joint account

holder and account signatory and therefore signed various documents by which the relationship with Credit Suisse was constituted contractually. But he gave no thought at all to how or for what the account was to be used or was in fact used; he had nothing to say as to Mahdi or Maytham's investment objectives or attitude to risk; he paid no real attention to this aspect of the family's dealings with the outside world. Whether it was proper for Mr Zaki to accept Mansour as joint account holder, and then to deal exclusively with Mahdi and Maytham in relation to the account, without attempting to ascertain his (Mansour's) own understanding, investment objectives or risk/reward preferences, is not a question I need to consider, given the claims pleaded (see again paragraph 71 above).

78. Mahmoud gave evidence by video link from Kuwait, through an interpreter present in court. He was not an easy witness, principally in my judgment because he was not in court. He gave evidence from Kuwait by agreement in view of his relatively frail health, so he is not to be criticised for that, as such. However, in my judgment the distance from the formality of proceedings that Mahmoud was thus afforded fostered in him a lack of care in his oral evidence and a willingness to make speeches that did not assist me or do him credit. As part of that, in his oral evidence he elaborated substantially upon, and contradicted himself as to, what he had said in his witness statement, and what Mahdi and Maytham said in their evidence, as to the length and nature of his (Mahmoud's) only contact with Mr Zaki, when he (Zaki) visited Mahdi and Maytham in April 2004 to set up the Credit Suisse account. That contact, I find, was limited to a brief introduction of Mr Zaki to Mahmoud, pleasantries and platitudinous generalities to the effect that Mr Zaki would do a good job looking after family money placed with him for investment. Again, as with Mansour, I wonder how that could be an adequate basis for accepting Mahmoud as joint account holder for structured products investments, but no such question arises on the claims as made.

79. My criticisms of Mahmoud as a witness notwithstanding, in my judgment his central evidence had the ring of truth, and I accept it, namely that he intended investments through Credit Suisse, which would be dealt with by Mahdi and Maytham, to be safe, secure, family money, not exposed to the geopolitical risks of investing in the Middle East and not at risk in the manner of the family's entrepreneurial venture capital investments in Kuwait. There was neither evidence nor reason to suppose that Mahmoud's intentions ever changed. He left the Credit Suisse account entirely to Mahdi and Maytham to deal with and paid it no attention, I find, at all events until the crisis hit in late October 2008. It was not apparent to me from the evidence how much, if any, real involvement he had even then. During the life of the account, Mahmoud did not appreciate that Mahdi and Maytham were investing with Credit Suisse on a leveraged basis. Although he was a signatory to the credit documents that facilitated that borrowing, I accept his evidence that he neither knew nor asked what those documents were for or what they achieved. He simply signed because Mahdi and Maytham had signed and (I infer) indicated to him that his signature was also necessary because the documents related to their Credit Suisse funds and he was an account holder. That said, I do not believe it would have troubled Mahmoud to know that the investments were leveraged as they were (see paragraphs 18, 19 and 25 above, and what I say below about Mahdi and Maytham's approach).

80. Turning, then, to Mahdi, I assessed him to be a generally honest witness. That is not to say that I can accept everything he told me, as I think he now has an exaggerated sense of how far some of Mr Zaki's assurances went. For example, he has persuaded himself, in relation to the Notes that put capital at risk if specified barriers were hit, that during the life of the Credit Suisse account Mr Zaki gave him and Maytham unconditional reassurances that if those barriers were hit, the Notes could always be restructured by Credit Suisse in such a way that loss of capital would be avoided. On the evidence I had about him, although I did not have the benefit of evidence from him, it is clear that Mr Zaki was a charming and persuasive man, well suited by personality and cultural background to managing the accounts of wealthy Arab investors like the Haider family. I am confident, and find, that in his dealings with Mahdi and Maytham, he (Zaki) will have emphasised Credit Suisse's experience and ability in managing difficulties should they arise. I find it credible, and accept, that this will have included reference to the possibility of seeking to restructure with a view to avoiding or minimising loss. But I do not find credible, and reject, the suggestion (though I think honestly advanced by Mahdi) that Mr Zaki gave unconditional promises or reassurance in that regard, whether (a) that Credit Suisse would always offer restructuring terms, or (let alone) (b) that Credit Suisse would always offer a restructure that would ensure there was never a loss of capital.

81. During the life of the Credit Suisse account through 2007, as he and Maytham invested successively in Notes 1 to 17 inclusive, Mahdi was well aware of their essential features. For the Notes under which capital protection was conditional upon barriers never being hit, in other words capital was in principle at risk ('in theory', as Mahdi expressed it), Mahdi properly understood that feature. He appreciated also that the Credit Suisse Notes offered, and typically realised, good returns, especially with the use of leverage, certainly returns well above anything available through simple time deposits; and he understood the general relationship between risk and reward. At the same time, he honestly regarded the returns offered by the Notes as not especially high, certainly not like the levels of return he believed were available through truly risky investments such as the family had in Kuwait. He was not looking to be aggressive with the risk/reward balance at Credit Suisse and did not believe that he and Maytham had been or were being. I accept his evidence that he consistently made that clear to Mr Zaki. Leaving aside the impact of leverage, Mahdi thought that the chances of losing capital were very low, because he relied on Mr Zaki's assessment and opinion, consistently given when explaining any new Note with conditional capital protection only, that the chances of barriers being hit were small. I accept his evidence that he made clear to Mr Zaki that he (Mahdi) was relying on Mr Zaki for an assessment of those chances and was only interested in investing where the assessment was that those chances were small. Mahdi was not capable of making that assessment for himself, nor could Mr Zaki have thought that he was. Mahdi was also reassured, as regards the real likelihood of any loss, by the prospect (albeit there was never any guarantee) that if there were difficulties, it might be possible to restructure to avoid or recoup any loss.

82. I have no doubt that Mahdi was aware from the outset of his father's intention that any investments at Credit Suisse be regarded as safe, secure, family money, not risky venture capital. There is in my judgment no inconsistency between that and what Mahdi believed he and Maytham had done with Mr Zaki through to late 2007 and the purchase of Note 17. That is so notwithstanding that Mahdi saw, even if he did not

always focus on their detail, term sheets for the Notes purchased through Credit Suisse that contained, if capital was at risk, lengthy risk warnings in the terms set out below (or similar). Those terms confirmed that par redemption was not guaranteed (but Mahdi knew that); they warned that an assessment of the risk that the Notes would not redeem at par should be made (a matter of risk evaluation) to ensure investment was suitable for the claimants; but they did not say that Mahdi could not rely for that assessment on Mr Zaki as trusted advisor, as in fact he did and Mr Zaki knew that he did. The risk warning language was as follows (or similar):

"*The product described in the attached product term sheet contains either no principal protection or is less than 100% principal protected. This notice is provided to you, as a private customer, in compliance with the rules of the Financial Services Authority (FSA).*

This notice cannot disclose all of the risks, therefore, before entering into any transaction you should ensure that you fully understand the potential risks and rewards and independently determine that it is suitable for you given your objectives, experience, financial resources and any other relevant circumstances. You should consult with such advisers as you deem necessary to assist you in making these determinations.

Please read the attached product term sheet carefully. There are risks associated with this type of product and you should remember that the value of an investment and the income from it can go down as well as up. The return at the end of the investment is not guaranteed and you may get back less than you originally invested. The product term sheet attached specifies limits within which your capital will be repaid. You should consider these limits and only enter into a transaction in the product described if you are prepared to lose some or all of the money invested. You should be aware that the maximum benefit described is only available after a set period and the rate of income or growth may depend on specific conditions being met. The relevant time periods and conditions are indicated in the attached product term sheet."

83. As regards the use of leverage, Mahdi would have been content to invest the amounts in fact invested without leverage. To him, leverage was (a) encouraged by Mr Zaki, but also (b) an efficient way to invest, improving the available returns. He never gave thought to the loss multiplying effect of leverage, were there a loss of capital; but in my judgment that is because he was an investor such as I described in paragraphs 19 and 25 above. I do not accept evidence he gave, in some cross-examination answers, to the effect that his only concern was with the un-borrowed 'equity' invested in the Notes. I judged that to be an after-thought. He knew that the full purchase cost ('equity' plus borrowing) was always at risk and that the borrowing had to be repaid come what may. Had Mahdi given any more thought to the effects of leverage in the Credit Suisse investments, they would have been obvious to him without any need for explanation by Mr Zaki. Further, in my judgment, they would not have been a concern to him.

84. In summary, therefore, I find it proved, as asserted by the claimants, that, to Mr Zaki's knowledge, Mahdi was only content to invest in Notes 1 to 17 (inclusive) because he (Mahdi) believed, based upon Mr Zaki's assessments, that even where the Note terms

put capital at risk, they did so conditionally upon events that were very unlikely to occur, so that in reality the risk of loss on the Notes was very low.

85. Finally, I come to Maytham. As a witness, I found him unsatisfactory: he was unresponsive, argumentative and unrealistic. He was shown to have been less than honest in his conversations with Mr Zaki and Mr Khodari in late October 2008, leading to the closing out of the claimants' position, but not only did he refuse to accept as much, he compounded the fault by the answers he gave in cross-examination on that point. I say all of that recognising and making allowance for the fact that Maytham was unrepresented at trial, so that he had the additional stress, and temptation to argue from the witness box, of a litigant in person unfamiliar with the trial process. Even so, overall and with regret, I came to the conclusion that Maytham was not trying to assist the court by giving a straight factual account, as best he could, but was giving as his evidence what he believed he needed to say to advance his claims. In short, I concluded that he was not a witness I could trust where his account was not supported by other evidence.

86. I judged Maytham to be cleverer than Mahdi, and more sophisticated in business and financial matters. During the life of the Credit Suisse account, he was capable of forming views on the likelihood of trigger events or barrier breaches, and did so when investing. But still, he was no financial market expert and in my judgment he would not have relied, and did not rely, on his own evaluations in deciding to invest. He trusted and relied on Mr Zaki's opinion and advice, and made it known to Mr Zaki that he was doing so. Like Mahdi, Maytham was well aware of his father's intentions for any investments through Credit Suisse. Like Mahdi, Maytham was comforted, in part, by knowing that Credit Suisse would generally seek to restructure to help avoid or minimise loss if there ever were problems, albeit he had never been given any promise or unconditional reassurance in that regard. Like Mahdi, in my judgment Maytham had good product comprehension to make informed decisions when buying Notes through Mr Zaki. He was happy to do so, though, and actually did so in the case of Notes 1 to 17 inclusive, only when, as regards risk evaluation, Mr Zaki advised that the chances of capital protection being lost were small (where, that is, capital protection was conditional rather than absolute under the Note terms).

87. As regards leverage, in my judgment Maytham also was an investor such as I described in paragraphs 19 and 25 above. He knew he was investing the full purchase price of each Note purchased (which generally meant the full nominal value of the Note, as most purchases were at par); the use of leverage was a cash-flow efficiency to improve returns that involved borrowing that had to be repaid come what may, so that in the unwelcome and unexpected event that there was a loss on the Notes, repaying the borrowing might require fresh funds from him.

88. I therefore find it proved for Maytham, as asserted by the claimants, that, to Mr Zaki's knowledge, he (Maytham) was only content to invest in Notes 1 to 17 (inclusive) because he had Mr Zaki's assessment that even where the Note terms put capital at risk, they did so conditionally upon events that were very unlikely to occur, so that in reality the risk of loss on the Notes was very low.

89. In reaching those conclusions, I have not overlooked the documents generated by Credit Suisse that Mr Handyside QC submitted painted the claimants, or at least Mahdi and Maytham, in a very different light. Two forms were created as part of the

account opening process that indeed ought to have provided a good record of the claimants' investment objectives and risk appetite at that time (April 2004), namely a 'Customer Profile' form and an 'Advisory Mandate' form. They were designed to be completed by the new client(s) (perhaps, though not necessarily, with the assistance of the relationship manager), and signed by the client(s). That was not done, however. Rather, Mr Zaki got the claimants to sign both forms in blank and then filled them in himself, or had them filled in by an assistant at Credit Suisse. Either way, the content in the completed forms came from Mr Zaki and the claimants' signatures do not evidence agreement with that content.

90. The content of the Customer Profile form, as completed or dictated by Mr Zaki, is woefully inaccurate and inadequate:

i) First, it is a Customer Profile only for Mahmoud, recording merely that Mahdi, Maytham and Mansour were to be additional account beneficiaries. In fact, this was to be a joint account and Mr Zaki should have prepared a separate Customer Profile form for each of the account holders, as indeed was stated at the head of the form.

ii) Second, it wrongly states that Mahmoud was a university graduate and 'Board Member – Executive Manager' of Al-Zummorodah Holding. He was neither. That Mahdi or Maytham may have been, as Mr Handyside QC emphasised in seeking to limit criticism of the form, seems to me no excuse for recording false information about Mahmoud.

iii) Third, it recorded for 'Estimated Total Assets' real estate worth "*$+20 Million*" and investments worth "*$+25 Million*", and by omission suggested that there was no material amount held in bank accounts. That wildly understated the claimants' assets and even if Mr Zaki may not have been given chapter and verse, it is difficult to imagine how he could have come up with those figures as even a correct order of magnitude.

iv) Fourth, it recorded the following, in a section headed 'EXPERIENCE':

a) That Mahmoud had "*20 yrs +*" experience trading fixed income and structured products, fixed income semi-annually with an average trade size of US$1m and structured products annually with an average trade size of US$5m, for each of which 'Advised or made own decisions' was answered "*Both*". In fact, neither Mahmoud nor any of his sons had any such prior experience. The introduction to Mr Zaki, by a family friend who worked for Credit Suisse, had been precisely to introduce them to the possibility of investing for the first time in structured products, that being Mr Zaki's specialisation. I regard it as impossible that the claimants might have said anything to Mr Zaki that could have justified these entries about product trading experience.

b) That as an investment adviser to companies in Kuwait, Mahmoud was able to assess the risks in investment markets and was capable of understanding the risks associated with investment products he wished to trade at Credit Suisse, and that he was considered an expert due to long years in conducting investment business with various financial

institutions, making his own decisions albeit valuing brokers' advice and recommendations. Again, I am satisfied that Mr Zaki was told nothing of the sort about Mahmoud, or about Mahdi or Maytham if perhaps he meant the relevant entries to refer to either of them. The family's experience and expertise in local, direct investments in Kuwait, may well have been discussed with Mr Zaki; but in my view that provided no reasonable basis for considering them knowledgeable, experienced or expert in the sort of products Mr Zaki would be introducing to them and did introduce to them over the next few years.

c) That an FSA protection waiver had been explained to Mahmoud. It had not been (nor, if relevant, was it explained to Mahdi or Maytham). This may have referred to a 'Notice of treatment as an intermediate customer' dated 18 April 2004 that Mr Zaki got the claimants to sign. Although they signed it, I am confident they did not read it or understand its implications. That they signed it nonetheless might have had ramifications for the claim if that customer classification had governed the account in 2008; but it did not.

v) Fifth, it contained ticks for 'Equities', 'Fixed Income' and 'Structured Products' under "*the products that we may deal in for you*", although there had been no discussion of trading in equities or fixed income and there was in fact no agreement or permission for Credit Suisse to deal for the claimants in anything. (One accuracy in the form is a tick for an 'Advisory' service, as opposed to 'Discretionary' or 'Execution Only'; it seems to me the 'products we may deal in for you' boxes applied only to discretionary accounts.)

91. Under 'INVESTMENT OBJECTIVES', the Customer Profile form required a selection between 'Income', 'Capital growth', 'Short term' and 'Other (please specify)'; for risk appetite, the choice was 'Low', 'Moderate' or 'High', for each of which descriptions were given. For the former, Income and Capital growth were ticked with 50% weighting stated for each; for the latter, Moderate was ticked. For the claimants, in my judgment 'Low Risk' should have been ticked ("*You seek to preserve capital after inflation and minimise investment volatility. You prefer investments with low downside price risk.*") I think Mahdi and Maytham did not readily sit within the 'Income / Capital growth / Short Term' classification so that 'Other' should have been ticked, with a description indicating that they were looking to improve returns over simple cash deposits where possible, but only where the risk of loss of capital was very low.

92. The Advisory Mandate form required one of four choices to be selected for investment objectives, namely 'Conservative / Capital preservation and income', 'Balanced / Capital preservation and growth', 'Growth / Maximise capital growth' and 'All risks / including high risk'. In that classification, I think Mr Zaki could only reasonably have identified the claimants' objective as either 'Conservative' or 'Balanced' (I think 'Balanced' is probably the more apt since the claimants were not looking to the Credit Suisse portfolio to generate income).

93. I came to the conclusion that, regrettably, the content of those forms is to be explained by a desire on Mr Zaki's part to ensure that he would have internal approval to trade the structured products he thought would be good for the claimants, even if they were

classified by Credit Suisse internally as suitable only for investors with a moderate to high risk appetite. To be clear, I do not mean by that, and do not find, that he set out to trade products he thought of as medium to high risk knowing that the claimants wanted low risk; doing the best I can to assess him without having heard from him myself, I think he was over-confident about his ability to evaluate risk for the claimants.

94. Those findings both explain, and are I think corroborated by, the 'Transaction Suitability Forms' ('TSFs') completed from time to time in terms that would have been dictated or directed by Mr Zaki. Their content was often inadequate or incomplete. They were inconsistent in their descriptions of the claimants' investment objectives, risk tolerance and proper classification as investors. But they always managed to say enough to ensure that the transactions Mr Zaki had recommended to the claimants went ahead. Mr Mill QC relied on the fact that Credit Suisse was fined by the FSA in 2011 because *inter alia* it did not have adequate systems and controls for the determination of clients' attitudes to risk in respect of the selling of SCARPs in 2007, 2008 and 2009. That was so although the account opening risk tolerance assessment process at Credit Suisse considered by the FSA appears to have been an improvement on what happened with the claimants in April 2004. The existence of a systemic shortcoming of that kind does not prove in any individual case that a particular duty owed to the client, for example a duty adequately to assess the suitability of some particular investment, was broken. But it does mean that it is perhaps less surprising than might otherwise have been the case to find that such a breach did occur.

95. To summarise, then, in my judgment and as regards Notes 1 to 17, that is to say for the period up to the key events, the foundation of the claimants' claim as I described it in paragraph 68 above has been made out. Mahdi and Maytham, to Mr Zaki's knowledge, were only willing to invest in the structured products he (Zaki) had to sell on the basis that Mr Zaki assessed on their behalf that the chances of actually suffering loss were very low.

96. I do not believe it is possible to express that in quantified terms, nor that Mahdi or Maytham would have sought to do so, either in their own minds or in their dealings with Mr Zaki. But I should not move on without referring again to the 'switch' trade in September 2005, when Notes 1 and 3 'became' Notes 8 and 7 (respectively), the loss on Note 10 (the Gulf Note) in December 2006 and the 'switch' trade in September 2007, when Note 12 'became' Note 16. All three episodes showed, if Mahdi and Maytham needed to be shown, that the value of an investment in structured products could fluctuate during the life of the product. In particular, it could fall so as to be below par even if full capital redemption at maturity was guaranteed (Notes 1, 3 and 12), or so as to be below the level of a minimum maturity redemption that was guaranteed (Note 10, with its minimum redemption level of 95%). Thus, they were shown how if Note investments were terminated early they might suffer a loss of capital they would not suffer if they held to maturity, or a greater loss of capital than if they held to maturity.

97. However, I do not think any of that ought to have caused them to doubt their investment belief that the chances of suffering a loss of capital at maturity were very low; nor did it do so in fact. Moreover, Notes 1, 3, 10 and 12 were rather different in nature from the equity barrier SCARPs that matter, structured by reference to the S&P

500, DJ Eurostoxx 50 and Nikkei 225 indices (or the three specific banking stocks in the case of Note 19). The claimants' experience with Notes 1, 3, 10 and 12 did not influence, nor in my judgment ought it to have influenced, the claimants' understanding of the chances that their equity barrier SCARP Notes would not redeem in full if held to maturity.

98. I turn next to consider the decisions to invest in Notes 18, 19 and 20. The question for Notes 18 and 19, in the light of my findings about Notes 1 to 17, is whether there was any change in Mahdi and Maytham's investment objectives and attitude to risk, or in what they may have communicated to Mr Zaki about that. I have already observed that Note 20 stands apart and must be considered in the light of the very particular context in which and purpose for which it was created.

The Cash Injection and Note 18

99. The aggregate value invested by the claimants in Notes through Mr Zaki, by par redemption value, rose steadily from US$25m, after the initial purchases of Notes 1 and 2 in April and July 2004, to US$58.5m in mid-2006, after the purchase of Note 14. Whilst that is a huge sum by most standards, it was not a very large percentage of the family's investment wealth – in fact, as best I can judge it in the absence of comprehensive evidence, it was probably only around 10% of that wealth. That aggregate investment amount fell back to US$36m by early 2007, because Note 10 was terminated early, then Notes 9 and 6 redeemed, respectively upon being triggered and at maturity (see paragraphs 51 to 54 above). The Note portfolio, as it then stood, comprised Notes 12, 13 and 14.

100. Such activity as there was later in 2007 left the Note portfolio with the same aggregate sum invested, US$36m, but now in the form of Notes 13, 15, 16 and 17 (see paragraphs 54 and 55 above). These were all SCARPs referencing the worst performer (relative to the strike levels set by the Notes) of the S&P 500, DJ Eurostoxx 50 and Nikkei 225. That aggregate investment was leveraged 2:1, i.e. it was funded by 'equity' (the claimants' 'own' cash) of US$12m and borrowing of US$24m. (I would need to state fractionally different figures to be exact, since the US$5m Note 16 was purchased at a discount to par, but that level of precision is not required for present purposes.) Prior to this, in file notes in June and August 2007, Mr Zaki recorded the claimants as waiting for more favourable market conditions before investing again. In my judgment, that will not have come from Mahdi or Maytham; it is more likely, I think, to reflect that Mr Zaki so advised them, that they were happy to take that advice, and thus Mr Zaki was able to record why there was no investment activity on the account.

101. At about this time (late 2007), Mr Bejjani began to play at least some role in giving Mahdi and Maytham investment ideas or advice. He was not made aware of or asked to be involved in the Credit Suisse portfolio until October 2008; however, his views may have been an influence on Mahdi and Maytham in the purchase of Note 19 in June 2008 (see below). Always bearing in mind that I did not hear from Mr Bejjani, in my judgment he did not have any influence on what Mahdi and Maytham did with their Credit Suisse portfolio before that (although he seems to have been asked by Maytham to look at the claimants' structured products at Citibank, BNP Paribas and Barclays in May 2008).

102. In mid-January 2008, Mr Zaki called Maytham to update him on the account. He explained to Maytham that because the Nikkei had fallen significantly the then current value of the claimants' Notes was low; however, he advised Maytham that the account remained okay because the Note barriers were still far distant. Maytham said he was glad he had taken advice given by Mr Zaki on a previous update call that they not stretch the account at that time.

103. About a month later, Mr Zaki met Maytham in Kuwait and discussed the account again; the detail of that discussion, whatever it was, has been lost to time, save that it seems Mr Zaki noted somewhat better market conditions then prevailed. In a further conversation thereafter, Maytham told Mr Zaki that the claimants might repay their Euro loan. By 19 March 2008, however, current Note values were again down, and the Euro loan had not in fact been repaid, leading Mr Zaki to email Mahdi with an updated valuation and a request that the claimants transfer cash to support the account. This was not a formal margin call under the transaction documents, nor in the event was such a call issued at that time. What Mr Zaki said was as follows:

"*… Due to the recent and continued turbulence and deterioration in the markets worldwide, the valuation of your investments has gone down. The investments themselves are sound but because they are highly leveraged we require fresh funds to support the account to be placed on deposit. ,,,*

… Maytham … mentioned that it may be a good idea to repay the EUR loan. This will improve the situation tremendously but if you are unable to do that, you obviously can transfer USD in. Anything above USD 3M will help support the account. As mentioned earlier these funds will be placed on deposit until the market stabilises, when we can consider further investments or transfer the funds out."

104. Mahdi replied by email that he would discuss the position with Maytham and revert to Mr Zaki. He did not do so (revert to Mr Zaki); I cannot say what, if any, discussion he had with Maytham. However, at some point thereafter, Mahdi and Maytham decided to reduce very substantially the level of borrowing at Credit Suisse. To that end, they transferred US$13m to Credit Suisse on 19 May 2008, for value received by Credit Suisse late the following day, having been told by Maytham (I infer) to expect such a transfer. Mr Zaki confirmed receipt by an email addressed to Maytham, stating that "*As agreed, the funds will be fully utilised to repay the loans on the account at no cost to you.*" In fact, the borrowing was reduced not only by that US$13m transfer. As (I infer) must also have been discussed when Maytham spoke to Mr Zaki, the claimants had US$ deposited with Credit Suisse beyond the amount required as collateral support for their Euro loan, so around US$3m from that deposit was added to the partial repayment of the US$ borrowing. That borrowing was thus reduced from c.US$24.4m to US$8.6m as of 21 May 2008. In my judgment, consistent with all of that, Mahdi and Maytham were not looking to invest in any further structured products at that time. (There was evidence that at the same time, they transferred US$2m to their Investcorp account, which must have been for new investments (their Investcorp portfolio always comprised direct, un-leveraged, shareholdings). I do not see that as inconsistent with the proposition just stated about investing in structured products.)

105. Mr Zaki's next meeting with Mahdi and Maytham, however, had previously been set up for 23 May 2008, a Friday; and at that meeting Mahdi and Maytham agreed to

purchase Note 18. The claimants sought to make something of the fact that the meeting was during their weekend and took place in a Starbucks at a shopping mall in Kuwait. But in my judgment nothing turns on that. Mr Zaki had intended the meeting to be at the new Al-Zummorodah offices, but Mahdi had told him the building would be closed at the weekend and he was happy for them to meet anywhere. I find that the relationship was good enough for Mahdi and Maytham to be happy to discuss their investments with Mr Zaki, and indeed to consider and agree upon a new investment if that is the direction the discussion took, in an informal setting. What matters is not the venue but the content of the discussion.

106. Late on 22 May 2008, in preparation for the meeting and what was going to be a recommendation by him to invest in Note 18, Mr Zaki sent by email summary documents showing the claimants' Credit Suisse account immediately before and immediately after the substantial reduction in the claimants' borrowings just referred to. They noted *inter alia*, and Mr Zaki chose in his covering email to emphasise, that one effect of the reduction in borrowing was to reduce the anticipated or expected return on equity for 2008 from 22.66% to 10.25%.

107. The upshot of the 23 May meeting was an order from Mahdi and Maytham to purchase what became Note 18, based upon Mr Zaki's presentation of it to them and his recommendation that they invest. Precisely how Mr Zaki sold Note 18 to Mahdi and Maytham in their discussion was explored in cross-examination, both with Mahdi and Maytham and also with Mr Khodari, who was indirectly involved as I describe below. I do not believe Mahdi or Maytham now has any reliable memory of Mr Zaki's exact words, nor would I expect them to. I accept and find that they invested in the belief that doing so was 'safe', in the sense that although capital would be at risk, with par redemption only guaranteed if barriers were not hit, it was thought to be very unlikely that the barriers would be hit. I do not accept the case put to them by Mr Handyside QC that, whatever the position hitherto, they were on this occasion taking a bold or aggressive investment approach, looking to take advantage of suppressed markets to maximise returns. It is possible that Mr Zaki described Note 18, in terms, as 'safe'; but even if he did, that would have conveyed to Mahdi and Maytham not that the Note had unconditional capital protection, but that in Mr Zaki's view there was only a small prospect of the barriers being breached. Whether by describing it as 'safe' or using other words, I do find that Mr Zaki conveyed to Mahdi and Maytham that in his opinion there was indeed only a small chance of loss.

108. As well as giving that message to Mahdi and Maytham when presenting the proposed terms for Note 18, Mr Zaki explained that he had arranged for his own family money to be invested on the same terms. That is how Mr Khodari comes in. To complete his presentation and take an order, Mr Zaki needed current pricing and so called Mr Khodari in London. As part of that call, Mr Zaki got Mr Khodari to confirm that his then recent transaction for his own family had been to invest on the same terms as he had presented to Mahdi and Maytham. This was unusual and lends credibility to Mahdi and Maytham's evidence, which I also accept, that they were initially reluctant to invest in a further Note and needed a greater degree of persuasion to do so than had been the case in the past. That is also supported by what Maytham said when problems arose: he referred to Mr Zaki having convinced him and Mahdi to invest at the 23 May meeting, that he had pushed them to do so; unlike other things Maytham

said at that later stage, I do not think this was posturing on his part, rather I think it was genuine recollection, in October 2008, of the meeting five months earlier.

109. Mr Zaki did not show Mahdi and Maytham only one set of terms for what would become Note 18. He obtained and gave them a choice between setting the barriers at 60% for coupon of 12.05% and setting them at 50% for coupon of 9.15%. Mr Handyside QC submitted that this, or rather the fact that they opted for the former, was inconsistent with an idea that they invested on advice from Mr Zaki that the risk of loss of capital was very low. I do not agree. Mahdi and Maytham understood that there was in general a relationship between reward and risk (increased reward offered generally meant increased risk). But they were not in a position to assess, and I am sure did not assess, that the increase in coupon offered by the higher level of barriers undermined the view they were getting from Mr Zaki that the risk of loss was small.

110. Late on 23 May 2008, following the meeting, Mr Zaki emailed Mahdi to confirm that the trade had been booked by Credit Suisse. He attached an indicative term sheet and said a final term sheet with final strike levels would follow later. I infer that Mr Zaki did not leave any indicative term sheet with the brothers at the meeting – had he done so, I think it improbable he would have sent the same by email that day at all, or without saying it was a further copy of what they already had. Indeed, the way Mr Zaki's email is worded suggests he did not even show the brothers an indicative term sheet at the meeting, as to my mind does the fact that he did not attach a copy to his pre-meeting email; and both brothers gave evidence that Mr Zaki did not do so. Mr Zaki's brief file note of the meeting states that he had "*presented them with an indicative term sheet for a USD structured note that pays 12% pa.*", but I do not think that must be read as meaning that he showed a copy to Mahdi and Maytham rather than that he presented its substance. Overall, I judged it more likely, and on balance I find, that Mr Zaki did not show Mahdi and Maytham an indicative term sheet in the meeting.

111. Both sides sought to make something of the fact that Note 18 was purchased with nominally infinite leverage, i.e. the claimants borrowed US$20m under their existing account facilities to purchase Note 18 at par for US$20m. But I do not think there is anything significant in that. I do not accept Credit Suisse's contention that Mahdi and Maytham had transferred the US$13m a few days before with a view to further investment. However, Mr Zaki having in the event persuaded them immediately thereafter to invest further, that transfer meant there was more than ample room for Note 18 to be purchased without any further cash up front and that was convenient to the claimants. I infer from what was said between Mr Zaki and Mahdi on 9 June 2008 when discussing what became Note 19 (see paragraph 118 below), that whether the full amount to buy Note 18 should be borrowed was discussed at the 23 May meeting and that it was Maytham's preference in particular that it should be. That does not mean, however, and I reject Credit Suisse's suggestion, that Maytham was looking to invest aggressively, or was acting inconsistently with an understanding that he was taking only very limited capital risk; in that regard, I refer again to my finding about Maytham and the use of leverage in paragraph 87 above.

Note 19

112. The background to Note 19, bought in June 2008, is that for some months the possibility had been mooted of investing in specific banking stocks. In January 2008,

Mr Zaki discussed that possibility with Maytham, but he (Zaki) was against investing at that time and so advised. In late January, Mr Bejjani gave a similar view to Mahdi, for example in an email on 28 January 2008, "*Despite some convincing arguments for an end to the bearish cycle on major financial prime names in the European banking industry, I still prefer to remain cautious*". A few weeks later, on 14 February, Mr Bejjani wrote suggesting that there might be some good opportunities to invest because of distressed prices but "*timing is very important and we should start looking on it*".

113. On 15 March 2008, Mahdi asked Mr Bejjani for his views on an 'Equity High Yield Note' proposal he had received from Credit Suisse (Zurich) that would reference the Dow Jones index. Mr Bejjani advised that the investment idea was attractive, but that the banking stocks included in the Dow Jones would be a concern. Those were Citigroup, Bank of America, JP Morgan and American Express, all of which were heavily down compared with six months previously. Mr Bejjani suggested that the time was not quite right yet, but he would recommend investing if Citigroup shares fell further to below US$15 which he thought very probable in the near term.

114. On 5 June 2008, there was a telephone call between Mr Zaki and Mahdi in which Mr Zaki presented the possibility of a further SCARP investment referenced to three specific banking stocks. Following that call, Mr Khodari sent Mahdi by email an indicative term sheet for that possible investment and "*a leverage analysis to show the indicative return p.a.*". As Mr Khodari stated in his email by way of summary, the proposed one-year Note was "*priced at approximately 85% and it redeems at 100% providing that none of the three stocks fall below 50% of their strike level (price at execution). In the event that the price of any of the three stocks falls below 50% of their strike level, the Note will redeem at the level of the worst performing stock at maturity.*" He also attached a table showing the performance of the three stocks over the prior year and Bloomberg screen prints summarising market analysts' recommendations in relation to the stocks. The proposed stocks were UBS, Merrill Lynch and Citigroup.

115. Mr Zaki called Mahdi again to discuss this new possible investment on 9 June 2008. I had the benefit of a transcript of that call. Mahdi had not read Mr Khodari's email, but said he would do so. Mr Zaki summarised the proposed investment as a Note that would be valid for a year, sold to the claimants at 85%, such that "*If its value does not go down to 50%, you get 100% of its value. You get redeemed at par. You'll make 17, 17.5% annually.*" This was a sloppy description, as the value determining whether par redemption was guaranteed was that of the worst performing reference stock (as a percentage of its strike level), not the value of the Note. Mahdi said "*I'm thinking about it, I'm thinking about it but I shouldn't be buying now.*" Mr Zaki asked why and Mahdi replied, "*See what happened to the UBS stock? It went down by 6%, God damn it.*"

116. Mr Zaki acknowledged that, but emphasised the simplicity of the investment idea and the strong return, "*17 or 18% [per annum] … without leverage … [if you] leverage 1:1 … that will give you about 35%.*" Mahdi indicated that if he invested at all, it would be US$4m maximum, US$2m cash, US$2m borrowed. There would have to be "*Not wide leverage, not wide leverage; no margin call, Mahmoud.*"

117. No investment decision was made on this call. Considering it as a whole, in my judgment it is clear that Mahdi appreciated, and Mr Zaki acknowledged, that this investment idea was a risky one in a volatile market. Mr Zaki expressed the view that conditions were more favourable then (June 2008) than in January 2008, or thereabouts, when he had discussed the idea with Maytham. He (Zaki) had "*refused such things at [that] time, but the situation now is different.*" He suggested that Mahdi and Maytham had to be "*a little bold*" to make an annual return of 17% (without leverage).

118. Mahdi did not want to make a decision there and then and told Mr Zaki to speak to Maytham. Mr Zaki said that he could but added, "*Let me tell you something. I don't want to tell Maytham because he will tell me to draw from the account because it has room ...*". In context, Mr Zaki was indicating that he thought Maytham would again decide to borrow the full amount of the investment (as with Note 18), whereas Mahdi had just indicated that he would not want more than 1:1 leverage.

119. On 10 June 2008, Mr Bejjani advised in the context of a proposal Citibank had presented to Z-Invest for a 5-year note referenced to specific banking stocks (Bank of America, Credit Suisse, Sumitomo and BNP Paribas) that such a long tenor should be rejected, but "*will advise investing for shorter tenors*".

120. In the event, Mr Zaki did speak to Maytham on 11 June 2008. Maytham gave a firm order for an investment of US$2m, leveraged 1:1. The structure traded was as discussed with Mahdi, but the reference banking stocks had changed to BNP Paribas, Barclays and JP Morgan. In the event, Note 19 was purchased for slightly less than US$2m, as described in paragraph 60 above.

121. Neither Mahdi nor Maytham could remember, I think, any discussion between them of the investment idea that became Note 19, let alone the detail of any such discussion, between Mr Zaki's call to Mahdi on 9 June and his call with Maytham when the order was placed on 11 June. But I think it highly unlikely that they did not discuss it. In my judgment, there is no reason to suppose that Maytham appreciated any less than Mahdi did that this investment was different in nature, and perceived riskiness, from the rest of their Note portfolio at Credit Suisse. Maytham claimed that when Mr Zaki spoke to him about Note 19, he was told it was "*very safe*". I am confident that is not true. Just before trial, Mahdi signed a supplementary witness statement asserting a recollection of being told by Maytham that Mr Zaki had assured Maytham that Note 19 was "*very safe*". It was clear to me that Mahdi had no such recollection, and he found it difficult to explain under cross-examination how he had come to claim that recollection in that very recent statement. I cannot say how precisely that error came about. However, I did not think that Mahdi had intended to mislead the court – I assessed this to be a case of confusion, not one of dishonesty.

122. In my judgment, investing in Note 19 represented a departure for Mahdi and Maytham, choosing on an informed basis to take a real risk, to be "*a bit bold*", with what was, proportionately, a very small investment (US$2m out of a Note portfolio of approaching US$60m that in turn represented only around 10% of the family's wealth). Their informed willingness to invest in Note 19 does not, in my judgment, cast doubt on my findings as to their prior, and general, intention to be conservative with the portfolio and their belief that they had been and were being conservative with it, up to and including their purchase of Note 18. It does, though, render their claim

that the sale of Note 19 to them involved Credit Suisse in a breach or breaches of duty impossible.

123. That does not necessarily mean that the claimants cannot recover compensation for the loss they suffered on Note 19 when their account was closed out, to the extent it exceeded any loss they would have suffered on Note 19 at maturity. As with Note 16, the sale of which to the claimants is not itself the subject of any claim, the claim logic is that the sale of Note 18 and/or Note 20 involved a breach or breaches of duty by Credit Suisse, but for which Note 19 would have been held to maturity. Whether that claim logic is sound depends on a number of issues, of course; but it means that Note 19 (like Note 16) cannot be ignored just because its sale did not involve any actionable fault on the part of Credit Suisse and it was not itself involved in the 'jumbo' restructuring that generated Note 20.

Note 20

124. As I found in paragraphs 61-62 above, Note 20 was traded on 9 October 2008, with markets in turmoil following the collapse of Lehman Bros a few weeks before. It represented a restructuring of Notes 13, 15, 17 and 18. The decision to purchase Note 20 was the culmination of a series of telephone calls on 7, 8 and 9 October variously involving Messrs Zaki and/or Khodari for Credit Suisse and Mahdi, Maytham and/or Mr Bejjani for the claimants. In my description of those calls below, any times given or indicated are times in London – for the claimants in Kuwait, the clock would have been two hours ahead.

7 October 2008

125. At 11.45 am on 7 October, Mr Zaki called Maytham and informed him that overnight the Nikkei 225 had fallen so as to hit the barrier under one of the claimants' Notes (in fact, Note 13), and that he (Zaki) was also concerned about another one of the Notes (in fact, Note 15) where the Nikkei was now close to the barrier.

126. Maytham's first reaction to news of the barrier breach was to complain that "*you should have told us that we were close to the barrier, and so we freeze our position*". Maytham explained that with Citibank, the claimants had frozen their position for a period for a fee. This was a reference to the fact that Citibank had sold the claimants an option to suspend the observation of the equity barriers for a period, so as to avoid for that period any possibility of the barriers being touched. Maytham appreciated that buying such an option had cost money that he would never get back and that if at the end of the suspension period markets were still down such that he might want to buy a further suspension, doing so would cost more money that he would not get back, although his conversation with Mr Zaki did not get into that much detail. Mr Zaki asked to be sent what exactly the claimants had done with Citibank and expressed the view, as it would turn out an over-optimistic view, that whatever any other bank had done, he could copy it at Credit Suisse – "*If other banks do something, then 100% we can do it.*"

127. Maytham's complaint, echoed in his evidence at trial, that Mr Zaki should have come to the claimants with a solution before barriers were breached, was to my mind a distraction, at all events once it became clear that, contrary to Mr Zaki's over-confident first response, Credit Suisse could not offer anything equivalent to the

Citibank suspension option. I should say in passing that I found that an oddity. It was not clear to me from the evidence, but nor did I have evidence from anyone at Credit Suisse capable of explaining, why protection equivalent to that sold by Citibank could not have been sold to the claimants by Credit Suisse, nor why it should be impossible to sell something to achieve equivalent protection retrospectively (in part), after a barrier had been hit. In other words, and for what it is worth, I had a certain sympathy with Mr Zaki in his immediate reaction that surely Credit Suisse, given its size and sophistication, would be able, it may be at a price, to offer something directly equivalent to any solution or partial solution offered by any other bank. Be that as it may, since no claim was advanced that Credit Suisse wrongfully failed to offer a direct equivalent to the Citibank (partial) solution, the complaint that Mr Zaki should have come to the claimants before barrier breach was to my mind a distraction because on any view (and as events demonstrated) the reality of barrier breach was not an impediment to the sort of restructuring that Credit Suisse was able and willing to offer, and there was no suggestion that it would have made any material difference to the terms available had the restructuring been effected just before rather than promptly after barrier breach.

128. Mr Zaki ran over the basic operation of Note 13, confirming for example that they were not 'triggered' by touching the barrier, but rather (a) coupon would not be payable for so long as the barrier remained hit and (b) capital protection was lost once and for all by touching the barrier, so that at maturity:

"***Maytham:*** *… if the NIKKEI is like it is now – down by 40%?*

Mr Zaki: *You get 60% of your capital.*

Maytham: *So you lose 40%.*

Mr Zaki: *Yes, and we have time, there is time. Some of the notes still have a year, and two years, and … it depends what your …*

…

Maytham: *[inaudible] 40%. So I lose the protection on 40%, Mahmoud? You're talking about 6 million.*

Mr Zaki: *No but we are not talking … you are assuming that the NIKKEI is going to [inaudible] at maturity.*

Maytham: *Yes Mahmoud, the NIKKEI if it doesn't [inaudible] it will be worse.*

Mr Zaki: *Worse than [inaudible]?*

Maytham: *Yes, what's your opinion? You don't think this?*

Mr Zaki: *No, I don't think so. I don't think so – this is now the bad time, bad news [inaudible]. We are in the bottom. Maybe we haven't touched the bottom but we are in the bottom … . The world is upside down now – this is not a usual time.*"

129. I do not accept the claimants' submission that Maytham was ignorant of, or had not understood when investing, the way the Notes worked. Maytham was being reminded of these matters in the context of the very unwelcome news that a barrier had been hit and by his questions to my mind indicated that indeed, having been reminded, he understood well enough how the Notes worked. He also identified immediately – a point to which I shall return when considering the later decision not to meet the margin call – that holding to maturity might or might not improve things. Mr Zaki emphasised that there was no immediate loss and if markets improved by maturity the claimants might still get their capital back, but Maytham was concerned that markets might fall further by then leading to a loss of more than the 40% loss that would result if at maturity things stood as they were on this call.

130. Maytham ended the call by saying he would get Mr Bejjani to call to explain exactly what had been done with Citibank. Before that call, Mr Zaki spoke to Maytham again, briefly, ran over some more of the details of the various Notes then held and reiterated that "*They [the Notes] only have two problems. … Two out of the six: one already hit the buffer and one is close … . You're telling me there is something in the market so let's look at it*" (that last being a reference again to whatever Maytham had done with Citibank). Maytham said "*OK. Please try to talk to [Mr Bejjani] as soon as possible [so] we can decide what to do.*"

131. Mr Zaki did speak to Mr Bejjani, at 12.22 pm on 7 October, immediately after that second call with Maytham. Mr Bejjani reminded Mr Zaki that they had met briefly in London about two years previously when he was Head of Treasury for one of the Kuwaiti banks. He explained that he had been Head of Treasury for the claimant's Al-Zummorodah group for about 18 months. He said that Maytham had just told him he (Maytham) did not know how the Credit Suisse portfolio was doing and had asked him to check its position "*in terms of risks and other issues*". Mr Bejjani obviously understood the basic investment structure involved and Mr Zaki moved the discussion quickly to the fact that Maytham was saying that "*he has made with Citibank a structure to freeze the position*". Mr Bejjani explained that Citibank had sold the claimants an option that gave protection for six months. If barriers were then hit during the protected period, that would not be counted, so capital protection would not be lost. Mr Bejjani said that this option cost a lot, 7 or 8% of the notional investment, and that it also extended the maturity of the investment. As Mr Bejjani observed to Mr Zaki, this was all very well if markets improved, "*But the problem with this is, let's say the level is 10,500 and we freeze for six months; if after six months the market stays below 10,500 we would have wasted money.*" So, as he put it, "*The issue is if I extend it well or not.*"

132. Mr Zaki said he thought that Credit Suisse could extend maturity but not 'freeze' for a period in the manner of the Citibank option.

133. A little over an hour later, at 1.38 pm, Mr Zaki spoke again to Maytham. He said that Credit Suisse was working on restructuring the two problem Notes and assured him that "*We will come up with some solutions and I will send you the emails today so it's not a problem and we can do it.*" He also said that the second note they had spoken about (Note 15) had in fact hit its barrier during the night. Maytham again complained that "*It's too late to know this now, if it hits, we have to pay it. … you should have told us. What you have done is unreasonable. You are meant to tell us that it's close.*" Mr Zaki took this to be a reference to Maytham's idea that if

forewarned he could opt to 'freeze' as he had with Citibank, saying "*You are talking about freezing and I cannot freeze. I have discussed the freezing issue with [Mr Bejjani] ... .*" Instead, however, Mr Zaki said he had "*a solution for you better than Citibank's freezing option, and you don't have to pay a penny.*" The idea was to extend the investment maturity, meaning Maytham would have to commit his money for another two or three years, which was "*not good news*", but meaning also that there could be a capital protection again. Mr Zaki did not spell out that any reinstated capital protection would again be conditional – the mechanism would be to restate barriers to levels below then current levels – but that became clear later and there is no question of Maytham being misled into thinking that Note 20, as ultimately purchased, was guaranteed to redeem at par.

134. In saying that the claimants would not have to "*pay a penny*", Mr Zaki may only have had in mind that, as in previous 'switch' trades, existing Notes would be bought back and a new Note or Notes sold at exactly matching prices, so the 'switch' trade itself would not generate a net purchase price payable by the claimants. However, the way he expressed himself was rather broader and, I find, gave Maytham to understand that the 'switch' trade Mr Zaki was proposing would not result in a need to transfer any further amount to support their investments and, in his mind, I think reasonably, that extended to margin calls. To be clear, that is not to say that Mr Zaki said there could not or would not be margin calls in the future; but in my judgment, he did convey *inter alia* that doing the proposed 'switch' would not itself generate any margin call.

135. The leverage in the portfolio was mentioned briefly in the next conversation, at 1.48 pm, between Mr Khodari and Mr Bejjani. Mr Khodari said he would send over a snapshot showing the position on all of the claimants' Notes and an indication of the proposed restructuring idea. Mr Bejjani asked for the snapshot to include detail of the amount of leverage, including finance charges on the borrowing, saying "*Because they have no idea how it was done, the deals.*" I do not accept the claimants' contention that this shows a general lack of comprehension on the part of Mahdi and Maytham as to how the Notes worked, or even as to how leverage worked. I think it shows something more limited, namely that Mr Bejjani wanted to have a full picture of the portfolio, inclusive of exact levels and costs of borrowing to the extent there was leverage, and Mahdi and Maytham did not have that level of detail in mind or readily to hand.

136. Following that call, at 2.30 pm on 7 October, Mr Khodari emailed Mr Bejjani the promised snapshot, saying also that he would email again later that day with "*possible exit/switch scenarios for [Notes 13 and 15] which have both breached their 60% barrier on the Nikkei 225*".

137. At 4.28 pm, Mr Khodari and Mr Bejjani spoke again. They first discussed Note 13, on which the barrier had been hit, having been set at 60% of strike levels for the reference indices. Mr Bejjani expressed the view that since maturity was only six months away, "*it's likely to have this loss now of ... 40%. So, my question was to [Mr Zaki] ... if we can do anything for it.*" Mr Khodari said that was precisely what he was working on and Mr Bejjani continued, "*Maybe restructure, maybe extend the maturity, maybe do something we have to avoid because we don't believe that the markets will do 40% from now to six months.*" They proceeded to discuss the redemption mechanics and risks of some of the other Notes. In discussing Note 15, Mr Khodari acknowledged that there had been some confusion over whether the

barrier had been hit or merely approached, but he confirmed that it had in fact been hit – "*it touched at one point during the night and then it went back up again.*" Of Note 19, Mr Khodari commented that "*obviously it's a very punchy trade … but the return on this is very attractive*".

138. Mr Bejjani asked for copies of full term sheets and said that he had to prepare for a one-hour meeting with Mahdi and Maytham the following morning. Mr Khodari understood that "*they want from you like an exit strategy or switch or something like that by tomorrow*" and Mr Bejjani confirmed, saying that there were "*two strategies out of six they are hit and they have to find something okay the one after two years I am not worried about because I think the market might do 40% from now to three years, might. But the one after six months it's impossible.*"

139. Mr Khodari agreed with that last: "*It's impossible, yes you're absolutely right.*" Mr Bejjani continued, saying that "*They have collected about US$6m now. They don't have to think 'I have a US$6m loss', they have to find a strategy. A smart strategy might combine the two, these two, and find something that says, 'okay gentlemen it's not over yet, we can find a solution'.*"

140. Thus, Mr Bejjani's position was that:

    i) It was now surely impossible not to suffer a significant loss on Note 13 if held to maturity. There was no way, in his view, the market would recover sufficiently in the following six months (only).

    ii) Mahdi and Maytham's priority would be to find a strategy to avoid crystallising that loss, if possible.

    iii) Whilst Note 15 had also touched a barrier, it was less worrying because the market might recover enough by the time it matured for loss to be avoided.

    iv) A smart strategy to deal with ii) above, given iii) above in particular, might be to combine Notes 13 and 15 into a single restructured Note. That was a strategy he wanted to present to Mahdi and Maytham; so that was a restructuring for which he wanted to get indicative terms from Mr Khodari overnight.

141. At 8.04 pm, Mr Khodari emailed Mr Bejjani the term sheets for the six Notes then held by the claimants, stated that the borrowing cost on the leverage was LIBOR + 0.50%, and gave brief indicative terms for a combination switch for Notes 13 and 15, to combine them into a single, 5-year Note, paying LIBOR + 1.00% but with coupon at risk and not to resurrect if barriers were hit, and new barriers set at 70% of the then current level of the S&P 500, 68.36% for the Nikkei 225 and 68% for the DJ Eurostoxx 50.

142. Mr Khodari commented that, "*The above strategy does not require any further funding from the client, and can be done as a simple switch. I have structured this with maximum safety in mind rather than return over the life of the Note. We can vary the above (extend the maturity further) to suit the client's requirements. I will refresh these prices tomorrow and see how they look again. If the Nikkei does improve overnight this will help the valuation of the existing Notes and may provide*

us with better terms than the above." In my judgment, Mr Khodari's comment that the proposed 'switch' strategy would not require "*any further funding*" from the claimants said rather more than he probably intended. He meant by it, I think, only that there would be no net sale price for the new Note proposed to replace Notes 13 and 15. But the way he put it was rather broader, so as to convey that the 'switch' trade would not generate a need for further funds to be transferred to Credit Suisse, including by way of margin requirement. Again, though, it did not convey and I do not think it would have been understood by Mr Bejjani as meaning that there could not or would never be any margin calls in the future. However, that is a different point: the potential for margin calls in the future remained; but Mr Bejjani was being told that effecting the 'switch' would not trigger a margin call.

143. Mr Khodari's reference to "*maximum safety … rather than return over the life of the Note*" conveyed that Mr Khodari was proposing that the new Note carry a coupon of only LIBOR + 1.00%, not resurrecting if the barriers were ever breached, in order to have those barriers reset as low as possible (meaning in practice as low as the Credit Suisse traders were willing to offer) for a Note to be sold to the claimants at a price equal to the aggregate price at which Credit Suisse would be willing to buy back Notes 13 and 15. But the notion here of relative degrees of safety is complex, since maturity was being reset. Even for given barriers, it would be simplistic and wrong to suppose that a longer rather than shorter new maturity was necessarily better, or *vice versa*. A shorter new maturity meant that the risk of losing capital protection was carried for a shorter time, but it gave less time for the market to recover so as to lessen any ultimate loss, or avoid it altogether, if capital protection was lost, i.e. if the new barriers were hit. Then again, if the new barriers were hit, but markets then recovered quickly, all during the shorter prospective new maturity, loss might be lessened or avoided altogether by having that shorter maturity whereas a longer new maturity would leave capital exposed to a subsequent market relapse. The true position is more complex still, since in fact the new barriers were not a given. It would require the sophistication and expertise of a major institution like Credit Suisse even to attempt an assessment whether, for example, somewhat higher new barriers than stated in Mr Khodari's indicative terms for a shorter new Note period (say, 4 years) was a safer bet than the indicated new barriers for a 5-year new Note period.

144. Whether or not Mr Bejjani had thought such subtleties through fully, in my judgment, to tell him that "*maximum safety*" had been built into the indicated terms was to tell him that the combination of maturity and barrier levels stated were assessed by Credit Suisse to offer, for the given coupon, the lowest chance of loss of capital at maturity that could be offered for a Note with the now familiar basic structure and with a purchase price equal to what Credit Suisse would pay to buy back Notes 13 and 15. I did not have evidence of what, if any, process Mr Khodari or any traders with whom he was dealing at Credit Suisse may have gone through to make any such assessment. From his evidence under cross-examination as to the terms in fact traded, i.e. those of Note 20, I rather think there was none and that Mr Khodari's logic was indeed the simplistic, and wrong, logic that a longer maturity was necessarily better. Looking also at Mr Khodari's comment that the new maturity proposed could be varied "*to suit the client's requirements*", I rather wonder if in fact 5 years for the indicative new maturity was picked fairly arbitrarily by Mr Khodari and he then asked the traders to quote for barrier levels on that maturity given his proposed coupon and pricing. But that is becoming speculative and I am not in a position to make any positive finding.

8 October 2008

145. At 10.20 am on 8 October 2008, Mr Khodari and Mr Bejjani spoke again. Mr Bejjani said he had just finished the meeting with Mahdi and Maytham that he had mentioned the day before. He said that Mahdi and Maytham wanted to restructure all of Notes 13, 15, 17 and 18, for an aggregate nominal value of US$51m, and not just Notes 13 and 15 (aggregate nominal US$25m). Other than that, I had no evidence of the content of Mr Bejjani's discussions with Mahdi and Maytham save that I infer from what Mr Bejjani said to Mr Khodari that they (Mahdi/Maytham and/or Mr Bejjani) were concerned that Notes 17 and 18 "*might be hit at any moment*" and "*liked the concept you mentioned yesterday, to do it on five years and finish everything because I think the market will not go up for two years*". Five years for the new maturity sought was not a fixed idea, but it was the maximum to be considered; the idea was to "*give us some breathing space*" so as not to have to "*pay the difference [i.e. crystallise any loss] after six months, a year, a year and a half or whatever, delay it to two years or two years and a half or whatever or three or four or five years. No longer than five years.*"

146. The idea of combining and restructuring those four Notes, not just Notes 13 and 15, had in fact also occurred to Mr Khodari overnight, so he was able to tell Mr Bejjani that the Credit Suisse traders were already working on exactly that. Mr Bejjani added that he wanted the structure to be callable so that, for example, if "*a miracle happens and the market is up after two years*", the new Note would be called. Whilst this was not said in terms, I think it was implicit and would have been understood by both that in the context of the claimants' Notes, callability meant at par, so that if the new Note were called that would mean full capital recovery earlier than whatever final maturity date was ultimately set. Mr Bejjani pushed Mr Khodari to move quickly – indeed to get everything settled before US markets opened a few hours later if possible.

147. At 1.52 pm, Mr Khodari called Mr Bejjani again and brought Mr Zaki in on the call. Mr Bejjani made it clear that the four-Note restructuring was what he was looking for on behalf of Mahdi and Maytham. He again pushed for it to be sorted quickly – that day if possible – and assured Messrs Khodari and Zaki that he would give them a prompt decision once they got proposed terms to him. Mr Zaki sought to assure Mr Bejjani that the claimants' portfolio was being treated as a high priority and that it was in good hands with Mr Khodari, and he apologised for having been hard to get hold of, given the demands on him in that very unusual time.

148. At 5.23 pm, Mr Khodari sent indicative terms for the four-Note restructuring. They were in substance the terms ultimately traded to become Note 20. Mr Khodari commented that the new barriers were approximately 70% of then current index levels. Coupon would be LIBOR + 1.65% at risk but resurrecting; Mr Khodari offered maturity of 4½ years (rather than 5 years) if the coupon was lowered to LIBOR + 1.0%.

149. At 5.31 pm, Mr Khodari called Mr Bejjani and talked him through those indicative terms. In particular, he explained that the strike levels by reference to which final redemption would be calculated at maturity if the barriers were ever touched were based on the original strike levels of the outgoing Notes, not on the then current index levels. He also advised that if Mr Bejjani were willing to have the additional risk of having the coupon not resurrect, then he could get the barriers to be lowered further or

increase the coupon rate or shorten the maturity. On that last, he indicated that he thought he could get the maturity down to 4 years, but not any shorter, in return for coupon not resurrecting, and he had a trader looking at that as they were speaking.

150. Mr Khodari confirmed in terms that the investment would still be leveraged, exactly as it was as things then stood; "*I combine all the loans with the notional so we are in a position will stay the same*". He then confirmed that there would be "*nothing to pay up front.*" Like Mr Zaki's comment that Maytham would not "*pay a penny*" (paragraph 134 above) and Mr Khodari's comment about no "*further funding*" (paragraph 142 above), to my mind these comments did not convey that there could not or would not be margin calls in the future, during the life of the new Note; but they did convey that concluding the proposed 'switch' trade would not generate a need to provide further funds, including by way of margin.

151. Mr Bejjani then asked "*Now … if we assume the market doesn't fall by 30%, does the capital guarantee remain?*"; Mr Khodari replied "*Exactly*". In that exchange, obviously "*the market*" was being used as convenient shorthand for the (worst performing of) reference indices and nothing turns on that. The conversation continued thus:

> "***Mr Bejjani:*** *Let me give you a scenario: if after one month the market falls by 30%, it gets hit, I don't have to pay anything until after the maturity?*
>
> ***Mr Khodari:*** *Exactly. Now at the maturity …*
>
> ***Mr Bejjani:*** *It will be hard for me, I'll have to pay 16600.*
>
> ***Mr Khodari:*** *Exactly, exactly. At maturity we will look at the worst performing index that it hit and see where it reached. For example, if the NIKKEI hits 6280 [the proposed new barrier], and then rises and reaches 16104 [the proposed new strike], then there is no problem. No probem. This is fantastic.*
>
> ***Mr Bejjani:*** *Okay, so if 12000, then I pay [inaudible].*
>
> ***Mr Khodari:*** *Exactly, whatever the percentage is [inaudible].*"

152. In my judgment, that exchange concerned, and concerned only, whether and if so how much loss would be suffered at maturity, if the barriers were hit at any time. It said nothing about whether the leverage on the account might or would generate margin calls, which obviously would depend on what happened in the markets in the future.

153. Mr Bejjani again pressed for quick action – "*Okay, yes or no. 5 minutes, 10 minutes, 15 minutes, 30 minutes – how long do you need?*". Mr Khodari said it would be very difficult to do the actual trade that day as the Nikkei had closed and the Euro indices had closed; but his trader had said the offered levels should be good until the morning so if Mahdi and Maytham liked the terms he could do the trade in the morning. Mr Bejjani indicated he had another meeting with Mahdi and Maytham immediately but in an hour would be on a plane for a trip away from Kuwait. Mr Khodari said that he would need Mahdi or Maytham, if they were happy, to call Mr Zaki, or Mr Khodari himself if they did not get hold of Mr Zaki, actually to place their order; but there was time – they had the whole night as any execution would be the next morning.

154. At 7.08 pm, Mr Khodari emailed Mr Bejjani asking him to call. Mr Bejjani did call Mr Khodari that evening, with either Mahdi or Maytham on the line too. Mr Khodari's file note of that call the next morning (but mis-dated 8 October) records that "*client and [Mr Bejjani] called to discuss teh [sic.] switch further. they were happy with the terms sent to them. I told them I would have to refresh the tarde [sic.] again in the morning and call them back. they were happy to execute if the terms stayed the same.*"

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155. Mr Khodari and Mr Bejjani spoke again at 8.34 am on 9 October 2008. Mr Khodari confirmed that the deal would go ahead to trade that day for settlement two weeks later. Mr Bejjani mentioned that 10% of the claimants' group was to be sold on the Kuwaiti stock market, which he expected would raise KWD 30m, then worth about US$125m. This exchange followed:

> ***Mr Bejjani:*** *I will get at my disposal cash in a month and a half or two months, I will have at my disposal a good amount of cash, at that time I can move … Meanwhile I'm managing ten large accounts just like the one that belongs to you here. The situation for all these accounts is bad. I can't move now, but after one and half or two months, when the situation gets better [inaudible] at that [time] you will have reported EBIT and then [Mr Zaki] can speak to the guys and tell them blah blah blah and reduce what I understood from you … the …*
>
> ***Mr Khodari:*** *The leverage, that's it, reduce the leverage, that's all.*
>
> ***Mr Bejjani:*** *Yes, reduce the loan a little. …*"

156. That exchange indicated that Mr Bejjani thought Mahdi and Maytham might reduce leverage on the portfolio come what may (whether or not required to do so) following the stock sale in Kuwait he mentioned. It does not say, however, that the claimants could not, if required, meet a margin call in the meantime (I think that reads too much into Mr Bejjani's comments); and it was their pleaded case that they could have met without difficulty or delay the margin call in fact issued a few weeks later. Again, that is different to the point that Mr Khodari and Mr Zaki both said things conveying that the 'switch' trade itself would not generate a call for funds, including by way of margin.

157. At 12.32 pm on 9 October, Mr Khodari sent Mr Bejjani an email attaching a Term Sheet for the proposed new Note. He asked for a conference call, or for the client simply to call him, to confirm instructions to proceed. By further email at 12.52 pm, Mr Khodari clarified that Notes 13, 15, 17 and 18 would be liquidated which, together with borrowing of US$28.6m would pay for the new Note, the notional continuing to be US$51m, and that there would be no fee for the trade. I think that was not strictly accurate as a characterisation of the trade – in fact, as I said in paragraph 62.vi) above, the sale of the Note was priced to match the price at which Credit Suisse was buying back the outgoing Notes and the extant borrowing would simply continue (but with the new Note rather than the outgoing Notes now forming part of the collateral held by Credit Suisse), but I think nothing turns on that. Further, it may have been untrue to say that there was no fee for the trade, since a later (internal) email told Mr Khodari

that the Note 20 price included a "*25bps in-built fee*", i.e. (I imagine) 25 basis points on the notional of US$51m, which is US$127,500, but that was not the subject of any complaint and was not explored with Mr Khodari.

158. At 1.04 pm, by email, Mr Bejjani asked Mr Khodari to confirm "*that means that no funds requested from you to replace the current four deal by the new structure of USD 51 m.*", to which Mr Khodari immediately replied by email, "*correct*". Yet again, that conveyed that the 'switch' trade would not generate a call for funds (including by way of margin), although Mr Khodari I think meant it only to convey that there would be no net sale price for the new Note.

159. Mr Bejjani, with Mahdi and Maytham on the line, called Mr Khodari back promptly after that last email exchange – Mr Khodari's file note of the call (again, mis-dated 8 October) is timed at 1.20 pm. The call appears to have been just a brief final confirmation of Mahdi and Maytham's instructions: "*Client agreed with the terms of the switch and wanted [Mr Khodari] to go ahead*".

160. Note 20 was duly sold to the claimants, and Notes 13, 15, 17 and 18 bought back from the claimants, in accordance with those instructions.

161. Before moving on, one specific claim made by Maytham in evidence, repeating an assertion he made in his first letter of complaint to Credit Suisse dated 11 November 2008, was that in the discussions leading ultimately to the purchase of Note 20, he had asked when there might be a margin call and was told that would occur only if barriers were hit. Indeed in the letter Maytham claimed to have a voice recording of that call. That was certainly untrue, and I did not believe Maytham's explanation for saying in the letter "*... we have a voice recording of this call*", which was that he meant Credit Suisse should have such a recording. Further, the claim is inherently improbable: Mr Zaki and Mr Khodari would have known perfectly well that barrier breach was not required for there to be a margin call; indeed, that had been explicit early in 2008 when Mr Zaki invited the claimants to support the account by a cash injection (see paragraphs 102 to 104 above). The claim is also contrary to the tenor of such contemporaneous evidence as there is, in emails and transcripts of recorded calls, which is that so far as leverage was mentioned it was in general terms with confirmations that the extant position would subsist. In my judgment, Maytham's claim to have been told there would only be margin calls if barriers were breached is one of several ways in which he sought to gild the lily in advancing the claim, and I reject it. This aspect of Maytham's evidence did him no credit, but it does not necessarily mean there is no valid claim, in other words that there was no lily to gild. I turn now to consider what, if any, valid claim the claimants do have, beginning with an identification of Credit Suisse's relevant duties.

Credit Suisse's Duties

162. The claim is for damages for breach of statutory duty. The relevant cause of action exists under s.138D(2) of the Financial Services and Markets Act 2000 ('FSMA'), which provides that:

> "*A contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.*"

163. It was common ground (at all events at trial, if not on the pleadings) that:

i) the Conduct of Business ('COBS') Rules in the FCA Handbook 2008 were 'rules' within s.138D(2) applicable when (each of) Notes 18, 19 and 20 were sold to the claimants and the claimants were 'private persons' within s.138D(2), so that the COBS Rules created actionable duties owed by Credit Suisse to the claimants in relation to those sales; and

ii) the actionable duties to the claimants thus created by the COBS Rules could not be excluded or modified by contract, nor could liability for contraventions be excluded or limited.

164. In the present case, the claimants, in the person of Mahdi and Maytham, made their own decision to invest in each of the impugned Notes. This is not a case of Credit Suisse trading for the claimants. The COBS Rules duties falling for consideration are the following:

i) the duty under COBS 9.2.1R to take reasonable steps to ensure that any personal recommendation is suitable for the client, with associated duty thereunder to obtain such information as to the client's knowledge and experience, financial situation and investment objectives as may be necessary to enable a recommendation as to suitability to be made;

ii) the duty under COBS 9.2.2R to have a reasonable basis for believing, upon information obtained from the client about him, that any specific transaction recommended (a) meets his investment objectives and (c) is such that he has the necessary experience and knowledge to understand the risks involved;

iii) the duty under COBS 4.2.1R to ensure that a communication or financial promotion is fair, clear and not misleading.

165. For the purposes of COBS 9.2.1R and 9.2.2R, the FCA Handbook defined a 'personal recommendation' in unsurprising terms as: "*a recommendation that is advice on investments, or advice on a home finance transaction, and is presented as suitable for the person to whom it is made, or is based on a consideration of the circumstances of that person. A recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public*". Thus there is no personal recommendation unless what is said or shown to the client involves, whether express or implied, advice as to the merits of the possible transaction for that client; and indeed Teare J. in *Zaki et al. v Credit Suisse (UK) Ltd* [2011] EWHC 2422 (Comm) at [83]-[84] equated the two (that is to say, a recommendation and advice on the merits).

166. A little caution may be needed as to that equation, lest it be thought to require that the firm or representative go as far as saying (or implying) in terms that the client should invest. There can be advice as to suitability amounting to a personal recommendation though the firm or representative does not express any such ultimate view. I agree with HHJ Havelock-Allan QC in *Rubenstein v HSBC Bank plc* [2011] EWHC 2304 (QB) at [81] that "*The key to the giving of advice is that the information is either accompanied by comment or value judgment on the relevance of that information to the client's investment decision, or is itself the product or a process of selection involving a value judgment so that the information will tend to influence the decision*

of the recipient. In both these scenarios the information acquires the character of a recommendation." (This point was not touched on in the Court of Appeal, [2012] EWCA Civ 1184.) I also agree with Carnwath J in *re Market Wizard Systems (UK) Ltd* [1998] 2 BCLC 282 in which, in relation to 'buy/sell/hold' signals that were generated by a computerised tool for analysing market data, he said at [34] that: "*The signals provide guidance as to the course of action which the user should take in relation to the buying or selling of the investments. Such guidance, in the ordinary use of English, is 'advice on the merits' of purchasing those investments. It matters not that the user is free to follow or disregard the advice; nor that he may receive further advice from his broker before making a final decision.*"

167. Of course, context, in particular the nature and history of a particular relationship, may be everything. But for example, "*I think this is an investment you may want to look at*" may well amount to at least implicit advice that the investment is suitable for the client, even if there is immediately added "*but it is of course your call whether to buy or whether now is the right time to buy*" or the like. The simple act of inviting a client to consider a particular investment, if the act of someone regarded as a trusted advisor, is apt to convey that it would be a reasonable investment to make, consistent with the client's investment objectives, and that is advice as to the merits of the investment for the particular client, even if the advisor does not offer a 'bottom line' opinion as to whether the client should go ahead. One purpose of the duty properly to assess an investment for suitability for the particular client is to prevent unsuitable investments from being shown to the client for consideration.

168. That is not to say that it is necessarily a contravention of the COBS duties as to suitability to show an advisory client a product riskier than anything the client has hitherto purchased or for which he has indicated an appetite. But great care is needed if presenting such a riskier product. The test for compliance is set by the language of the COBS provisions. Whether that test is satisfied will depend on all the factual circumstances of any given case, so what I say here should not be taken as a gloss on the words of the provisions. But as a practical reality, if a riskier product is presented to an advisory client without its riskier nature being brought squarely to the client's attention and explicit confirmation being obtained from him (and preferably documented) that he is content to be exposed to the greater level of risk, there will be a real prospect that the COBS suitability duties will not have been discharged. That may be particularly so where the issue is one of risk evaluation, as opposed to product comprehension. Standard-form risk warnings and disclaimers in term sheets or product descriptions may or may not be read, and in any event may in practice (as in the present case) convey to the client only that the terms of the proposed investment create certain types of risk, leaving open the question of the magnitude of that risk in the market and other circumstances in which the investment is proposed.

169. That means that I agree with an observation of Morison J's cited by Mr Handyside QC, but only so long as it is not taken too far. In *Valse Holdings SA v Merrill Lynch* [2004] EWHC 2471 (Comm), at [71], Morison J said in the context of an advisory relationship that:

"*As paid investment advisors it was their duty to keep the investment objective in mind when making recommendations on the purchase of stocks and when giving other investment advice. However, it is going too far, in my judgment, to suggest that the Bank were obliged to stop the client from taking risk or trading beyond the agreed*

objective. They were required to review the objective with their client from time to time and discuss the shape of the portfolio with him. Provided they were satisfied that their client knew what he was doing, then they had fulfilled their duty."

170. That could be taken too far if the final sentence were thought to mean that the limit of a firm's duties as regards suitability was to ensure there was good product comprehension. For that may merely beg the question whether the magnitude of the risks created by the terms of the product is within, or exceeds, the client's risk appetite. Fulfilling a firm's duty, where the client is "*taking risk or trading beyond the [previously] agreed objective*", on the basis of being satisfied that the client "*knew what he was doing*", involves being satisfied that the client appreciates that he is indeed taking risk or trading beyond what was the agreed objective. So I do not read Morison J's observation as inconsistent with what I said in paragraph 168 above. Similarly, I agree with Kerr J in *O'Hare & O'Hare v Coutts & Co* [2016] EWHC 2224 (QB), who said at [218] that a private banker does not breach his duty of care "*if, without irresponsibly encouraging foolhardiness, he advises a client to take higher investment risk than he would otherwise take*", so long (again) as it is understood that in so advising the private banker must take reasonable steps to ensure that the client appreciates that that is what he is being advised to do.

171. In the present case, the claimants had from the outset sought and contracted for an investment advisory account. On the evidence I heard, from Mahdi, Maytham and Mr Khodari, about the relationship between Mahdi and Maytham as client and Mr Zaki as representative of Credit Suisse, and from the evidence about that I saw (in the form of emails and telephone transcripts), I am satisfied that Mahdi and Maytham regarded Mr Zaki as their close and trusted investment advisor, and that Mr Zaki knew he was so regarded and trusted. In that relationship, as with other major clients of his, Mr Zaki was charming and persuasive; he engendered and cultivated the feeling in the claimants that he was their expert friend, almost like family. Whilst I did not have the advantage of assessing Mr Zaki in person, I note that in *Zaki et al. v Credit Suisse, supra*, Teare J, before whom Mr Zaki had given evidence, made similar findings that Mr Khodari, in his evidence before me, recognised as describing the Mr Zaki he had known at Credit Suisse. Any question as to whether Mr Zaki made personal recommendations engaging the COBS Rules suitability duties falls to be assessed in that context.

172. In relation to COBS 4.2.1R, Mr Mill QC sought to put the claim in a general context that Mr Zaki was "*heavily financially incentivised to sell the Claimants … Notes [18, 19 and 20]*" and, in effect, invited me to proceed on the basis that it was therefore more likely that he may have provided unfair, unclear or misleading information about the Notes. I do not accept that invitation. The fact, assuming Mr Mill QC was right about it, that the sale of Notes 18, 19 and/or 20 had a significant, or at least material, impact on Mr Zaki's earnings, does not help me to discern from the evidence what Mr Zaki said about the Notes, to the extent there is no documentary record of that, and is not relevant at all to any question of whether what was said was unfair, unclear or misleading (at all events given that there is no allegation that he said anything about his own remuneration that might be rendered unfair (etc.) by the true position, whatever that was).

173. In considering COBS 4.2.1R, below, therefore, I shall simply focus on what was communicated to Mahdi and Maytham and whether that was, on its substance, fair, clear and not misleading as required by that Rule.

Breach of Duty

Note 18

174. I have no doubt on the evidence that Mr Zaki gave Mahdi and Maytham a personal recommendation to buy Note 18, at their meeting in Kuwait on 23 May 2008. He went to that meeting to persuade Mahdi and Maytham to invest in such a Note and succeeded in that purpose. He did so by advising them to the effect that the chances of suffering a loss of capital on the Note were small because it was very unlikely the Note barriers would be breached. He conveyed to them the view that Note 18 was suitable for their generally conservative risk appetite, namely their wish to incur very little risk of loss of capital.

175. In my judgment, Mr Zaki did enough in respect of Note 18 to ensure that Mahdi and Maytham had adequate product comprehension for a decision whether to invest; but that is only one aspect of the matter. There was, as generally, no issue as to the claimants' risk capacity in respect of their investment in Note 18. The claim is indeed, as I indicated at the outset, a claim that the risk evaluation was wrong, so that Mahdi and Maytham were misdirected by Mr Zaki to be willing to invest in Note 18. Their risk appetite for that investment was conservative, as I have described, and they believed Note 18 matched that appetite. In the context of the relationship between Mahdi, Maytham and Mr Zaki, I think it is unrealistic to dismiss Mr Zaki's conveying the view that there was very little risk of loss as a mere prediction or personal view not capable of amounting to a suitability recommendation, as Mr Handyside QC said I should, citing *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm), *per* Gloster J at [374], and *Thornbridge Ltd v Barclays Bank plc* [2015] EWHC 3430 (QB), *per* HHJ Moulder at [96(i)]. The question of breach of the COBS suitability duties under COBS Rules 9.2.1R and 9.2.2R boils down to this, namely whether Mr Zaki had a reasonable basis for his advice that there would be only a small chance of the barriers under Note 18 being hit so as to result in a loss of capital.

176. I heard expert evidence from Mr Rob Mason, called by the claimants, and Dr Desmond Fitzgerald, called by Credit Suisse. Their evidence fell into two broad areas: explanations, analysis and opinions tendered with a view to assisting the court as to the riskiness of Notes 18, 19 and 20, given their terms and the prevailing market conditions at the time of purchase; and quantified assessments of the outturn result for hypothetical scenarios, for example what would have happened if none of Notes 18, 19 and 20 had been purchased and Notes 13, 15, 16, 17 and 18 had been held to maturity.

177. At this stage I am concerned with the first broad area of expert evidence, as to which I found much of Mr Mason's and Dr Fitzgerald's evidence of little real assistance. In particular, a significant focus of their evidence, introduced by Mr Mason's initial approach to the questions posed, was quantified 'equity delta risk' analyses said by Mr Mason to be a relevant tool for assessing the riskiness of the impugned Notes. However, in this regard accepting and preferring Dr Fitzgerald's evidence, in my

judgment that type of analysis would not have been undertaken, understood or referred to, by a private client investment advisor in Mr Zaki's position. As Mr Handyside QC submitted, Mr Mason's equity delta risk analyses were really directed to the sensitivity of the value of a note to small movements in the levels of the underlying reference indices, rather than to the likely performance of the note at maturity.

178. As to an assessment of likely performance at maturity, Mr Mason did not, in my view, have the best expertise or experience to assist me as to whether someone in Mr Zaki's position could reasonably have concluded that the chances of losing capital under Note 18 were small. In Dr Fitzgerald's case, much of his distinguished career would likewise not really have equipped him to help. However, latterly he has for a number of years been a partner in a partnership specialising in the provision of investment advice to high net worth individuals and institutions and also chairman of a specialised financial training and risk management consultancy. It seemed to me that Dr Fitzgerald was well placed, and better placed than was Mr Mason, to assist as to (a) the reasonable approach an advisor in Mr Zaki's position or investors in the claimants' position might take to investing in the Credit Suisse Notes and (b) the reasonableness of a view, if conveyed by someone in Mr Zaki's position at the time of investment, that the chance of losing capital under Note 18, Note 19 or Note 20, was small.

179. Turning, then, to Note 18, as Dr Fitzgerald explained, it was a relatively complex product, at all events from Credit Suisse's perspective, involving "*a variety of option-related risks, including barrier options [and] based on multiple equity indices, with the coupons being conditional or contingent depending on equity market developments, and the level of capital returns to the investor also conditional or contingent on the performance of the various equity indices. Most importantly, the potential risks and rewards would depend on a number of market inputs.*" Those features would make for a complex set of exposures for the Credit Suisse traders to hedge, as they would be expected to do. For that and other purposes, Credit Suisse would have a range of models for risk valuation or assessment, including proprietary methods for evaluating and forecasting such inputs as volatilities, correlations, dividend yields and others. But, "*I would not … expect the Private Banking arm of Credit Suisse to have access to the same types of models and databases as the traders and risk managers in the investment banking operation*" and "*investors such as [the claimants] would also not have the type of pricing and modelling capacity that would be present in an investment bank creating and managing the risks of structured products. In fact, I do not think they would think of it as relevant. … I would rather expect such investors to assess the attractiveness of [Note 18] by comparing the available coupon with market rates of interest available in the market at similar maturities, their assessment of the likelihood of the various barriers in the Note being hit, and the likelihood of the Note being redeemed early by the issuer.*"

180. With one important qualification, I accept all of those views of Dr Fitzgerald's and find that the private investor approach he described was the approach of Mahdi and Maytham in their dealings with Mr Zaki. The qualification – it is in fact fundamental, not merely important – is that as Mr Zaki will have known full well, Mahdi and Maytham relied on him to assess for them the attractiveness of Note 18, i.e. to conduct the assessments referred to by Dr Fitzgerald, or more likely to have

conducted them before presenting Note 18 to them as suitable, in particular to have assessed for them the likelihood of barrier breach and ultimately of losing capital. In that regard, I agree with Mr Mill QC that Dr Fitzgerald displayed a "*rather dim view of the advice offered by private banking 'super salesmen'*", the label Dr Fitzgerald used to describe private banking relationship managers like Mr Zaki. He was thus, in my judgment, somewhat predisposed (he would say with good reason from experience) to find fault in such advice and I have borne that in mind to ensure that I do not too readily find fault in Mr Zaki's advice.

181. Other than the distraction (as I found it) of equity delta risk quantifications, and the detailed differences of view between Mr Mason and Dr Fitzgerald in relation to them in the case of the impugned Notes, the essential disagreement between Mr Mason and Dr Fitzgerald for Note 18 came down to whether it should have been thought of as 'medium' risk or 'high' risk on a qualitative scale of 'low / medium / high / very high' risk. Dr Fitzgerald adhered to the view he had expressed in writing that it could properly have been seen as a 'medium' risk; Mr Mason to his written view that it could only be seen as 'medium to high' risk or 'high to very high' risk taking account of leverage. To take that last point briefly, Mr Mason's approach to leverage was to treat it as always increasing riskiness substantially because that approach treated the capital at risk as the cash 'equity' invested only. I do not think that is an approach relevant to the claimants as investors, as I have already indicated.

182. Leaving leverage to one side, then, the experts disagreed as to whether Note 18 was 'medium' or 'medium to high' risk. Whilst it did not persuade him to revise his view that 'medium' was the correct label, cross-examination to my mind showed that Note 18 was at the high end of 'medium' risk in Dr Fitzgerald's mind; and I rather felt that if he had initially committed to saying it was 'high' risk, but at the lower end of that category, he would have felt able to defend that view too.

183. In the light of those views, in my judgment Mr Zaki could properly have assessed Note 18 to be suitable for the claimants if he judged it to be at the upper end of the risk scale for a 'medium' risk product and he had a reasonable basis for believing that that fitted Mahdi and Maytham's appetite for risk. However, he did not have any reasonable basis for believing that, but on the contrary should reasonably have understood that Mahdi and Maytham were only happy to invest on the basis that very little risk of loss of capital was being run; and the assessment he effectively conveyed to Mahdi and Maytham, namely that Note 18 indeed involved only a very low risk of a loss of capital, was not in my judgment a reasonable view to hold. That does not mean it was unreasonable of him to think the market was stronger in May/June 2008 than it had been for a while, and might be recovering. It was unreasonable of him to think that there was only a small chance that his optimistic view would turn out to be sufficiently wrong for Note 18 to result in loss. Thus, for example, Dr Fitzgerald told me that at the time of investment he would have assessed the probability of Note 18 hitting its barriers to be around 50% (an assessment which Mr Mason said he would not dispute). Whilst I do not think Mr Zaki himself had the expertise to quantify the risk in that way, it seems to me that gives the flavour very well – buying Note 18 was taking a 50:50 bet on having no capital protection and therefore being exposed. That in my judgment is not what Mahdi and Maytham thought they were buying, and is not what Mr Zaki could reasonably have believed they wanted to buy, even bearing in mind that hitting barriers did not make a loss of capital a certainty.

184. Having not had the advantage of hearing from Mr Zaki, I cannot say why he fell into such error, although I note that in *Zaki et al. v Credit Suisse*, *supra*, at [126]-[129], Teare J found it proved, having had evidence *inter alia* from Mr Zaki, that in May 2008 he wrongly judged a Note similar to Note 18 to be suitable for investment even by an investor properly characterised as having a 'moderate' risk appetite. So it may be Mr Zaki simply had an unreasonably bullish view or an unreasonable level of confidence in his own view. Be that as it may, in my judgment he failed properly to assess, as he should have assessed, that Note 18 was not suitable for Mahdi and Maytham. Credit Suisse thereby contravened COBS 9.2.1R and 9.2.2R in respect of Note 18.

185. The claimants also claimed that Note 18 was unsuitable for them because there was no diversification in their Credit Suisse portfolio. When Note 18 was being traded, their Credit Suisse Notes all referenced the worst performing of the S&P 500, DJ Eurostoxx 50 and Nikkei 225 indices; Note 18 referenced the worst performing out of those three and also the Swiss Index, but that did not add any material diversification. However, I agree with Dr Fitzgerald that for investors such as the claimants, diversification in their specialist structured products portfolio at Credit Suisse is not a meaningful enquiry. It formed one element only, and proportionately not that large an element, in the claimants' overall wealth. There was never any question of Credit Suisse being asked to, or being given the information to be able to, provide overall investment or wealth management advice. In fact, considering the range of the claimants' entire assets, to the extent I had evidence about that, the concentration in their Credit Suisse portfolio upon one type of structured product and one set of reference indices did not, in my judgment, represent or create inadequate diversification.

186. The claimants' claim under COBS 4.2.1R in relation to Note 18 amounted, in substance, to the complaint that Mr Zaki told Mahdi and Maytham that Note 18 was a 'safe' investment, when in reality it involved significant risk. I have found that whether or not Mr Zaki said in terms that Note 18 was 'safe', he did convey to Mahdi and Maytham that which saying so would have conveyed to them, namely that Note 18 would involve only a small chance of loss (see paragraph 107 above). That was inaccurate and it was not reasonable of Mr Zaki to hold that view, so I would conclude that it was a misleading communication by Mr Zaki, putting Credit Suisse in breach of COBS 4.2.1R. However, that breach is effectively incidental to, and a consequence of, the underlying fault, namely the breach of Credit Suisse's suitability duties under COBS 9.2.1R and 9.2.2R. I do not think that the breach, in addition, of COBS 4.2.1R, adds anything in the circumstances of this case.

Note 19

187. As with Note 18, I am quite satisfied that Mr Zaki gave Mahdi and Maytham his personal recommendation that they invest in Note 19. The nature of that recommendation, however, was different. Far from saying, or (given the investment history) implying by not saying otherwise, that Note 19 would involve very little risk of loss, Mr Zaki made it very clear that it would be a bold, risky investment, with a view to a very high return; Mahdi and Maytham made an informed decision to take on that level of risk on a very modest (for them) investment amount. Mr Zaki did also give them his view that there was a better chance at that time (June 2008) than there

had been at the beginning of the year of this sort of bet on a selection of individual banks paying off, a view that Mahdi and Maytham had also been given by Mr Bejjani.

188. Mr Mason viewed Note 19 as 'high' risk; Dr Fitzgerald's written evidence said it should be classified as no more than 'medium' risk. However, there were errors in Dr Fitzgerald's analysis, exposed by cross-examination; and he accepted that it referenced "*a relatively high risk group of underlyings*" in return for "*a very, very large coupon premium*". In my judgment, Dr Fitzgerald's adherence to his 'no more than medium' characterisation did not withstand scrutiny. He should have conceded, and any reasonable advisor in Mr Zaki's position would have assessed, that Note 19 was 'high' risk.

189. But as I found above, Mahdi and Maytham invested in Note 19 knowing that in doing so they were making a bold, risky, investment, offering the potential for a very high return. They were willing to do so because of the very modest amount involved (relatively speaking, for them). In doing so, they were departing from their generally conservative approach to risk, but they knew they were doing so. The claimants' claim was not put on the basis that Mr Zaki's advice for Note 19 was negligent, namely that June 2008 was a better time for a bet on individual banking stocks than January 2008. Whilst some of the expert analysis would suggest there might at least be a case to consider in that regard, it was not explored sufficiently for it to be fair or possible to judge the Note 19 claim on that basis. In that regard, Mr Mill QC in my view fairly prosecuted the claim that had been pleaded, namely that Note 19 was unsuitable because it was high risk. That claim fails.

190. As for COBS 4.2.1R, the claimants' contention is that Mr Zaki misleadingly communicated Note 19 to be a 'safe' or 'very safe' investment. On my findings there was no such communication. This claim also fails.

Note 20

191. There was a slight air of unreality about the claimants' suitability complaint in relation to Note 20. Lehman Bros had collapsed, markets were in turmoil, it was obviously a risky, turbulent time to be investing. Note 20 was equally obviously not a Note to be buying if you had only a conservative appetite for risk, willing to run only a small chance of loss of capital. This was not an investment in the ordinary course of Mahdi and Maytham's relationship with Mr Zaki.

192. Furthermore, Mahdi and Maytham sought and obtained advice in relation to what became Note 20 primarily from Mr Bejjani. That does not absolve Credit Suisse from any COBS suitability duty. But it does mean that Mahdi and Maytham had, and Messrs Zaki and Khodari knew they had, advice independent of Credit Suisse on the basis of which they were setting clear and particular investment objectives specific to that turbulent time.

193. The firm objectives thus set and communicated from the outset to Messrs Zaki and Khodari (but primarily the latter, in his conversations with Mr Bejjani) were that: (a) Notes 13 and 15 be replaced by a new Note with a maturity of up to 5 years, but on any view more than 2 years, and new barriers lower than those that had been breached; (b) the funding of the investment remain static. It became, in addition, a firm objective that the new Note also replace and restructure Notes 17 and 18. By

happy coincidence, since it meant he had already got traders looking at it, the thought of making it a jumbo restructuring had also occurred to Mr Khodari. However, it is clear that the initiative for it came from Mahdi and Maytham, as advised by Mr Bejjani, independently of anything said by Mr Zaki or Mr Khodari.

194. Against that background, I do not think the debate between Mr Mason and Dr Fitzgerald, by reference again both to equity delta risk quantifications and to more qualitative assessments, over whether Note 20 was 'high' risk, and if so how high, is relevant. If it matters, Dr Fitzgerald was ultimately disposed to accept, as Mr Mason had said all along, that Note 20 is properly to be characterised as having been 'high' risk. That in my judgment is a correct assessment and, again if it matters, I could not find that Mr Zaki or Mr Khodari assessed it at the time as anything other than 'high' risk.

195. It was well appreciated by Mr Bejjani, who cannot have failed to advise Mahdi and Maytham to this effect, that only time would tell whether opting for the sort of restructuring proposed would be better or worse for the claimants than taking whatever 'hit' it seemed inevitable they would take if they simply let Notes 13 and 15 run to maturity.

196. Whilst the terms of Note 20 as traded were the only terms quoted in full by Credit Suisse, i.e. with specific strike and barrier levels identified, it was made clear to Mahdi and Maytham that Credit Suisse would offer shorter maturities and/or lower barriers if that were preferred.

197. In all the circumstances, in my judgment Note 20 in fact satisfied, and on any view it was reasonable for Mr Zaki and Mr Khodari to believe it satisfied, Mahdi and Maytham's objectives as of 9 October 2008 when the trade was booked. The claimants' claim under COBS 9.2.1R and 9.2.2R in respect of Note 20 therefore fails.

198. The claim under COBS 4.2.1R complains about the statements by Mr Khodari, following the initial statement by Mr Zaki, that the 'switch' trade would not require funds from the claimants. Those statements were accurate to the extent they concerned whether there would be a net purchase price payable by the claimants for the trade, i.e. to buy Note 20 in return for giving up Notes 13, 15, 17 and 18. Furthermore, neither Mr Zaki nor Mr Khodari said there would be no margin calls in respect of the new Note, either at all, or for some particular period, or unless the barriers were hit. There is, though, a subtlety here meaning that there is more to the COBS 4.2.1R claim than that, because the reassurances that restructuring would not require further funds from the claimants went further (as I have found) than that there was no net purchase price to pay for Note 20.

199. The subtlety is this:

    i) Credit Suisse bought back Notes 13, 15, 17 and 18 and sold Note 20 at a price of 58.47 on the nominal value of US$51m. That price, or a price derived consistently with it, was taken as the 'mark-to-market' value of Note 20 from completion of the trade on 23 October 2008 for the purpose of assessing collateral value on the claimants' account.

ii) However, when assessing that collateral value before Note 20 was issued, Credit Suisse was pricing Notes 13, 15, 17 and 18 differently. For example, on 9 October 2008 (when the 'switch' trade was booked at the price of 58.47), the weighted average mark-to-market value given to Notes 13, 15, 17 and 18 was 75.77. Why that was so was not identified in the evidence. In particular, I did not have evidence from anyone at Credit Suisse capable of explaining what had happened. As a result, I have no reason to suppose or find that without the restructuring trade the mark-to-market pricing of Notes 13, 15, 17 and 18 would have changed materially at that time. (To be clear, I am not saying the mark-to-market price would have remained static at precisely 75.77; but the basis upon which those Notes were marked to market would have stayed the same, that being a basis that generated a price of 75.77, not 58.47, on 9 October 2008.)

iii) Further, whereas the LTV ratio given by Credit Suisse to Notes 13, 15 and 17 was 70%, and that given to Note 18 was 60%, a ratio of 50% was given to Note 20 upon issue. Messrs Zaki and Khodari had booked the 'switch' trade without knowing what LTV ratio the new Note would be given.

iv) As a result of the different basis for the mark-to-market pricing used for Note 20 and its lower LTV ratio, as soon as Note 20 was issued, Credit Suisse assessed the claimants' account to suffer from a large collateral shortfall (as I discuss in a little more detail below, at paragraphs 218*ff*). The margin call followed that led ultimately to the closing of the account.

v) Thus, the reassurances given to Mahdi and Maytham, through Mr Bejjani, by Mr Khodari, that the 'switch' trade would not result in any need for further funds from them, were inaccurate and misleading. Although, as I have found, Mahdi and Maytham were not told that there could not or would not be margin calls in the future, and were not told that there could or would only be a margin call if barriers were hit, they did understand that the position on their account, as they traded to buy Note 20 on 9 October 2008, was that Credit Suisse did not need further funds from them at that time and would not need further funds from them as a result of executing that trade. That was a misunderstanding engendered by Mr Khodari's communications.

200. On that basis, in my judgment there was a breach of COBS 4.2.1R in respect of Note 20 and that breach induced the claimants to enter into the 'switch' trade and thus to acquire Note 20. However, that is only so because the claimants' portfolio prior to the restructuring included Note 18 and borrowing of US$20m drawn down when Note 18 was purchased. That follows from the assessments the experts made upon various hypotheses of whether margin calls would have been made, to which I refer below. This breach of COBS 4.2.1R in respect of Note 20 therefore will not add to whatever damages are properly to be awarded to the claimants, since they will be assessed by considering what would have happened without Note 18.

Primary Causation

201. Note 18 was only presented to Mahdi and Maytham, and they only bought it, because of Mr Zaki's failure to assess, as he should have done, that it was not suitable for the claimants. Had they not bought Note 18, then:

i) I find no reason to suppose that they would have sought to terminate their Credit Suisse account, at all events prior to October 2008, or that they would not have been willing to invest in Note 19 in June 2008 as in fact they did.

ii) That said (as regards Note 19), in my judgment Mahdi and Maytham would not have been looking for further structured product investments in the summer of 2008. There was no evidence of other such investments that Mr Zaki might have presented to them, or of any interest on Mahdi or Maytham's part in buying structured products elsewhere at that time. I reject the suggestion pleaded by Credit Suisse that without Note 18 the claimants would have invested in something similar elsewhere.

iii) As a matter of probability, therefore, I find that Mahdi and Maytham's Credit Suisse portfolio when the crisis hit in September/October 2008 would have comprised Notes 13, 15, 16, 17 and 19.

202. As events in fact unfolded, the claimants did not look to take any active step with the Credit Suisse portfolio until notified on 7 October 2008 that Notes 13 and 15 had touched their barriers. There is no reason to think they would have behaved any differently in the absence of Note 18. Equally, it seems to me, the absence of Note 18 would not have affected the substance of the claimants' response to learning that Notes 13 and 15 had hit their barriers. They would still have asked Credit Suisse for a restructuring with the objectives I summarised in paragraph 193 above. Of course, there would have been no Note 18 to include in the restructuring. However, given Mr Bejjani's explanation for seeking the jumbo restructuring in the events as they actually transpired, and Mr Khodari's response to that request, it seems to me more probable than not that the restructuring requirement set by Mahdi and Maytham, via Mr Bejjani, would still have taken in Note 17.

203. In that restructuring, in my judgment as in the actual events: Mr Khodari and Mr Bejjani would probably have alighted upon 5 years as a prime candidate for the period of the new Note to replace Notes 13, 15 and 17; Mr Khodari would have quoted terms for a 5-year maturity and indicated that other maturities could be considered; Mahdi and Maytham would still have adopted the approach, with Mr Bejjani, that they wanted to give the markets plenty of time to recover, albeit with 5 years maximum as their limit; in all probability, therefore, the new Note restructuring Notes 13, 15 and 17 would have been, like Note 20, a 5-year Note callable quarterly from its second anniversary, referencing the S&P 500, DJ Eurostoxx 50 and Nikkei 225, with strike levels set at the weighted average of original strike levels, coupon at a premium above LIBOR at risk but resurrecting and barriers as low as they could be made, under the preceding parameters, for a price of 53.17 on a nominal value of US$31m (that being the weighted average of the 9 October buy-back prices actually used for Notes 13, 15 and 17).

204. I find below when dealing with the 'financial suicide' argument that in late October 2008, Mahdi and Maytham decided they would not commit any further funds to support their account at Credit Suisse, though that meant their positions would be closed out. Without Note 18, (a) the aggregate exposure at Credit Suisse would have been substantially lower (c.US$38m rather than c.US$58m) and (b) the leverage would have been much reduced (less than 1:3 with borrowing of c.US$9m rather than c.1:1 with borrowing of c.US$29m). Whether or not it was a reasonable decision to

allow the actual portfolio to be liquidated by choosing not to meet a margin call – which is the 'financial suicide' issue addressed below – the late October 2008 margin call was plainly the trigger for Mahdi and Maytham to consider liquidating rather than holding onto the Notes. Whilst I have not accepted their claim that the leverage in the portfolio itself involved Credit Suisse in any breach of duty, it did catalyse their decision to let the portfolio go. I do not think that, having restructured, they would have done anything with their Notes at Credit Suisse, other than hold them to maturity, in the absence of a margin call. I see no reason why that would not also have been true for the portfolio I have held they should have had as of 9 October 2008, i.e. Notes 13, 15 and 17 restructured, plus Notes 16 and 19.

205. The question therefore arises whether, with that portfolio, there would have been any margin call. That is a question of (hypothetical) fact for the court, but I have no doubt that Credit Suisse would have called for margin if entitled to do so, at all events if any collateral value shortfall was not insignificant in the context of the account. So the question turns on an assessment of how the account would have performed, including what value Credit Suisse would have given to the Notes from time to time and what LTV ratio it would have applied, on which the experts could assist. They had not conducted any such exercise prior to trial, but it became clear at trial that it might be relevant, depending on my findings. Both experts therefore provided supplementary reports prior to giving their oral evidence.

206. That evidence proved to be uncontentious; but it did not address the exact hypothesis that now arises on my findings. Thus, it demonstrated that:

i) If the claimants had held only Notes 13, 15, 16 and 17, there would never have been a margin call. As of 9 October 2008, there would have been a collateral value surplus of c.US$6.5m, even using the buy-back prices for Notes 13, 15 and 17 as their fair value rather than the higher values that were being used by Credit Suisse to mark those Notes to market prior to completing the restructuring (although absent any restructuring I have held that the latter would have continued to be used).

ii) In that analysis, the low point for the reference indices, when the Notes would have had their lowest collateral value, was on 9 March 2009. Their fair values would have tracked closely the levels of the worst performing index (or in the case of Note 16, 1.5x that level). By my calculation, that means they would have had a fair value, in aggregate, of at least US$15m at that point (the worst performing index was above 40% of strike in all cases; 40% of par for Notes 13, 15 and 17 plus 60% of par for Note 16 gives US$15.4m). Even if – which is speculative – Credit Suisse had reduced the LTV ratio to 60% (the LTV in fact given to Note 20 in October 2008), that gives a collateral value of at least US$9m and therefore a collateral value surplus of over US$3m.

iii) Adding Note 19 does not affect the conclusion that no margin call would have been made. The maximum difference it could have made would have been to reduce the collateral value surplus by c.US$1.85m (the amount of borrowing associated with Note 19, c.US$1m, plus 85% of the cash used to buy Note 19); and that maximum impact would only occur in the highly unlikely event that Note 19 was given a nil value at some point.

iv) If Note 20 had not been purchased, in other words if the claimants' portfolio was as it was in fact, but no October 2008 restructuring took place (so that the portfolio comprised Notes 13 to 19), there would have been a margin call on or shortly after 9 October 2008 if Notes 13, 15, 17 and 18 were 're-priced' for that purpose in line with their actual sale prices in the restructuring, but not otherwise. The same is true if neither Note 19 nor Note 20 had been purchased (so the portfolio had comprised Notes 13 to 18).

207. The maturity date of Note 16 was in September 2013, so the identification of 9 March 2009 as the low point against which to test the possibility of margin calls stands for the correct hypothetical portfolio on my findings, namely Notes 13, 15 and 17 restructured, plus Notes 16 and 19. The Note replacing Notes 13, 15 and 17 would have had a maturity date in October 2013 but I think I can take notice of the fact that August to November 2013 was a period of rising markets at levels well above those of March 2009. Furthermore, the barrier levels for that Note would have been lower than those of replaced Notes 13, 15 and 17. I conclude, therefore, that the collateral value of the hypothetical portfolio of that new Note, plus Notes 16 and 19, would not have been worse at that low point in March 2009 than that considered in paragraph 206(ii)-(iii) above.

208. A clear corollary of all those findings is that whilst it was barrier breach on Notes 13 and 15 that provoked a crisis and led to a restructuring, and that would have occurred in any event, the difficulty for the account as regards collateral value and margin calls was Note 18, the borrowing at the time of its purchase, and then the different treatment of Note 20, for collateral value purposes, as compared to the treatment of Notes 13, 15, 17 and 18.

209. My conclusion, overall, therefore is that but for the purchase of Note 18:

i) The claimants' portfolio in early October 2008 would have comprised Notes 13, 15, 16, 17 and 19.

ii) There would have been a crisis on 7 October 2008 when it became known that Notes 13 and 15 had hit their Nikkei barriers overnight, culminating in a restructuring trade on 9 October 2008 to restructure Notes 13, 15 and 17, equivalent in kind to the actual restructuring by which Note 20 replaced Notes 13, 15, 17 and 18.

iii) Thereafter, the claimants would have held the restructured portfolio to maturity so long as they were not asked to provide any further funds to support it.

iv) The claimants would not have been asked to provide any further funds to support that restructured portfolio. They would only have been asked for further funds by way of a margin call; but there would not have been any margin call. It is therefore unnecessary to grapple with the further question whether, if to the contrary there had then been a margin call, *ex hypothesi* in rather different circumstances to those of the actual events, Mahdi and Maytham would still have chosen not to meet it.

210. The claimants can therefore say that had they not bought Note 18, the purchase of which I have concluded resulted from actionable breaches of duty by Credit Suisse, their Credit Suisse account would not have been closed out, at a loss, in late October 2008, but instead they would have had, and would have held to maturity, the restructured portfolio I have identified. To assist the court as to *quantum*, if liability were established, the experts quantified a large number of different permutations, that is to say they calculated a value for the outturn result that would have obtained in a large number of different hypothetical scenarios. None of the scenarios considered quite matches the one I have just stated. But I expect that the calculated difference in outturn result for that scenario will be large. If the claimants are entitled to damages in that amount, the order upon this judgment will be for damages to be agreed, if possible, but in case of disagreement assessed by me on that basis with the benefit (it will have to be) of further assistance from the experts. (The modelled scenario closest in logic to that required by my findings is Dr Fitzgerald's 'Scenario 3b', under which he assumed that Notes 18 and 20 were never purchased and Notes 13, 15, 16, 17 and 19 were held to maturity. For that he calculated an outturn result at 31 October 2013 of c.US$17.6m, which would mean damages of c.US$17.9m. But what I cannot estimate without further assistance is how much difference would be made by the restructuring of Notes 13, 15 and 17 I say would have occurred.)

211. Credit Suisse contended that the claimants' losses should not be regarded as caused by any breach of duty on its part, or should be regarded as too remote to be recoverable in damages, because they resulted from the extreme nature and severity of the 2008 crash. But on the facts of this case, the essence of the duty broken by Mr Zaki was to protect the claimants from major market falls by assessing with proper care that any capital protection barriers were very unlikely to be hit. Mr Mason and Dr Fitzgerald were properly careful to ensure that their opinions as to how the risk of capital loss under Note 18 should have been evaluated were opinions by reference to market conditions and data as they stood in May 2008, without the knowledge that hindsight now brings of quite how badly things would turn for the worse a few months later. Had it been reasonable in May 2008 to assess Note 18 as offering only a small chance of loss of capital, then there would have been no breach of duty at all. As it is, that assessment on Mr Zaki's part, as conveyed to the claimants so as to persuade them to invest, was unreasonable, resulting in breach. When it comes then to causation or remoteness of loss, it seems to me that the resulting loss, even if its magnitude was a product of the severity of the subsequent crash, is within the scope of the duty broken, as to which see *Rubenstein v HSBC Bank plc* in the Court of Appeal, [2012] EWCA Civ 1184, [2012] 2 CLC 747, *per* Rix LJ (with whom Lloyd and Moore-Bick LJJ agreed) at [118]-[124].

'Financial Suicide'

212. Whether the claimants are entitled to damages as described in paragraph 210 above (subject to any reduction for contributory negligence) now depends on the final causation issue I must determine, the 'financial suicide' issue. Did the claimants cause their own loss, or fail properly to mitigate, by deciding not to meet Credit Suisse's late October 2008 margin call, opting thereby for the inevitable closing out of their Credit Suisse account, to the extent their loss resulted from doing so (i.e. to the extent that their actual loss calculated under paragraph 210 above is greater than it

would have been had they held Notes 16, 19 and 20 to maturity, meeting any margin calls as they arose)?

213. A decision not to meet a margin call so as to support leveraged investment positions can, depending on the facts, break any chain of causation in respect of breach of duty in the selling of those positions, or constitute contributory negligence. An example is *Al Sulaiman v Credit Suisse Securities (Europe) Ltd et al.* [2013] EWHC 400 (Comm), [2013] 1 AER (Comm) 1105. At [207]-[211], Cooke J found on the particular facts of that case that there had been an irrational and unreasonable decision not to put up margin. The investor had decided not to do so, not because she in fact wanted her investments to be closed out, not as a rational 'stop loss' measure because no one could know the future, but "*in the hope that [Credit Suisse] would not insist on … additional collateral*", an approach "*so irrational as to be almost incomprehensible, explicable only if it really was thought that [Credit Suisse] would not liquidate the account.*" When that bluff (as Cooke J held it to have been) was called, the investor still had time to retrieve the position but chose not to, indicating "*blind irrational pique at [Credit Suisse]'s movement of the goal posts on LTV*".

214. With no doubt a deliberate nod to those findings, Mr Handyside QC put the case for Credit Suisse squarely on the basis that the decision to allow the portfolio to be closed out was a fit of pique on Maytham's part, an irrational bout of anger. He was right as a matter of analysis to do so, for there is no rule of law that a failure to meet a margin call an investor could readily meet breaks the chain of causation or amounts to contributory negligence. The issue depends upon a close examination of the facts of any given case and so the question is whether Mr Handyside QC's submission correctly characterises the material facts of this case, to which I now turn.

215. On 14 October 2008, Citibank issued a margin call in respect of the claimants' investments there. Mr Bejjani explained in an email to Citibank, referring to the Note 20 'switch' trade although not naming Credit Suisse or going into full detail, that "*… with … another bank, we were given a solution to restructure by extending maturities for a few more years and lowering barriers by about 30 pct of current levels. Since we dealt that, no margin calls to pay and portfolio status is looking better.*" Mona Mohtasseb, the Citibank relationship manager, responded with some restructuring ideas on that theme that would come at an up-front cost for the claimants. She added that "*Personally speaking, it [sic.] do not think its [sic.] a better option compared to the top up*". The next day, she confirmed that "*… the total cost will be around 3,045,000 USD and we do not think that it is worth it.*" Mr Bejjani replied saying that US$2m would be transferred in response to the margin call.

216. The story then begins in earnest on Thursday 23 October 2008, the day the restructuring trade to switch Notes 13, 15, 17 and 18 for new Note 20 completed. It was also, by coincidence, Mr Bejjani's last day working for the claimants. Late that morning (London time), Mr Khodari emailed Mr Bejjani, saying that:

> "*As I am sure you are aware the markets have fallen further and has effected [sic.] the value of the Notes on the account. The account is shortfall [sic.] and I cannot delay our Credit department any longer. Let me know if you would like me to send you a full analysis of exactly how much we are short, or would you recommend speaking with Maytham directly?*"

217. Mr Khodari's message was plain: falling markets had hit the mark-to-market value of the Notes resulting in a collateral shortfall where there had been none before. This was seriously misleading. True it is that Credit Suisse had assessed there to be a collateral shortfall for the first time that day. That assessment was that whereas on 22 October 2008 there was no shortfall, there was now a shortfall of c.US$9.5m. But there was no evidence of a fall in the markets that might have generated such a change in the position.

218. An internal collateral shortfall monitoring spreadsheet records by way of comment for 23 October, "*Discrepancy over LTV, Daniel dealing with.*" That referred to Daniel Masserli in the Credit Risk Management department. The "*discrepancy*" was that the LTV ratio being given to new Note 20 was only 50%. That was increased to 60% for the following day's calculations, bringing the collateral value shortfall down to c.US$6.5m. The comment then was this: "*No more than 60%LTV to new note bought, RM [relationship manager, i.e. Mr Zaki] to advise immediately how this shortfall will be covered.*" Thus the reason identified internally why there was suddenly a collateral shortfall was that it was a by-product of the restructuring trade.

219. The difficulty, however, was not only the LTV ratio for Note 20. As shown by the impact of the 10% increase in LTV ratio from 23 to 24 October, its fair value as issued was assessed by Credit Suisse to be c.US$30m. So the 'discrepancy' in the LTV ratio allowed could only explain, by my calculation, something approaching half of the US$9.5m shortfall. (From the mark-to-market pricing for 9 October: Note 18 contributed 42% of the aggregate value of Notes 13, 15, 17 and 18; the LTV ratio for Note 18 was 60%, for the other three Notes it was 70%; if the balance of value was about the same two weeks later, dropping the LTV to 50% affected collateral value by c.US$(30m x ((42% x 20%) + (58% x 10%)) = c.US$4.26m.)

220. I infer that the balance of the shortfall resulted from this, that despite the booking on 9 October of their sale back to Credit Suisse for just c.US$30m (for completion on 23 October), Notes 13, 15, 17 and 18 continued to be marked to market at significantly higher prices (as referred to in paragraph 199 above), but once the trade completed Note 20 was marked to market at a price consistent with the pricing of the trade. (The aggregate mark-to-market pricing of Notes 13, 15, 17 and 18 used by Credit Suisse for collateral value assessment purposes was c.US$38.5m on 9 October. With LTV ratios of 70% for Notes 13, 15 and 17, and 60% for Note 18, with Notes 16 and 19 giving c.US$3m in collateral value, and with deposited cash giving c.US$8.7m in collateral value, the mark-to-market value of Notes 13, 15, 17 and 18 on 22 October must still have been c.US$38.5m (or more) for there to have been an assessment that there was then no shortfall. Looking at the point another way, if the aggregate value of Notes 13, 15, 17 and 18 were reduced by US$8.5m, and if Note 18 contributed c.42% of that value, the corresponding loss of collateral value if LTV ratios were kept constant would have been c.US$5.6m (US$(8.5m x ((42% x 60%) + (58% x 70%)) = US$5.593m).)

221. Mr Zaki called Maytham on 24 October and told him, as recorded in a file note at the time, that "*due to the severe decline in the Nikkei the account is now short by US$7M*". They agreed to talk further over the weekend. Mr Khodari knew that this was the message Mr Zaki had given Maytham as he drafted the confirmatory email under Mr Zaki's name, addressed to Maytham but in fact sent only to Mahdi (nothing turns on that), copied to Mr Bejjani, at the end of that day (24 October), which was as

follows: "*As discussed in our telephone conversation, due to the severe decline in the Nikkei the account has fallen into shortfall of approx USD 7,000,000. Because of the size of this shortfall the Bank has issued a Margin Call letter which I have attached below.*" That margin call letter dated 24 October put the shortfall at a fraction over US$6.5m at the close of business on 23 October (which must mean that for the purpose of that letter the LTV ratio used for Note 20 was 60% rather than 50%).

222. Mr Khodari was not straightforward about this in his witness statement, claiming that substantial falls in the Nikkei index "*at the end of October 2008*" caused the claimants' portfolio to incur a collateral shortfall. But the falls in the Nikkei to which he referred occurred over 24/27 October and so could not have been the reason why a shortfall arose on 23 October, leading to his email to Mr Bejjani that day. Nor in fact do those falls in the Nikkei appear to have had any real impact on the claimants' position. The market value of the claimants' collateral as assessed by Credit Suisse was materially constant between 23 and 30 October (inclusive), giving equally a materially constant collateral value of c.US$30.8m except on 23 October itself when only 50% LTV was given to Note 20 so the aggregate collateral value was c.US$27.9m. Mr Khodari struggled, in my view vainly, to explain under cross-examination how the message that falls in the Nikkei had caused or were causing the collateral shortfall could not have been misleading or why the true explanation was not given to the claimants. To be fair to Mr Khodari, the contribution to the problem of the inconsistent pricing of Notes 13, 15, 17 and 18 as between collateral value assessments and the pricing of the restructuring 'switch' trade may not have been apparent to him and it is possible he did not appreciate there was an LTV 'discrepancy' until after he had sent his email to Mr Bejjani on 23 October. But still I do not think he had a proper basis, even when that email was sent, for saying that falling markets had created the shortfall; and he did understand the LTV 'discrepancy' to be the issue by the time Maytham and Mahdi were being told the next day that the problem was a decline in the Nikkei.

223. Mr Zaki and Maytham spoke during the weekend. Maytham asked how much he would have left on the account if he decided to close it down. This was the first indication that the claimants might choose liquidation rather than meeting the margin call. Mr Zaki said he would get that information for a further call on the Monday morning (27 October). That call was at 9.25 am (London time, which would now have been three hours behind Kuwait – where I give other times, below, they are all times in London). Mr Khodari was also on the line. Mr Zaki said the margin call letter had not taken account of the Nikkei's falls on the Friday or that (Monday) morning and that taking those falls into account the shortfall as they spoke was up to c.US$9m. As regards closing the account down, he said this: "*Now you asked me another thing. If you liquidate, you will only end up with about US$2m in the account which is of course unbelievably … disaster … not at all recommended.*" This was a simplistic view: on the one hand, of course closing down to a net balance in the claimants' favour of only c.US$2m would crystallise a very large loss (c.US$27m); but the claimants' maximum exposure was much larger still.

224. Maytham asked how much would be needed to de-leverage completely. Mr Zaki said that de-leveraging was an extremely good idea and that if Maytham sent a further US$28m that would "*solve all the problem*". Mr Khodari said a little later it would in fact need to be US$29m. Mr Zaki said that Maytham did not need to de-leverage

completely: "*We talked about 9 [meaning the collateral shortfall Mr Zaki had put at US$9m] and you talk about 28-29 [meaning the amount to de-leverage completely]. Why don't we bridge the gap … ? Assuming the market will go down a little bit more before it starts stabilising and going up, you can send US$15m. … You don't have to go all … the whole hog and pay everything.*" Maytham expressed obvious concern about what would happen in the long run if he did provide more funds. He went over with Mr Khodari what happened if Note 20 hit its barriers. He asked in terms for a view on whether that would happen, to which Mr Khodari responded: "*I mean had you asked me a week ago I would say it's unlikely, but with how the Nikkei's been dropping considerable amounts every night, it's … I mean it's possible.*" Mr Khodari added, though, that overall "*our strategy of extending maturity and everything, it's still working, I think, in our favour, even if we do hit.*" (I note in passing that this is the call in which Maytham referred to how he and Mahdi were pushed by Mr Zaki to invest back in May (Note 18), as I mentioned in paragraph 108 above.)

225. Maytham spoke again to Messrs Zaki and Khodari that evening (27 October, 6.53 pm). Mr Khodari said that Credit Suisse could lower the barriers again, this time for an up-front cost: he indicated US$3.8m to take the Nikkei barrier down to 5,000 and c.US$7.2m to bring it down to 4,000; in each case the other two barriers would be brought down by a proportionately similar amount. Again, Maytham wanted to know how secure that would really make him:

"***Maytham:*** *Do you think it will reach 4,000?*

Mr Khodari: *I mean, I would personally be very surprised if it does. But with these things with these kinds of markets obviously you can't tell. But 4,000 is a very low barrier. And again, you have got the Eurostoxx barrier is at 1,189. The S&P barrier, I brought down to 440.*

Maytham: *What's the S&P now?*

Mr Khodari: *The S&P, the S&P now … 872.*

Maytham: *872.*

Mr Khodari: *Yes. So on the second option – the one that's going to cost you 7.2 million – you're pretty much halving the current value of the indices, you're giving yourself roughly around 50% barrier on the other two and 44% on the Nikkei. I mean, we can tweak these slightly … .*"

226. Maytham asked when the Nikkei had last been as low as 4,000 and after some checking of data, Mr Khodari indicated it had not been that low since 1975. Maytham remained concerned: "*This is a problem Mahmoud. The problem is that this today is something like a disaster. … Because when we're talking 'no way the Nikkei will reach the 7,000'. It's all in the air. Speaking of the 7,000 even two months ago was a joke.*" The discussion continued, with Mr Zaki advising to take things in stages, the first stage being to transfer some funds to reduce the borrowing, then leave things for a few days and consider again buying protection by way of a reduction in the barriers. Maytham asked when he would be told there was a margin call again, if he did pay to reduce the barriers. Mr Khodari confirmed that if protection was purchased, by way

of reduced barriers, there would still be a shortfall on the account because of the borrowing so there would still be a margin call to meet.

227. After checking some of the detail as to the amounts borrowed, Maytham then reverted to the possibility of simply liquidating there and then, leading to the 'financial suicide' exchange itself, as follows:

"***Mr Zaki:*** *Do you mean the whole position?*

Maytham: *Yes.*

Mr Khodari: *You mean selling the notes as well?*

Maytham: *Yes, yes.*

Mr Khodari: *Okay.*

Mr Zaki: *That's suicide [audio unclear]. This is financial suicide!*

Maytham: *Mahmoud [audio unclear] I sent you the 20 million and I told you just keep there in the account and you were the one to advise me to put it here … [inaudible]*

Mr Zaki: *This was not seen, foreseen at all, especially the last month, yeah. This month of October was …*

Maytham: *You insisted that 20 million is excellent.*

Mr Zaki: *I mean, the actual transaction is not bad, is what's happening, how fast the indices gone down worldwide. The market meltdown it was definitely not foreseen, how ferocious it is or it was in recent weeks. It is just unprecedented, I mean nobody could have foreseen it, it's unbelievable.*

Mr Khodari: *Okay, if we do a simulation of liquidating everything now as it stands, bearing in mind these are not accurate prices, so this is just for indication only, there will be somewhere in the region of over US$2m on the account.*

Maytham: *So basically, I will lose 26 million?*

Mr Khodari: *If you take into account everything that has been transferred, yeah.*"

228. After further brief discussion of the figures, Maytham asked Mr Zaki what he thought they should do. Mr Zaki said he should definitely meet the margin call as a first step; the second step, in a day or two, could be to restructure again, reduce the barriers, or the like – "*we have to have plan A, plan B, you know? We have to save this account … .*"

229. A little later in the evening, probably at about 9.00 pm, Maytham called Mr Zaki on his mobile phone and said he wanted to liquidate the portfolio. Mr Zaki passed that message on to Mr Khodari and asked for a live price to be obtained the following morning.

230. Mr Khodari called Maytham at 10.07 am on 28 October. He said it might be possible to liquidate just Note 20, leaving Notes 16 and 19 to run. Maytham said he did not want to "*get into this today*". He asked Mr Khodari to get a definite price to liquidate everything so he (Maytham) could decide what to do. That proved to be difficult, as Mr Khodari explained to Maytham in a further call that afternoon – and in the event Mr Khodari did not manage to get a firm price on 28 October for a liquidation of the portfolio.

231. The following morning, Mr Khodari took a call from Hani Esbaitah, CEO of one of the Haider family's companies, who was now advising Maytham on the portfolio, Mr Bejjani having left as I mentioned above. Mr Esbaitah said that he had advised Maytham not to liquidate the position; he asked for copies of the term sheets by email. Messrs Khodari and Esbaitah spoke again just after 12 noon. Mr Khodari explained that the collateral shortfall had arisen because Note 20 had been given a 60% LTV ratio and because its market value had fallen. As I have already said, the latter is not reflected in Credit Suisse's collateral value calculation spreadsheet and was not, I think, correct. To his credit, Mr Khodari was now identifying that (due to the LTV issue) buying Note 20 was at least in part to blame for there now being a margin call. Mr Esbaitah said he would be speaking to Maytham again and advising him to send Credit Suisse the money required to keep the account alive. Mr Khodari said that as things then stood, the margin call requirement was for US$11.5m.

232. At 2.47 pm, Messrs Zaki and Khodari spoke to Mahdi. They said the collateral shortfall was now c.US$12m, and that if the portfolio were to be liquidated, there would be a net deficit of c.US$2m. Mahdi said he had thought there would be no margin calls if the barriers had not been hit and that "*This is what I understood from you when I did the deal.*" Neither Mr Zaki nor Mr Khodari had ever said that to Mahdi. However, as I have held, Mr Khodari had given the clear impression that restructuring by switching Notes 13, 15, 17 and 18 to Note 20 would not result in further funding being required. Some bewilderment and concern a few weeks later is not surprising, when it was being said that Note 20 was to blame, at least in part, for there now being a large margin shortfall (even if the full detail of how that was so, as I have been able to see it, did not come through in what was being said and may not have been appreciated by Mr Khodari or Mr Zaki).

233. At 2.54 pm, Mr Khodari spoke to Maytham and told him that he now had firm prices, on which liquidating the portfolio would leave a net shortfall of US$1.9m. Maytham reacted angrily. He claimed that on 27 October, (a) Mr Khodari had given him a binding quote that liquidating would result in a surplus of US$2m and (b) he had given a firm instruction to sell. Neither claim was true, and in my judgment Maytham knew that at the time. He knew that Mr Khodari had not given a firm price on 27 October and that, although he did tell Mr Zaki late that evening that he wanted to liquidate, that could not have been acted upon until the next morning, but when that morning came he asked Mr Khodari for firm pricing so as to make a decision.

234. Mr Khodari, likewise Mr Zaki in a later call that day (29 October), reminded Maytham that the US$2m surplus mentioned on 27 October had been an indication only and approximate. There had been nothing firm. Maytham was intemperate with both of them and refused to back down. In that later call, Maytham also added the claim that when the US$13m was sent in May 2008, he had told Mr Zaki "*I don't want any leverage, I want all my positions clear, zero*". This too, in my judgment,

was not true. Had it been, I have no doubt that Maytham would have obtained from Mr Zaki the figure required to de-leverage completely and would have transferred that amount to Credit Suisse with that instruction. It was, I think, an exaggeration born of Maytham's anger at how things were turning out.

235. The gist of Mahdi's evidence as to his and Maytham's thinking at the time was, in my judgment, clear and credible: they could have met the margin call; but it felt like throwing good money after bad; they also felt let down and misled by Mr Zaki about their portfolio, leading them to be less happy than before to trust his advice. That last – the sense that the family had been let down by Credit Suisse – was to the fore in Mahdi's oral evidence, but I do not think it was the only factor and overall I felt Mahdi's evidence withstood challenge at trial.

236. Further, it is clear from the transcripts I have discussed above that for Mahdi and Maytham this further slump in value was unwelcome, concerning and a real surprise to them, coming as it did so soon after they had restructured the portfolio to stabilise the account. They sought reassurance that things could not end up even worse. Mr Khodari said that even a week previously he would have said no, but acknowledged that now anything was indeed possible, albeit Mr Khodari also gave his view that keeping the restructured portfolio was the better option. As a result, I do not think it right to say, as Mr Handyside QC submitted, that because the purpose of the restructuring was to buy time, it was therefore irrational to choose to crystallise a loss so soon after the restructuring had been put together. In fact, I think it is very difficult to say overall that it was irrational or unreasonable of the claimants to let the account go then, so as to stop the rot. On the contrary, it seems to me that was a reasonable view to form, even if it would also have been reasonable to form the view that the margin call should be met and the account kept alive.

237. That that was their thinking is corroborated by the fact that they also let their Citibank and Barclays investments go at about this time (as I mentioned in paragraph 66 above). There has been no claim against Citibank or Barclays; and there was no evidence of any side issue with either of them similar to those that Maytham raised with Credit Suisse such as the fight he picked over the US$2m. To my mind that supports the conclusion that the decision to exit from these investments was not a result of those side issues.

238. Maytham gave evidence similar in effect to Mahdi's evidence. But he also said a number of other things that were not credible. Had his been the only witness evidence on the point, it might have been more difficult to discern the grains of truth.

239. Taking the evidence as a whole, I find that Mahdi and Maytham decided on 27 October 2008 that they would not commit any further funds to support the account, so that if the margin call stood the account would be closed down, and that they adhered to that decision even when Mr Esbaitah added his voice to that of Mr Zaki in advising that they should meet the margin call and keep the account alive. They did not do so irrationally or in anger, but out of concern that the worst might not be over and that the final loss might therefore be larger still than whatever loss would be suffered upon a liquidation then.

240. I do not agree with Mr Handyside QC that Mahdi and Maytham "*understood the effect that transferring the funds requested would have and that effect could only be*

positive". They understood, rather, that meeting the margin call was the alternative to liquidating the portfolio (or letting it be liquidated by Credit Suisse) and that if they met the margin call, it was uncertain whether the funds thus transferred would ultimately come back to them rather than be swallowed by increased final losses. Thus, and contrary to Mr Handyside QC's submission that this did not make sense, meeting the margin call could indeed prove to be 'good money after bad' – it could prove to be merely pre-funding a larger final loss than the loss to be taken if the portfolio were liquidated there and then. I also do not agree with a submission by Mr Handyside QC that the claimants' case on this aspect was fatally flawed because of a mistaken belief that there had been a margin call in early October, prior to the restructuring. A mistaken analysis to the effect that there had been a prior margin call was pleaded, and Maytham's witness statement said he had been called in early October by Mr Zaki asking for funds to be transferred to meet a margin call. But I do not accept that evidence; there was no such call. Mahdi and Maytham did not at the time think there had been any margin call prior to 24 October 2008.

241. As I have indicated above, one influence on Mahdi and Maytham's thinking was their sense that they had been let down by and could no longer trust Mr Zaki. Mr Handyside QC submitted that it "*in a commercial context it is not open to parties to justify their own damaging conduct on the grounds that they simply did not trust the other party*", citing *Uzinterimpex JSC v Standard Bank plc* [2008] EWCA Civ 819, at [49]-[53], in which the Court of Appeal in turn cited and applied the well-known statement of Scrutton LJ in *Payzu Ltd v Saunders* [1919] 2 KB 581, at 589, that "*In certain cases of personal service it may be unreasonable to expect a plaintiff to consider an offer from the other party who has grossly injured him; but in commercial contracts it is generally reasonable to accept an offer from the party in default. However, it is always a question of fact.*" Since it is indeed always a question of fact, the unqualified proposition advanced by Mr Handyside QC must be wrong. Moreover, it seems to me the present case is different to the situations considered in those authorities. If there be any arguable strength in Credit Suisse's position in the present case, it is that Mahdi and Maytham allowed their positions to be closed out at what turned out to be a bad moment despite very firm advice from Mr Zaki that that is how things would turn out. In those particular circumstances, in the context of what had been a close and trusted advisory relationship, whether that was an irrational or unreasonable choice is bound to involve consideration of the weight the claimants should have given to that advice. In my judgment, it was not unreasonable for Mahdi and Maytham to be concerned whether it was still safe to follow Mr Zaki's recommendations, and to feel as I have said I detected in the evidence a sense of bewilderment that what was supposed to have been a good solution only a few weeks before was already unravelling.

242. Maytham's unattractive attempt to bully Credit Suisse into paying the claimants a net US$2m for liquidating was no more than that. The decision not to support the account with further funding, and therefore not to meet the margin call, even though that would mean it would be closed out, was not Maytham's alone and was not made when or because the attempt to bully Credit Suisse did not succeed.

243. In all the circumstances, in my judgment the claimants' decision not to meet Credit Suisse's margin call in late October 2008, leading inevitably to the closing out of their

Credit Suisse portfolio, was not an unreasonable decision and did not break the chain of causation.

Contributory Negligence

244. It follows from what I have just said that it does not assist Credit Suisse to raise the 'financial suicide' argument as a (partial) defence of contributory negligence. In my judgment, the claimants made a reasonable decision not to commit further funds that could be lost to their Credit Suisse portfolio, but rather to stop their losses as they were at the end of October 2008. Although Mr Zaki advised so firmly against taking that course, and although Mr Esbaitah also thought and advised Mahdi and Maytham that it would be better to meet the margin call, it was not unreasonable to prefer to exit their investments and stop their losses as they did.

245. Credit Suisse also alleged contributory negligence in failing to read term sheets, failing to take adequate steps to understand the investments made and failing to complete the Customer Profile Form to ensure Credit Suisse would have no doubt as to their investment objectives. None of those allegations had force, in my judgment:

    i) Mahdi and Maytham indeed often did not read at all events the detail of term sheets when sent; but that was not causative even if it should be regarded as careless. Reading term sheets more closely, either in the past or specifically in the case of Note 18, would not have caused them to appreciate that their chances of losing capital under Note 18 were much greater than Mr Zaki had effectively advised.

    ii) Mahdi and Maytham took adequate steps to understand their investments given that they were relying on Mr Zaki for risk evaluation. They were simply let down by him in respect of that evaluation for Note 18.

    iii) I have found that Mr Zaki was well aware of Mahdi and Maytham's generally conservative risk appetite. The difficulty in this case that has given rise to loss and liability is that Mr Zaki unreasonably thought Note 18 was suitable although that was Mahdi and Maytham's risk appetite, not that Mr Zaki thought them to be more aggressive, risk-tolerant investors than was the case when they bought Note 18.

Damages Calculation

246. In the result, there needs to be a calculation of the outturn result that would have obtained on the basis I identified in paragraphs 209-210 above, reflecting the conclusions I have reached as to liability and causation. That can be compared to the actual outturn result, in which the claimants were left overdrawn at Credit Suisse by US$336,275.60. The claimants are entitled to damages in the amount of the difference between the two, which they can set off against their overdraft liability. The result will be a net judgment in their favour for an amount representing the outturn result under paragraphs 209-210 above and the dismissal of Credit Suisse's counterclaim.

Conclusion

247. For the reasons set out above, and to the extent there identified, the claimants' claim succeeds. Unless a figure for damages can be agreed by the time this judgment is handed down, the parties having had sight of it in draft in the usual way, there will be judgment for damages to be assessed on the basis I have identified and I shall discuss with counsel directions for that assessment.

Coda

248. I close by expressing my thanks for the considerable, and very effective, hard work undertaken by the legal teams on both sides for and during trial. One particular respect in which that work was effective is that a considerable volume of factual evidence was adduced, and a significant number of important and complex factual matters and issues were explained and argued out, in only nine sitting days (plus a brief mid-trial case management conference to discuss and finalise directions for an adjournment necessitated by serious illness on the part of Dr Fitzgerald, from which I was very glad that he recovered sufficiently to play his part at trial when we resumed). It is testament to the skill, experience and judgment of counsel in the case, and that of their instructing solicitors, that so much should have been dealt with so efficiently. I have been much assisted by the product of all of their efforts in considering and preparing my judgment.

Approved Judgment

Approved Judgment

Abdullah v Credit Suisse
CS Notes timeline